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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.

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JUDGES OF THE HIGH COURT.

1ST JANUARY—31ST DECEMBER 1908.

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A TABLE

OF THE

NAMES OF CASES REPORTED

IN THIS VOLUME.

PRIVY COUNCIL.

	PAGE
Sankaralinga Nadan *v.* Rajeswara Dorai	236

FULL BENCH.

Bangappa Naik *v.* Kamti Naick	366
Kommineri Appayya *v.* Mangala Rangayya	419
Rahimadulla Sahib *v.* Emperor	140
Ramu Aiyar *v.* Sankara Aiyar	89
Saravana Pillai *v.* Sesha Reddi	469

APPELLATE CIVIL.

Achuthayya *v.* Thimmayya	345
Adipuranam Pillai *v.* Gopalasami Mudali	354
Aiyasami Aiyar *v.* The District Board, Tanjore	117
Aiyathurai Ravuthan *v.* Santhu Meera Ravuthan	252
Alagirisamy Naidu *v.* Venkatachellapathy Ayyar	77
Amara Veerayya *v.* Annamala Chetty Pichayya	502
Annamalai Mudaliar *v.* Ramier	234
Annapurani Ammal *v.* Subramanian Chettiar	347
Asan Kani Ravuttar *v.* Somasundaram Chettiar	206
Babubalendruni Guruvaraju *v.* Chandrasekararaju	362
Bollapragada Garu Narayana Row *v.* Bollapragada Janaki Ramiah Garu ...	414
Budrudeen Sahib *v.* Abdul Rahim Sahib	125
Cangayam Venkataramana Iyer *v.* Henry James Colley Gompertz ...	425
Chalavadi Kotiah *v.* Poloori Alimelammah	71
Challa Subbiah Sastri *v.* Palury Pattabhiramayya	446
Chama Swami *v.* Padala Ananda	439
Chidambaram Chettiar *v.* The Tinnevelly Sarangapani Sugar Mills Company, Limited	123
Dakshinamoorthy Pillai *v.* The Municipal Council of Trichinopoly ...	157

PAGE

Damaraju Narasimha Rao *v.* Thadinada Gangaraju 431
Devaguptapu Peda Satyanarayana *v.* Gogulapati Narasamma 526
Duraisami Reddi *v.* Muthial Reddi 458
East Indian and Anglo-Indian Deposit and Loan Society (Limited) *v.* Dr. T. M. Nair 364
Ekambara Gramany *v.* Muniswamy Gramany 328
Erasala Gurunatham Chetty *v.* Addepally Raghavalu Chetty 472
Etakkott Moyan *v.* Etakkott Pathukutti 1
Gopala Aiyar *v.* Ramasami Sastrial 49
Gutta Saramma *v.* Maganti Raminedu 405
Hammade Beari *v.* The Secretary of State for India in Council 264
Jivarathnam Mudaliar *v.* Srinivasa Mudaliar 33
Kanemar Venkappayya *v.* Krishna Chariya 161
Kidambi Venkatachariar *v.* Lakshmi Doss 62
Kolintavita Mama Amma *v.* Kolintavita Haji Kandi 87
Kondeti Kama Row *v.* Nukamma 485
Krishnamachariar *v.* Kuppammal 540
Krishnama Chariar *v.* Narasimha Chariar 114
Krishna Satapasti *v.* Sarasvatula Sambasiva Row 177
Kumaru Reddi *v.* Nagayasami Thambachi Naiker 17
Kuppu Konan *v.* Thirugnana Sammandam Pillai 461
Mahomed Khan Bahadur *v.* Mahomed Munawar Sahib 467
Manager of Hampi Sri Virupakshaswami Temple *v.* Lambani Golya ... 397
Manuel Louis Kunha *v.* Jnana Coelho 187
Mary Harriett Annie Wilson *v.* George Oakes 283
Masilamania Pillai *v.* Thiruvengadam Pillai 385
Miyaji *alias* Mahomed Ghouse Sahib *v.* Sheik Ahmed Sahib 212
Mogera Nandi *v.* Parameswara Udpa 51
Moidiyan's Son Ambialath Veettil Punnayil Kuttu *v.* Raman Nair ... 230
Muniappan Chetti *v.* Balayan Chetti 505
Munisami Mudaliar *v.* Subbarayar 97
Muthya Chettiar *v.* The Secretary of State for India in Council represented by the Collector of Tinnevelly 522
Nagaruru Sambayya *v.* Tangatur Subbayya 330
Olati Pulliah Chetti *v.* Varadarajulu Chetti 474
Pachaiperumal Chettiar *v.* Dasi Thangam 400
Palaniappa Chetti *v.* Sithravelu Servai 14
Pattatheruvath Pathumma *v.* Mannamkunniyil Abdulla Haji 228
Peria Karuppan *v.* Subramanian Chetti 261
Periakaruppa Pillai *v.* Manager of the Lessees of the Sivaganga Zamindari. 22
Ponnusami Mudaliar *v.* Srinivasa Naickan 333
Prayaga Doss Jee Varu *v.* Tirumala Anandam Pillai, Purisa Sriranga-charvulu Varu 406
Radhakrishna Iyer *v.* Muthusawmy Sholagan 530
Raghavan *v.* Alamelu Ammal 35
Rajah Venkata Narasimha Appa Rao *v.* Rajah Surenani Venkata Purushothama Jagannadha Gopala Row 321
Raja Venkata Narasimha Appa Row *v.* Rajah Suraneni Venkata Purushothama Jaganadha Gopala Row 310

PAGE

Ramachandra Naiker *v.* Vijayaragavulu Naidu 349
Raman Chettiyar *v.* Gopalachari 223
Ramanuja Chariar *v.* Krishnasawmi Mudali 169
Rama Odayan *v.* Subramania Aiyar 171
Ramaswami Kone *v.* Sundara Kone 28
Ramayyan *v.* Kadir Bacha Sahib 68
Ranganatha Rao *v.* Narayanasami Naicker 482
Rangasami Naiken *v.* Annamalai Mudali 7
Rangiah Naidu *v.* Rungiah 490
Salakshi *v.* Lakshmayee 500
Sambasiva Ayyar *v.* Venkataswara Aiyar 179
Sambasiva Mudaliar *v.* Panchanada Pillai 24
Samoo Patter *v.* Abdul Sammad Saheb 337
Sarala Subba Rau *v.* Kamsala Timmayya 5
Settappa Goundan *v.* Muthia Goundan 268
Shamu Patter *v.* Abdul Kadir Ravuthan 215
Singam Setti Sanjivi Kondaya *v.* Draupadi Bayamma 153
Sivasankara Pillai *v.* Soobramania Pillai 517
Somasundaram Chettiar *v.* Manioka Vasaka Desika Gnana Sammanda Pandara Sannidi 60
Somasundarum Chetty *v.* Vadivelu Pillai 531
Sowcar Lodd Govinda Doss Krishna Doss Varu *v.* Lepati Muneppa Naidu 534
Srimath Daivasikamani Pandarasannidhi *v.* Noor Mahomed Routhan ... 47
Srinivasa Raghava Dikshadar *v.* Rengasami Aiyangar 452
Subbiah Iyer *v.* Subramania Aiyar 479
Subramania Aiyar *v.* Subramania Aiyar 250
Subramanian Chetty *v.* Veerabadran Chetty 442
Sundarappaiyar *v.* Arunachella Chettiar 493
Sundarasastrial *v.* Govinda Mandarayan 528
Suppa Pillai *v.* Nagayasami Thumbichi Naicker 19
Surampalli Bangaramma *v.* Surampalli Brambaze 338
The Arbuthnot's Industrials (Ltd.) *v.* Muthu Chettiar 464
The Chairman, Municipal Council of Rajahmundry *v.* Susurla Venkateswarlu 111
Thenappa Chettiar *v.* Marimuthu Nadan 258
The President of the Taluk Board, Kundapur *v.* Burde Lakshminarayana Kampthi 54
The Regulation Collector of Uthumalai Estate *v.* Subbier 495
The Secretary of State for India *v.* Manjeshwar Krishnaya 415
Tiruvenkatachar *v.* Desikachar 532
Vadapalli Narasimham *v.* Dronamraju Seetharamamurthy 163
Vadlamannati Venkatramiah Pantulu *v.* Sri Rajah Venkata Rangiah Appa Row 64
Vaidiswara Ayyar *v.* Siva Subramania Mudaliar 66
Valia Koni Kalathil Cheria Pangalchan *v.* Marutha Veera Kavundan ... 454
Vallamkondu Subbiah *v.* Malupeddi Venkataramiah 343
Vedammal *v.* Vedanayaga Mudaliar 100
Veerappa Chetty *v.* Tindal Ponnan 86

	PAGE
Venkatasubbiah Chetty *v.* Govindarajulu Naidu	45
Venkateswara Aiyar *v.* Secretary of State for India in Council	12
Venkatramana Bhatta *v.* Gundaraya	403

APPELLATE CRIMINAL.

Alagu Ambalam *v.* Emperor	277
Aluvala Guruviah *v.* Emperor	280
Arumuga Govindan *v.* Venkatasubbier	82
Arunachellam *v.* Emperor	272
Bhaskari Kasavarayudu *v.* Bhaskaram Chalapatirayudu	318
Chidambaram Pillai *v.* Emperor	315
Chinna Ramana Gowd *v.* Emperor	506
Emperor *v.* Hussain Beg	548
Emperor *v.* Maddipatla Subbarayudu	547
Emperor *v.* Maheswara Kondaya	543
Ganapathi Bhatta *v.* Emperor	276
Joghi Kannigan *v.* Emperor	515
Jogiah *v.* Emperor	510
Kristna Pillai *v.* Krishna Konan	43
Lakshminarasappa *v.* Mekala Venkatappa	133
Mylapore Hindu Permanent Fund *v.* The Corporation of Madras	408
Narasimma Chari *v.* Chairman, Municipal Council, Conjeeveram	181
Narayana Mudaly *v.* Emperor	131
Perumalla Nayudu *v.* Emperor	80
Ponnayee *v.* Periya Mooppan	185
Ragava Aiyangar *v.* Krishnasami Aiyar	416
Raghavalu Naidu *v.* Sundramurthi Mudali	512
Sankappa Rai *v.* Emperor	127
Sessions Judge of Mangalore *v.* Malinga	40
The Public Prosecutor	84
The Public Prosecutor *v.* Ramaswami Konan	271

TABLE OF CASES CITED

IN THIS VOLUME.

A

	PAGE
Abdul Karim *v.* Salimun. I.L.R., 27 Calc., 190 at p. 193	216, 221
Abdulla Naha *v.* Moidin Kutti. 17 M.L.J., 287	263
Abdul Rahman *v.* Yar Muhammad. I.L.R., 3 All., 636	346
Ablakh *v.* Bhagirathi. I.L.R., 9 All., 427	160
Adamson *v.* Arumugam. I.L.R., 9 Mad., 463	57
Adhibai *v.* Cursandas Nathu. I.L.R., 11 Bom., 199	342
Adimulam *v.* Pir Ravuthan. I.L.R., 8 Mad., 424 at p. 427	167
Advyapa *v.* Rudrava. I.L.R., 4 Bom., 104	... 102, 105, 108
Aetna Life Insurance Company *v.* Middleport. 124 U.S., 534	442
Agra Bank *v.* The Barry. L.R., 7 H.L., 135	10, 11
Ajudhia Prasad *v.* Balmukand. I.L.R., 8 All., 354	160
Akkanna *v.* Venkayya. I.L.R., 25 Mad., 351	326
Aklemannessa Bibi *v.* Mahomed Hatem. I.L.R., 31 Calc., 819	92, 93, 95
Aldrige *v.* Cooper. W. & T. Leading cases, Vol. I, Notes	422
Aleyn *v.* Belchier. 2 W. & T. (L.C.), 7th Edition, 313	373
Ali Akbar *v.* Khurshed Ali. I.L.R., 27 All., 695	51
Ambica Dasia *v.* Nadyar Chand Pal. I.L.R., 11 Calc., 172	346
Anandamoyee *v.* Lakhi Chandra Mitra. I.L.R., 33 Calc., 339	404
Anandrao Vinayak *v.* Administrator-General of Bombay. I.L.R., 20 Bom., 450	521
Angammal *v.* Venkata Reddy. I.L.R., 26 Mad., 509	105
Annaji Rau *v.* Ragu Bai. 6 M.H.C.R., 400	251
Appadu *v.* Venkata Ranga Rao. 18 M.L.J., 23	542
Arunachellam *v.* Arunachellam. I.L.R., 15 Mad., 203	332
Assan *v.* Pathumma. I.L.R., 22 Mad., 494	229
Athavulla *v.* Gouse. I.L.R., 11 Mad., 283	14
Atma Ram *v.* Balkishen. I.L.R., 5 All., 267	444, 445

B

Bahadur Singh *v.* Mohar Singh. I.L.R., 24 All., 94 at p. 107; L.R., 29 I.A., 1	371, 384
Baird *v.* Williamson. 15 C.B. (N.S.), 376	170
Bajrangi Singh *v.* Manokarnika Bakhsh Singh. I.L.R., 30 All., 1; 12 C.W.N., 74; 17 M.L.J., 605	... 447, 367, 369, 370, 371, 372, 374, 375, 379, 380, 382
Balabux *v.* Rukhma Bai. I.L.R., 30 Calc., 725 at pp. 735, 736	484
Balkishan Shiwa Bakas *v.* Wagarsing. I.L.R., 20 Bom., 76	80

PAGE

Balkishen Das *v.* Legge. I.L.R., 22 All., 140 191
Balmakundas Atmaram *v.* Moti Narayan. I.L.R., 18 Bom., 414 11
Banh Bal *v.* Manni Lal. I.L.R., 27 All., 450 ... ... 34, 35
Bank of Madras *v.* Multan Chand Kanyalal. I.L.R., 27 Mad., 343 ... 233
Beckham *v.* Drake. 9 M. & W., 79 46
Beegu Singh *v.* Emperor. I.L.R., 34 Calc., 551 ... ... 141, 143, 147, 149, 151, 152
Behari Lal *v.* Madho Lal Ahir Gayawal. I.L.R., 19 Calc., 236 at p. 241 ... 370, 373, 375, 378, 380, 382
Bemola Dossee *v.* Mohun Dossee. I.L.R., 5 Calc., 792 208
Bhagvan *v.* Kesur Kuverji. I.L.R., 17 Bom., 428 471
Bhagwanta *v.* Sukhi. I.L.R., 22 All., 33 371
Bhaiya Radhbat Singh *v.* Maharani Indar Kunwar. L.R., 16 I.A., 53 at pp. 55, 59 450
Bhikhari Das *v.* Dalip Singh. I.L.R., 17 All., 435 ... ... 420, 422
Bhola Nath Bhuttacharjee *v.* Kanti Chundra Bhuttacharjee. I.L.R., 25 Calc., 311 30
Bhupativazu *v.* Ramasami. I.L.R., 23 Mad., 268 23
Bhup Indar Bahadur Singh *v.* Bijai Bahadur Singh. I.L.R., 22 All., 152. 31
Bhura Mal *v.* Har Kishan Das. I.L.R., 24 All., 383 457
Bibijan Bibi *v.* Sachi Bewah. I.L.R., 31 Calc., 863 358
Bibi Phul Kumari *v.* Ghanshyam Misra. 17 M.L.J., 618 348
Bindesni Naik *v.* Ganga Saran Sahu. I.L.R., 20 All., 171 333
Briggs *v.* Penny. 3 Mac. & G., 567 200
Bryan *v.* White. 2 Rob., 315 at p. 317 221
Buddree Doss *v.* Hoare, Miller & Co. I.L.R., 8 Calc., 171 257
Burdett *v.* Spilsbury. 10 Cl. & F., 340 218

C

Calder *v.* Dobell. L.R., 6 C.P., 486; Ex.Ch., 18 47
Canadian Pacific Railway *v.* Parke. (1899), A.C., 535 121
Casement *v.* Fulton. 3 M.I.A., 395 216
Chakrapani *v.* Varahalamma. I.L.R., 18 Mad., 227 ... ... 363, 364
Chandri *v.* Daji Bhau. I.L.R., 24 Bom., 504 167
Chattar Singh *v.* Lekhraj Singh. I.L.R., 5 All., 293 346
Chembre Raman Menon *v.* Patinhateeri Damodaran Nambudri. A.A.A.O. No. 37 of 1889 (unreported) 26
Chenvirappa *v.* Puttappa. I.L.R., 11 Bom., 708 488
Chhagun Guman *v.* Lakshman Dagdu. 9 Bom., L.Rep., 728 35
Chinnappa Mudaliar *v.* Sikka Naikan. I.L.R., 24 Mad., 36... 172
Chinnathambi Mudaliar *v.* Veerabadriah Naidu. I.L.R., 26 Mad., 163 ... 492
Chinniya Mudali *v.* Venkatachella Pillai. 3 M.H.C.R., 320 391
Chiruvolu Punnamma *v.* Chiruvolu Perrazu. I.L.R., 29 Mad., 390 at p. 401 384
Chunder Koomar Lahoree *v.* Gopee Kristo Gossamee. 20 W.R., 205 ... 270
Chundra Nath Dey *v.* Burroda Shoondury Ghose. I.L.R., 22 Calc., 813 ... 35
Colgan *v.* Administrator-General of Madras. I.L.R., 15 Mad., 424 ... 190
Collector of Masulipatam *v.* Cavaly Venkata Narrainapah. 8 M.I.A., 500 at p. 551 ... ... 374, 375, 377
Collector of Salem *v.* Rangappa. I.L.R., 12 Mad., 406 267

PAGE

Comber *v.* Leyland. (1898), A.C., 525... 225
Cracknell *v.* Mayor, etc., of Thetford. L.R., 4 C.P., 629 121
Cullen *v.* Attorney-General for Ireland. L.R., 1 H.L., 198... 197

D

Dakhina Mohan Roy *v.* Saroda Mohan Roy. I.L.R., 21 Calc., 143 ... 441
Dalton *v.* Fitzgerald. L.R., (1897), 2 Ch.D., 86 at p. 93 327
Damodar *v.* Raghunath. I.L.R., 26 Bom., 551 346
Damodara *v.* Somasundara. I.L.R., 12 Mad., 429 9
Dampanaboyina Gangi *v.* Addala Ramaswami. I.L.R., 25 Mad., 736 at p. 745 257
Daulat and Jagjivan *v.* Bhukandas Manekchand. I.L.R., 11 Bom., 172 ... 30
Debendra Narain Roy *v.* Ramtaran Banerjee. I.L.R., 30 Calc., 599 ... 429
Denobundhoo Chowdry *v.* Kristomonee Dossee. I.L.R., 2 Calc., 152 at pp. 162, 176 ... ... 391, 392
Devi Persad *v.* Gunwanti Koer. I.L.R., 22 Calc., 410 342
Dinamoyee Debi *v.* Bon Behari Kapur. 7 C.W.N., 160 221
Dinonath Ghose *v.* Shama Bibi. I.L.R., 28 Calc., 23 270
Dougal *v.* McCarthy. (1893), 1 Q.B.D., 736 166

E

Ellis *v.* Smith. 1 Ves. Jun., 11 (30 Eng. Rep., 205) 216, 217, 220, 221
Emperor *v.* Chinna Kaliappa Gounden. I.L.R., 29 Mad., 126 545
Emperor *v.* Jonnalagadda Venkatrayudu. I.L.R., 28 Mad., 567 ... ... 507, 508
Emperor *v.* Karuppana Pillai. I.L.R., 29 Mad., 188 548
Emperor *v.* Muthukumara. I.L.R., 27 Mad., 525 516
Emperor *v.* Purshottam. I.L.R., 26 Bom., 418 133
England *v.* Roper. 1 Stark, 304 218
Eranholi Athan *v.* King-Emperor. I.L.R., 26 Mad., 98 150
Exchange Telegraphic Co. *v.* Gregory & Co. (1896), 1 Q.B., 147 ... 176
Ex parte Modalatha. I.L.R., 2 Mad., 75 160

F

Fischer *v.* Kamakshi Pillai. I.L.R., 21 Mad., 136 ... ... 19, 20, 21
Ford *v.* Kettle. 9 Q.B.D., 139 at p. 141 ... ... 218, 220
Frankenburg *v.* Great Horseless Carriage Company. (1900), 1 Q.B. 504 256
Freshfield *v.* Reed. 9 M. & W., 404 220
Furzand Ali *v.* Mohanth Lal Puri. I.L.R., 32 Calc., 268 16

G

Gangadas Bhutter *v.* Jogendra Nath Mitter. 11 C.W.N., 403 ... ... 259, 260
Ganga Dei *v.* Shiam Sundar. I.L.R., 26 All., 69 ... ... 216, 218 221
Ganga Prasad *v.* Kura. I.L.R., 28 All., 408 346

	PAGE
Gantapalli Appalamma *v.* Gantapalli Yellayya. I.L.R., 20 Mad., 470 ...	186
General Auction Estate & Monetary Company *v.* Smith. (1891), 3 Ch., 432	209
George *v.* Vastian Soury. I.L.R., 22 Mad., 202	346, 482
Ghulam Khan *v.* Muhammad Hassan. I.L.R., 29 Calc., 167	482
Gilkinson *v.* Subramania Ayyar. I.L.R., 22 Mad., 221	159
Giriudra Nath Mukerjee *v.* Bejoy Gopal Mukerjee. I.L.R., 26 Calc., 246 at p. 248	216, 221
Giyana Sambandha Pandara Sannadhi *v.* Kandasami Tambiran. I.L.R., 10 Mad., 375 at p. 508	214
Gnanamuthu Upadesi *v.* Vana Koilpillai Nadan. I.L.R., 17 Mad., 379 ...	28
Gnana Sambandha Pandara Sannadhi *v.* David Nadar. 14 M.L.J., 433 ...	25, 26
Goberdhan Singh *v.* Ritu Roy. I.L.R., 23 Calc., 962	99
Gobind Singh *v.* Baldeo Singh. I.L.R., 25 All., 330	156
Gokaldas Gopaldas *v.* Puranmal Bemsukhdas. I.L.R., 10 Calc., 1035 ...	440
Gokul Mandar *v.* Pudmanund Singh. L.R., 29 I.A., 196; I.L.R., 29 Calc., 707 (P.C.)	279, 63
Gomti Kunwar *v.* Gudri. I.L.R., 25 All., 139	63
Gopala Chetti *v.* Subbier. I.L.R., 26 Mad., 604	455, 457
Gopalasami Chettiar *v.* Fisher. I.L.R., 25 Mad., 328	20, 21
Govindan *v.* Chapputti. A.A.A.O. No. 23 of 1888 (unreported)	30
Govinda Pillai *v.* Thayammal. I.L.R., 28 Mad., 57	371
Grayson *v.* Atkinson. 2 Ves. Sen., 454 (28 Eng. Rep., 291)	216, 217, 220
Guddappa *v.* Tirkappa. I.L.R., 25 Bom., 189	388, 396
Gulraj Marwari *v.* Sheik Bhatoo. I.L.R., 32 Calc., 796	418
Gurdeo Singh *v.* Chandrikah Singh. 5 C.L.J., 611	441
Guruva *v.* Subbarayudu. I.L.R., 13 Mad., 366	168

H

Hafizuddin Chowdhry *v.* Abdool Aziz. I.L.R., 20 Calc., 755	80
Hannay *v.* Smurthwaite. (1893), 2 Q.B., 412	255
Hanumanthappa *v.* Hussain Saib. Weir's Law of Offences and Cri Pro., 4th edition, vol. II, page 118, and also *ibid.*, p. 97	83
Hare *v.* Horton. 5 B. & Ad., 715	210
Hari Dass Sanyal *v.* Saritulla. I.L.R., 15 Calc., 621	137
Hari Kissen Bhagat *v.* Valiat Hussein. I.L.R., 30 Calc., 755	336
Hari Saran Moitra *v.* Bhubaneswari Debi. I.L.R., 16 Calc., 40	466, 467
Harish Chandra Tewary *v.* Chandpore Company, Ltd. I.L.R., 30 Calc., 961	466
Harrison *v.* The Delhi & London Bank. I.L.R., 4 All., 437 at p. 459 ...	209
Hawley *v.* Steele. 6 Ch.D., 521	121
Hem Chunder Sanyal *v.* Sarnamoyi Debi. I.L.R., 22 Calc., 354 at pp. 355, 363	371, 372, 373, 380, 443, 451
Hewett *v.* Loosemore. 9 Hare, 449	10, 11
Hildreth *v.* Sayaji Piraji, Contractor. I.L.R., 20 Bom., 380	506
Hudson *v.* Basdeo Bajpye. I.L.R., 26 Calc., 109	445
Huro Krishno Doss *v.* Motee Chand Baboo. 8 W.R., (C.R.), 260	457
Hutchinson *v.* Gillespie. 2 M.P.C., 244	408

I

	PAGE
In re Baikunt Kumar. 3 C.L.R., 134	83
In re Boyes. Boyes *v.* Carritt. 26 Ch.D., 531	196, 202
In re Maddock. Llewelyn *v.* Washington. (1902), 2 Ch., 220 at pp. 230, 231	196, 197, 203
In re Patent File Company. L.R., 6 Ch., 83	211
In re Pitt Revers. Scott *v.* Pitt Revers. (1902), 1 Ch., 408	196
In re Shepherd. L.R., 10 Ch.D., 667	56
In re Subbaraya Vathyar. 15 M.L.J., 489	141, 145, 147, 149, 152
In re Whitehouse & Co. L.R., 9 Ch.D., 595	67
In the matter of "Alraja Naidu." I.L.R., 30 Mad., 222	402
In the matter of Arokiam. I.L.R., 2 Mad., 38	135
In the matter of the petition of Jamoona. I.L.R., 6 Calc., 620 at p. 621 ...	507, 509
In the matter of the petition of Ram Prasad Hazra. B.L.R., (F.B.), 426...	511
Ishri Prasad *v.* Sham Lal. I.L.R., 7 All., 871	150
Ismal Rowther *v.* Shunmugavelu Nadan. I.L.R., 29 Mad., 149	81

J

Jadu Lal Sahu *v.* Lowis. I.L.R., 34 Calc., 848 at p. 851	511
Jadu Nath Poddar *v.* Rup Lal Poddar. I.L.R., 33 Calc., 976	99
Jagan Nath *v.* Ganesh. I.L.R., 18 All., 413	168
Jagjar Nath Pande *v.* Jokhu Tewari. I.L.R., 18 All., 223	30
Jagjivan Javherdas *v.* Gulam Jilani Chaudhri. I.L.R., 8 Bom., 19 ...	434, 436
Janaki *v.* Kesavalu. I.L.R., 8 Mad., 207	28
Jan Mahomed Mandal *v.* Mashar Bibi. I.L.R., 34 Calc., 352	93, 95
Jantoo *v.* Radha Canto Doss. I.L.R., 8 Calc., 515	91, 92
Jayanti Subbiah *v.* Alamelu Mangamma. I.L.R., 27 Mad., 50	501
Jennings *v.* The President, Municipal Commission, Madras. I.L.R., 11 Mad., 253	413
Jogemaya Dassi *v.* Thackomoni Dassi. I.L.R., 24 Calc., 473 at p. 491 ...	27
Jogeswar Narain Deo *v.* Ram Chandra Dutt. I.L.R., 23 Calc., 670 ...	180
Jonardan Dobey *v.* Ramdhone Singh. I.L.R., 23 Calc., 738	506
Jones *v.* Badley. L.R., 3 Ch., App. 362	196, 197
Joobraj Singh *v.* Buhooria Alumbasee Koer. 7 C.L.R., 424	75
Joy Gopaul Banerjee *v.* The Emperor. 11 C.W.N., 173	135

K

Kali Charan Ghosal *v.* Ramchendra Mandal. I.L.R., 30 Calc., 783 ...	191, 199
Kallar Singh *v.* Toril Mahtiri. 1 C.W.N., 24	6
Kalyan Das *v.* Pyare Lall. 4 A.L.J., 256	346
Kamalammal *v.* Peeru Meera Levvai Rowthen. I.L.R., 20 Mad., 481 ...	251
Kamal Narain Chowdry *v.* Emperor. 11 C.W.N., 472	277
Kameswar Pershad *v.* Rajkumari Ruttan Koer. I.L.R., 20 Calc., 79 ...	390
Kamini Dassee *v.* Chandra Pode Mondle. I.L.R., 17 Calc., 373	342
Kanai Das Bairagi *v.* Radha Shyam Basack. I.L.R., 26 Calc., 232 ...	513
Kanemar Venkatappayya *v.* Krishnacharya. 2 M.L.T., 529	474
Kantheppa *v.* Sheshappa. I.L.R., 22 Bom., 893	167

PAGE

Karim Baksh *v.* Queen-Empress. I.L.R., 17 Calc., 574 508
Kearley *v.* Thomson. 24 Q.B.D., 742 99
Kedarnath Dutt *v.* Harra Chand Dutt. I.L.R., 8 Calc., 420 ... ... 75, 76
Kessowji Issur *v.* Great Indian Peninsula Railway Company. I.L.R., 31 Bom., 381 115
King-Emperor *v.* Tulakhan. I.L.R., 30 All., 334 516
Kishori Mohun Roy Chowdry *v.* Chunder Nath Pal. I.L.R., 14 Calc., 644 178
Kojiyadu *v.* Lakshmi. I.L.R., 5 Mad., 149 ... ... 102, 103, 105, 110
Kolandai *v.* Sankara. I.L.R., 5 Mad., 302 13
Kolha Koer *v.* Muneswar Tewari. I.L.R., 34 Calc., 840 83
Konwur Doorganath Roy *v.* Ram Chunder Sen. L.R., 4 I.A., 52 49
Koroth Amman Kutti *v.* Perungottil Appu Nambiar. I.L.R., 29 Mad., 322 ... ... 229, 230,
Koyyana Chittemma *v.* Doosy Gavaramma. I.L.R., 29 Mad., 225 6
Krishna Ayyar *v.* Krishnasami Ayyar. I.L.R., 23 Mad., 597 345
Krishna Ayyar *v.* Muthukumarasawmiya Pillai. I.L.R., 29 Mad., 217 at pp. 224, 217 ... ... 336, 420, 422, 423, 424
Krishnaji Ramchandra *v.* Antaji Pandurang. I.L.R., 18 Bom., 256 ... 167
Krishnamachariar *v.* Rukmani Ammal. 15 M.J., 370 468
Krishnamma *v.* Suranna. I.L.R., 16 Mad., 175 58
Krishnasami Naidu *v.* Somasundaram Chettiar. I.L.R., 30 Mad., 335 ... 168
Krishnayya *v.* The Bellary Municipal Council. I.L.R., 15 Mad., 292 ... 183
Kristna Reddi *v.* Srinivasa Reddi. 5 M.H.C.R., 174 470
Kumarasami Reddiar *v.* Subbaraya Reddiar. I.L.R., 23 Mad., 314 ... 51
Kumaretta Servaigaran *v.* Sabapathy Chettiar. I.L.R., 30 Mad., 26 ... 126
Kunhacha Umma *v.* Kutti Mammi Hajee. I.L.R., 16 Mad., 201 229
Kunhi Marakkar Haji *v.* Kutti Umma. I.L.R., 20 Mad., 496 471
Kunhimbi Umma *v.* Kandy Moithin. I.L.R., 27 Mad., 77 229
Kunja Behari Dos *v.* Khetro Pal Singh Roy. C.W.N., 38 418
Kumarasami Reddiar *v.* Subbaraya Reddiyar. I.L.R., 23 Mad., 314 ... 278
Kurri Veerareddi *v.* Kurri Bapireddi. I.L.R., 29 Mad., 337 191
Kuthaperumal Rajali *v.* The Secretary of State for India. I.L.R., 30 Mad., 245 464
Kylasa Goundan *v.* Ramasami Ayyan. I.L.R., 4 Mad., 172 75

L

Lakshmanaswami Naidu *v.* Rangamma. I.L.R., 26 Mad., 31 ... ... 126, 478
Lakhmidas *v.* Jamnadas. I.L.R., 22 Bom., 304 420
Lakshmi Periya Chowdhurani *v.* Rama Kanta Shaha. I.L.R., 30 Calc., 440 436
Lala Dilawar Sahai *v.* Dewan Bolakiram. I.L.R., 11 Calc., 258 420
Laldas *v.* Kishordas. I.L.R., 22 Bom., 463 468
Lalessor Babuf *v.* Janki Bibi. I.L.R., 19 Calc., 615 406
Lalit Mohun Singh Roy *v.* Chukkun Lal Roy. I.L.R., 24 Calc., 834 at p. 846 303
Lidlingappa *v.* Hirasa. I.L.R., 31 Bom., 405 99

PAGE

London, Brighton and South Coast Railway Company *v.* Truman. 11 A.C., 45 121
Lumley *v.* Gye. 2 E. & B., 216 172

M

Madan Mandul *v.* Haran Ghose. I.L.R., 20 Calc., 687 548
Madan Mohun Lal *v.* Holloway. I.L.R., 12 Calc., 555 257
Madras Building Company *v.* Rowlandson. I.L.R., 13 Mad., 383 9
Madras Equitable Assurance Company *v.* The President, Municipal Commission, Madras. I.L.R., 11 Mad., 238 413
Magniram *v.* Medhi Hossein Khan. I.L.R., 31 Calc., 95 at p. 101 420
Mahabir Prasad *v.* Basdeo Singh. I.L.R., 6 All., 234 473
Maharana Shri Ranmal Singji *v.* Vadilal Vakhatchand. I.L.R., 20 Bom., 61 49
Maharaval Mohansingji *v.* Jeysingji *v.* The Government of Bombay. L.R., 8 I.A., 77 14
Mahomed Hamidulla *v.* Tohuennissa Bibi. I.L.R., 25 Calc., 155 457
Mallikarjuna *v.* Pullayya. I.L.R., 16 Mad., 319 88
Mallikarjunadu Setti *v.* Lingamurti Pantulu. I.L.R., 25 Mad., 244 at p. 282 ... ... 69, 358, 359
Manaku Kom Pedru *v.* Sitaram Atmaram Vagh. I.L.R., 18 Bom., 142 ... 457
Manavikraman *v.* Unniappan. I.L.R., 15 Mad., 170 30
Mangal Khan *v.* Sallim-ullah Khan. I.L.R., 16 All., 26 80
Manickam Pillai *v.* Ramalinga Pillai. I.L.R., 29 Mad., 120 ... ... 371, 448
Manickka Odayan *v.* Rajagopala Pillai. I.L.R., 30 Mad., 507 178
Manohur Lall *v.* Gouri Sunkur. I.L.R., 9 Calc., 283 406
Marudamuthu Nadan *v.* Srinivasa Pillai. I.L.R., 21 Mad., 198 ... ... 370, 374, 375, 376, 380, 382
Mayandi *v.* McQuhae. I.L.R., 2 Mad., 125 524
Mayor of Lyons *v.* East India Company. 1 M.P.C., 176 399
McCormick *v.* Grogan. L.R., 4 E. & I., App. 82 at p. 9 ... ... 190, 196
McDowell & Co. *v.* Ragava Chetty. I.L.R., 27 Mad., 71 ... ... 162, 473, 474
Meyappa Chetty *v.* Periannan Chetty. I.L.R., 29 Mad., 50 ... ... 253, 254, 255, 257
Mithiram Bhat *v.* Somanatha Naickar. I.L.R., 24 Mad., 397 338
Miya Vali Ulla *v.* Sayad Bava Santi Miya. I.L.R., 22 Bom., 496 14
Moholal *v.* Bai Jivkore. I.L.R., 28 Bom., 472 170
Mohun Chunder Koondoo *v.* Azeem Gazee Chowkeedar. 12 W.R., 45 ... 88
Moidin Kutti *v.* Kunhi Kutti Ali. I.L.R., 25 Mad., 721 168
Monindra Chandra Nandy *v.* Troyluckho Nath Burat. 2 C.W.N., 770 ... 10, 11
Moniram Kolita *v.* Keri Kolitani. I.L.R., 5 Calc., 776 at p. 787 ... 110
Monomohini Chowdhurani *v.* Nara Narayan Roy Chaudhri. 4 C.W.N., 456 457
Mothooranath Tewaree *v.* Brindabun Tewaree. 14 W.R., 327 346
Motilal *v.* Surajmal. I.L.R., 30 Bom., 167 227
Mowji Monji *v.* Kuverji Nanaji. I.L.R., 31 Bom., 516 257
Munni Ram Chowdhry *v.* Bishon Perkash Narain Singh. I.L.R., 24 Calc., 878 51
Murigeya *v.* Hayat Saheb. I.L.R., 23 Bom., 237 126
Murugesa Mudali *v.* Jotharam Davay. I.L.R., 22 Mad., 478 436

	PAGE
Murugesa Mudaliar *v.* Jatharam Davy. I.L.R., 23 Mad., 621 at p. 624 ...	433, 434, 436
Musammat Ganga Jati *v.* Ghasita. I.L.R., 1 All., 46	105
Muthappa Chetty *v.* Muthu Palani Chetty. I.L.R., 27 Mad., 80	253, 254, 255, 256, 257
Muthumadeva Naik *v.* Sivattamuthumadeva Naik. 7 M.H.C.R., 160 ...	387, 388 389, 390, 393
Mutteeram Kowar *v.* Gopaul Sahoo. 11 B.L.R., 416	155

N

Naganna *v.* Raja Rangayya Apparow. S.A. No. 133 of 1892 (unreported).	75
Nagappa *v.* Venkat Rao. I.L.R., 24 Mad., 265	478
Nagireddi v. Venkatareddi. C.M.S.A., No. 87 of 1905 (unreported) ...	70
Nallayappa Pillian *v.* Ambalavana Pandara Sannadhi. I.L.R., 27 Mad., 465	24
Narasimham *v.* Madhavarayudu. 13 M.L.J., 323	371, 372, 373, 448
Narayan *v.* Lakshmandas. I.L.R., 7 Bom., 934	338
Narayan *v.* Sono. I.L.R., 24 Bom., 345 at p. 349	74
Narayana Nayak *v.* Karuppa Pillai. Refd. C. No. 18 of 1880 (unreported)	79
Narayanasami *v.* Natesa. I.L.R., 16 Mad., 424	415
Natasayyan *v.* Ponnusami. I.L.R., 16 Mad., 99	162, 474
Neelakantam Iyer *v.* Madasamy Tevan. 17 M.L.J., 39	338
Nilmoni Singh Deo *v.* Taranath Mukerjee. I.L.R., 9 Calc., 295	61
Nizamuddin *v.* Mamtazuddin. I.L.R., 28 Calc., 135	263
Nobokishore Sarma Roy *v.* Hari Nath Sarma Roy. I.L.R., 10 Calc., 1102.	372, 374, 378, 382, 384
Nogendra-Nandini-Dassi *v.* Benoy Krishna Deb. I.L.R., 30 Calc., 521 ...	106
Noor Ali Chowdhuri *v.* Koni Meah. I.L.R., 13 Calc., 13	30
Norendra Nath Pahari *v.* Bhupendra Narain Roy. I.L.R., 23 Calc., 374	466
Northern Counties of England Fire Insurance Company *v.* Whipp. L.R., 26 Ch.D., 482	10

O

Orr *v.* Rakkumarathi. I.L.R., 29 Mad., 83	65

P

Pachiappa Achari *v.* Poojali Seenan. I.L.R., 28 Mad., 557	70, 75
Panatulla *v.* Queen-Empress. I.L.R., 15 Calc., 386	550
Parasara Bhattar *v.* Ranga Raja Bhattar. I.L.R., 2 Mad., 202	383
Parke *v.* Mears. 2 Bos. & P., 217	218
Patloji *v.* Ganu. I.L.R., 15 Bom., 370	30
Peary Mohun Ghosaul *v.* Harran Chunder Gangooly. I.L.R., 11 Calc., 261.	491
Periaroyalu Reddi *v.* Royalu Reddi. I.L.R., 18 Mad., 434	267
Peruvian Guano Company *v.* Dreyfus. (1892), A.C., 166	441
Pethcrpermal Chetty *v.* Muniandy Servai. I.L.R., 35 Calc., 551 ...	487
Phool Chund Lall *v.* Rughoobuns Suhaye. 9 W.R., 108 at p. 109	155, 156
Pichuvayengar *v.* Oliver. I.L.R., 26 Mad., 260	2
Pitam Singh *v.* Tota Singh. I.L.R., 29 All., 301	235

	PAGE
Ponduranga *v.* Nagappa. I.L.R., 12 Mad., 366 at p. 368	113
Ponnambala Thambiran *v.* Sivagnana Desika Gnana Sambandha Pandara Sannadhi. I.L.R., 17 Mad., 343	407
Pranal Anni *v.* Lakshmi Anni. I.L.R., 22 Mad., 508	333
Prannath Shaha *v.* Madhu Khulu. I.L.R., 13 Calc., 96	263
Pydal Nambiar *v.* Kannan Nambiar. 12 M.L.J., 87	90, 92, 94

Q

Qamar-ud Din Ahmad *v.* Jawahir Lal. I.L.R., 27 All., 334	74
Queen-Empress *v.* Amir Khan. I.L.R., 8 Mad., 337	136, 137
Queen-Empress *v.* Balasinnatambi. I.L.R., 14 Mad., 334	137
Queen-Empress *v.* Bishamber Lal. I.L.R., 13 All., 577	281
Queen-Empress *v.* Commer Sahib. I.L.R., 12 Mad., 153	129
Queen-Empress *v.* Erram Reddi. I.L.R., 8 Mad., 299	135
Queen-Empress *v.* Krishna Bhat. I.L.R., 10 Bom., 319	42
Queen-Empress *v.* Lakshmi Nayakan. I.L.R. 19 Mad., 238	135
Queen-Empress *v.* Munisami. I.L.R., 15 Mad., 39	188
Queen-Empress *v.* Muppan. I.L.R., 18 Mad., 401	271
Queen-Empress *v.* Nanjunda Rao. I.L.R., 20 Mad., 79	508
Queen-Empress *v.* Ramasami. I.L.R., 24 Mad., 321	275
Queen-Empress *v.* Shankar. I.L.R., 13 Bom., 384	148, 152
Queen-Empress *v.* Subbanna Goundan. 1 M.H.C.R., 30	508
Queen-Empress *v.* Surendra Nath Sarkar. I.L.R., 28 Calc., 397	41, 42
Quinn *v.* Leathem. (1901) A.C., 495	172, 175

R

Radha Krishna *v.* Kissonlal. I.L.R., 26 Bom., 289	514
Radha Nath Singh *v.* Chandi Charan Singh. I.L.R., 30 Calc., 660 ...	159
Radha Shyam Sircar *v.* Joy Ram Senapati. I.L.R., 17 Calc., 896 ...	380
Rahimbhoy Habibbhoy *v.* Charles Agnew Turner. I.L.R., 17 Bom., 341 ...	233
Raja of Vizianagram *v.* Dantivada Chelliah. I.L.R., 28 Mad., 84 ...	126, 478
Raj Chunder Mozumdar *v.* Gour Chunder Mozumdar. I.L.R., 22 Calc., 176	81
Rajdhur Chowdhry *v.* Kalikristna Bhatta Charjya. I.L.R., 8 Calc., 963 ...	257
Raj Lukhee Dabea *v.* Gokool Chunder Chowdhry. 13 M.I.A., 209 at p. 228.	374, 375, 382
Rama *v.* Varada. I.L.R., 16 Mad., 143	70
Ramachandra *v.* Narayanasawmi. I.L.R., 16 Mad., 333	176
Ramachandra *v.* Narayanasami. I.L.R., 10 Mad., 229	23
Ramachandra Aiyar *v.* Subramania Chettiar. 14 M.L.J., 393	235
Ramachandra Pandurang Naick *v.* Madhav Purushottam Naick. I.L.R., 16 Bom., 23	159
Ramakrishnamma *v.* Bhagamma. I.L.R., 13 Mad., 56	90, 93, 98
Ramanadan *v.* Rangammal. I.L.R., 12 Mad., 260	500
Ramanadhan Chetti *v.* Periatambi Shervai. I.L.R., 6 Mad., 250 ...	70
Ramananda *v.* Raikishori Barmani. I.L.R., 22 Calc., 347 at p. 354 ...	105
Raman Nayar *v.* Subramanya Ayyan. I.L.R., 17 Mad., 87	402
Ramanathan Chettiar *v.* Levvai Marakayar. I.L.R., 23 Mad., 195 ...	126

	PAGE
Ramannja Reddiar *v.* Rungaswami Aiyangar. 18 M.L.J., 51	505
Rama Raju *v.* Subbarayudu. I.L.R., 5 Mad., 387	420
Ramasami Naik *v.* Ramasami Chetty. I.L.R., 30 Mad., 256	478
Ramaswamy Ayyar *v.* Muthusamy Ayyar. I.L.R., 30 Mad., 12	434
Ramaswamy Ayyar *v.* Vythinatha Ayyar. I.L.R., 26 Mad., 760 at pp. 767, 779	388, 389, 390, 391, 394, 397
Ramchandra *v.* Krishnaji. I.L.R., 28 Bom., 4	416
Ramchandra *v.* Mulji Nanabhai. I.L.R., 22 Bom., 558	450
Ramchandra Govind Manik *v.* Sono Sadashiv Sarkhot. I.L.R., 19 Bom., 551	471
Rami Deka *v.* Brojo Nath Saikia. I.L.R., 25 Calc., 97	471
Ramji *v.* Bai Parvati. I.L.R., 27 Bom., 91	216, 218, 221
Ramnath Tolapattro *v.* Durga Sundari Debi. I.L.R., 4 Calc., 550 ...	105
Ram Pertab Jhowar *v.* Madho Rai. 7 C.W.N., 216	504
Ramphal Rai *v.* Tula Kuari. I.L.R., 6 All., 116	379
Ram Shankar Lal *v.* Ganesh Prasad. I.L.R., 29 All., 385	429, 531
Ram Soondur Dey *v.* Shoshi Mohun Pal Chowdhry. 11 C.L.R., 389 ...	494
Rangammal *v.* Echammal. I.L.R., 22 Mad., 305 at p. 307	341
Rangammal *v.* Venkatachari. I.L.R., 18 Mad., 378	98, 99, 487, 488
Rangappa Naick *v.* Kamti Naick. I.L.R., 31 Mad., 366	447, 449
Rangasami Pillai *v.* Krishna Pillai. I.L.R., 22 Mad., 259	389
Rangayya Appa Row *v.* Ratnam. I.L.R., 20 Mad., 392	63
Rangayya Chettiar *v.* Parthasarathi Naicker. I.L.R., 20 Mad., 120 ...	430
Rani Kattama Nachiar *v.* Muhammad Mira Ravuthan. 7 M.H.C.R., 150...	400
Rani Mewa Kuwar *v.* Rani Hulas Kuwar. 13 B.L.R., 312 at p. 322 ...	54
Raru Kutti *v.* Mamad. I.L.R., 18 Mad., 480	416
Rash Behari Lal Mandal *v.* The Emperor. 12 C.W.N., 117	135
Ratnachalam Ayyar *v.* Venkatrama Ayyar. I.L.R., 29 Mad., 46	434
Rein *v.* Stein. (1892), 1 Q.B., 753	224
Rengasami Nadan *v.* Subbaroya Iyen. I.L.R., 30 Mad., 408	530
Reynolds *v.* Coleman. 36 Ch.D., 453	224
Right *v.* Darby. 1 Term Rep., 159	166
Roberts *v.* Phillips. 4 E. & B., 450 at p. 453 [24 L.J. (N.S.) Q.B., 171 ...	221
Rodh Mal *v.* Ram Harakh. I.L.R., 7 All., 711	420
Rowsell *v.* Morris. L.R., 17 Eq., 20	204
Royzuddi Sheik *v.* Kali Nath Mookerjee. I.L.R., 33 Calc., 985	338
Runga Ayyar *v.* Emperor. I.L.R., 29 Mad., 331	141, 144
Rungiah Gounden & Co. *v.* Nanjappa Row. I.L.R., 26 Mad., 780	69
Rup Chand *v.* Shamsh-ul-Jehan. I.L.R., 11 All., 346	30
Rup Jaun Bibee *v.* Abdul Kadir Bhuyan. I.L.R., 31 Calc., 643	445
Rustomji *v.* Sheth Purshotamdas. I.L.R., 25 Bom., 606	344

S

Sadasook Gambir Chund *v.* Kannayya. I.L.R., 19 Mad., 196	492
Sadler *v.* Great Western Railway Company. (1896), A.C., 450	256
Sadodin *v.* Spiers. I.L.R., 3 Bom., 438, 437	348, 494
Samia Pillai *v.* Chockalinga Chettiar. I.L.R., 17 Mad., 76	70

	PAGE
Sandhu Taraganar *v.* Hussain Sahib. I.L.R., 28 Mad., 87	178, 179
Sankaravadivelu Pillai *v.* Secretary of State for India in Council. I.L.R., 28 Mad., 72 at p. 74	120, 173
Sappani Asari *v.* The Collector of Coimbatore. I.L.R., 26 Mad., 742 ...	265
Sarat Chendra Bisu *v.* Tarivi Prosad Pal Chowdry. 2 C.W.N., 487 ...	7
Sasi Bhusan Pal *v.* Chandra Peshkar. I.L.R., 33 Calc., 864	221
Sasivarna Tevar *v.* Arulanandam Pillai. I.L.R., 21 Mad., 261	74
Sassoon *v.* Hurry Das Bhukut. I.L.R., 24 Calc., 455	491
Saunadanappa *v.* Shivbasawa. I.L.R., 31 Bom., 354	251
Savarimuthu Pillai *v.* Alagiam Pillai. 12 M.L.J., 88	90, 91, 92, 94
Savitribai *v.* Luximibai and Sadasiv Ganoba. I.L.R., 2 Bom., 573 at p. 597	342
Sayaji Bin Habaji Bhadvalkar *v.* Umaji Bin Sadaji Ravut. 3 B.H.C.R., App. C.J., 27	166
Seal *v.* Claridge. 7 Q.B.D., 519	220
Sellack *v.* Harris. 5 Vin. Ab., 521	198
Serajul Huq Khan *v.* Abdul Rahaman. I.L.R., 29 Calc., 257	254
Serle *v.* Norton. 2 M. & R., 401	365
Seshammal *v.* Munisami Mudali. I.L.R., 20 Mad., 358	492
Seshamma Shettati *v.* Chickaya Hegade. I.L.R., 25 Mad., 507 at p. 511 ...	167
Sham Sundar Lal *v.* Achhan Kunwar. I.L.R., 21 All., 71 at p. 80 ...	382, 383
Shankar Dat Dube *v.* Radha Krishna. I.L.R., 20 All., 195	506
Shan Maun Mull *v.* Madras Building Company. I.L.R., 15 Mad., 268 ...	9
Shanmuga Mudaly *v.* Paluati Kuppu Chetty. I.L.R., 25 Mad., 613 ...	24
Sharpe *v.* Birch. 8 Q.B.D., 111 at p. 114	218
Sheoratan Kunwari *v.* Ram Pargash. I.L.R., 18 All., 227 at p. 232 ...	214
Sheo Tahalojha *v.* Sheodan Rai. I.L.R., 28 All., 174	336
Shiro Kumari Debi *v.* Govind Shaw Tanti. I.L.R., 2 Calc., 418	532
Shyama Charan Pramanik *v.* Prolhad Durwan. 8 C.W.N., 392	346
Simmani Ammall *v.* Muttammal. I.L.R., 3 Mad., 265 at p. 269	108
Sitarama Sastrulu *v.* Suryanarayana Sastrulu. I.L.R., 22 Mad., 12 ...	470, 471
Sivayya *v.* Rami Reddi. I.L.R., 22 Mad., 223 at p. 227	214
Slark *v.* Dakyns. (1874), L.R., 10 Ch. Ap., 35	521
Smurthwaite *v.* Hannay. (1894), A.C., 494	255
Somasundara Tambiran *v.* Sakkarai Pattan. 4 M.H.C.R., 369	9
Sorabji Jamsetji *v.* Ishwardas Jugjiwandas. I.L.R., 20 Bom., 654 at p. 658	37
South Staffordshire Water Company *v.* Sharman. (1896), 2 Q.B., 44 ...	399
Sreemutty Rabutty Dossee *v.* Sibchunder Mullick. 6 M.I.A., 1	180
Sri Balusu Gurulingaswami *v.* Sri Balusu Ramalakshmamma. L.R., 26 I.A., 113	450
Sri Mohan Thakur *v.* Narsing Mohan Thakur. I.L.R., 27 Calc., 259 ...	319
Srinivasa *v.* Rathanasabapathi. I.L.R., 16 Mad., 475	58
Srinivasa Ayyangar *v.* Seetharama Ayyar. I.L.R., 19 Mad., 72	504
Srinivasa Charlu *v.* Balaji Rau. I.L.R., 21 Mad., 232	492
Sriramulu Naidu *v.* Andalammal. I.L.R., 30 Mad., 145	494
Stonehouse *v.* Evelyn. (1734), 3 P. Wms., 251 (24 Eng., Rep. 1051) ...	216, 220
Subban *v.* Arunachalam. I.L.R., 15 Mad., 487	336
Subbarayana *v.* Subakka. I.L.R., 8 Mad., 236	342
Subbaraya Pillai *v.* Ramasami Pillai. I.L.R., 23 Mad., 171	103

	PAGE
Subrahmania *v.* Secretary of State for India. I.L.R., 6 Mad., 361 ...	14
Subrahmania Ayyar *v.* Poovan. I.L.R., 27 Mad., 28	489
Subrahmanyam *v.* Venkamma. I.L.R., 26 Mad., 634 *and* 635	383, 384
Subramania Aiyar *v.* Armuga Chetty. I.L.R., 26 Mad., 330	460
Subramania Aiyar *v.* King-Emperor. I.L.R., 25 Mad., 61	277
Subramaniyam Chetti *v.* Arunachelam Chetti. I.L.R., 28 Mad., 1 ...	326
Sugeeram Begum *v.* Juddoobuns Suhaye. 9 W.R., 284	156
Sullivan *v.* Norton. I.L.R., 10 Mad., 28 at *p.* 35	402
Sundararaja Ayyangar *v.* Pattanathusami Tever. I.L.R., 17 Mad., 306 ...	49
Sundari Letani *v.* Pitambari Letani. I.L.R., 32 Calc., 871	105
Susya Pillai *v.* Aiyakannu Pillai. I.L.R., 29 Mad., 529	27
Swindell *v.* Bulkeley. L.R., 18 *Q.B.D.*, 250	88
Syamalarayudu *v.* Subbarayudu. I.L.R., 21 Mad., 143	440, 441
Syed Hussain Sahib Rowthen *v.* Rajagopala Mudaliar. I.L.R., 30 Mad., 28	79
Symes *v.* Hughes. L.R., 9 Eq., 475	99

T

Taylor v. Bowers. 1 Q.B.D, 291	99
Taylor *v.* Horde. 2 Sm. L.C. at p. 732 (*8th Ed.*)	167
Temperton *v.* Russell. (1893), 1 Q.B., 715	172
Thakoor Jeebnath Singh *v.* The Court of Wards. L.R., 2 I.A., 163 ...	314
The Eider. (1893,, L.R., P.D., 136	226
The Madras Hindu Union Bank *v.* Venkatrangiah. I.L.R., 12 Mad., 424.	9
The Secretary of State for India *v.* Abdul Hakkim Khan. I.L.R., 2 Mad., 294	13
The Secretary of State for India *v.* Kasturi Reddi. I.L.R., 26 Mad., 268	265, 267
Thirumalai *v.* Ramayyar. I.L.R., 13 Mad., 1	332
Thrikaikat Madathil Raman *v.* Thiruthiyal Krishnen Nayar. I.L.R., 29 Mad., 153	389, 394
Tincowrie Dawn *v.* Debendro Nath Mookerjee. I.L.R., 17 Calc., 491 ...	27
Tirupati v. Narasimha. I.L.R., 11 Mad., 210	405
Tokhan Singh *v.* Girwar Singh. I.L.R., 32 Calc., 494	332
Toulmin *v.* Steere. 3 Mer., 210	441
Trotman *v.* Dunn. 4 Comple, 211	402
Trustees of the Harbour, Madras *v.* Best & Co. I.L.R., 22 Mad., 524 ...	524

U

Umayammi *v.* Muthiah Nadar. 17 M.L.J., 99	3, 4
Umes Chunder Sircar *v.* Zahur Fatima. I.L.R., 18 Calc., 164	259
Underwood *v.* Lord Courtown. 2 Sch. & Lefr., 68	478
Unhamma Devi *v.* Vaikunta Hegde. I.L.R., 17 Mad., 218	263
Upendra Lal Mukerjee *v.* Girindra Nath Mukerjee. I.L.R., 25 Calc., 565.	445

V

Vallabha Valiya Rajah *v.* Vedapuratti. I.L.R., 19 Mad., 40	358, 360
Vama Dava Desikar *v.* Murugesa Mudali. I.L.R., 29 Mad., 75	24
Vasudeva Shanbog *v.* Naraina Pai. I.L.R., 2 Mad., 356	3

	PAGE
Vedachala Gramani v. Boomiappa Mudaliar. I.L.R., 27 Mad., 65 ...	63
Vedapuratti *v.* Vallabha Valiya Rajah. I.L.R., 25 Mad., 300	360
Veerabadran Chetty *v.* Nataraja Desikar. I.L.R., 28 Mad., 28	61
Veerana Pillai *v.* Muthukumara Asary. I.L.R., 27 Mad., 102	389
Venkatakrishnamma *v.* Annapurnamma. I.L.R., 23 Mad., 486	383
Venkata v. Rama. I.L.R., 8 Mad., 249 at p. 263	527
Venkatappiah *v.* Jagannadha Rao. 12 M.L.J., 24	75
Venkatigadu *v.* Emperor. 2 Weir, p. 452; Cri. R.C. No. 466 of 1903 (unreported)	517
Venkatrama Chetti v. Emperor. I.L.R., 28 Mad., 17	413
Venkatramanna *v.* Viramma. I.L.R., 10 Mad., 17	487
Venkoba *v.* Subbanna. I.L.R., 11 Mad., 151	405, 406
Vidyapurna Tirtha Swami *v.* Vidyanidhi Tirthaswami. I.L.R., 27 Mad., 435	48
Vinayak *v.* Govind. I.L.R., 25 Bom., 129	379, 383, 384
Vithal Janardan *v.* Vithojirav Putlajirav. I.L.R., 6 Bom., 586	75
Vithu *v.* Dhondi. I.L.R., 15 Bom., 407	263

W

Wallgrave *v.* Tebbs. (1855), 2 K. & J., 313	196
Whalley *v.* Lancashire and Yorkshire Ry. Co. 13 Q.B.D., 131	170
Wheeler *v.* Young. 13 T.L.R., 468	365
White *v.* Trustees of the British Museum. 6 Bing., 310	216, 220
Wilson *v.* Hart. 7 Taunt., 295	46
Woomatara Debia *v.* Unnopoorna Dassee. 11 B.L.R., 158	389, 391

Y

Yaramati Krishnayya *v.* Chundru Papayya. I.L.R., 20 Mad., 326 ...	99, 487, 488
Yethirajulu Naidu *v.* Mukunthu Naidu. I.L.R., 28 Mad., 363	315

Z

Zair Husain Khan *v.* Khurshed Jan. I.L.R., 28 All., 545	93, 95

THE

INDIAN LAW REPORTS,

Madras Series.

APPELLATE CIVIL.

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

ETAKKOTT MANMOD KUTTI'S SON MOYAN (PLAINTIFF), APPELLANT,

1907. October 29.

v.

ETAKKOTT KUTHAYI'S DAUGHTER PATHUKUTTI AND OTHERS (DEFENDANTS NOS. 1 TO 8 AND 10), RESPONDENTS.*

Oaths Act—Act X of 1873, *ss.* 11, 12—*Where plaintiff agreeing to take oath subsequently refuses, Court cannot dismiss suit but must record the fact of refusal under s.* 12 *and proceed with the suit.*

The defendant in a suit agreed in the course of the trial to be bound by the statement on oath of the plaintiff as to certain facts. By an agreement in writing between the parties the plaintiff agreed to take the oath as required on a certain date; that if he failed to do so the suit should be dismissed; and that if the defendant prevented the taking of the oath, there should be a decree for plaintiff. Before the appointed day, the plaintiff applied to withdraw from the agreement, but the Court refused the application. The plaintiff failed to take the oath and the Court declined to allow the plaintiff to adduce further evidence and dismissed the suit:

Held, that the Court ought not to have dismissed the suit, but should have recorded the refusal and the reasons therefore under section 12 of the Oaths Act and proceeded with the trial.

The agreement did not amount to an adjustment of the suit so as to bar further proceedings in the trial.

Umayammai v. *Muthiah Nadar*, (17 M.L.J., 95), distinguished.

Vasudeva Shanbog v. *Narain Pai*, (I.L.R., 2 Mad., 356), followed.

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* Second Appeal No. 157 of 1905, presented against the decree of L. G. Moore, Esq., District Judge of South Malabar, in Appeal Suit No. 622 of 1904, presented against the decree of M.R.Ry. M. R. Narayanaswami Ayyar, District Munsif of Parapangadi, in Original Suit No. 588 of 1905.

MOYAN v. PATHUKUTTI.

Per MILLER, J., *obiter*: If by the act of the party refusing to take the oath, the other party has lost evidence which was available to him, the Court may be justified in refusing to allow the former to adduce evidence.

THE facts necessary for the report of this case are sufficiently set out in the judgment.

K. Naraina Rau for appellant.

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

JUDGMENT.—Sir ARNOLD WHITE, C.J.—Whilst the plaintiff was being examined as a witness, the defendants challenged him to make statements on oath as to certain specified facts. By a written agreement the plaintiff agreed to take the oath on a certain date, and the parties agreed that if the plaintiff failed to take the oath the suit should be dismissed, and if the taking of the oath was stopped by the defendants' negligence there should be a decree for the plaintiff. The plaintiff subsequently applied for leave to withdraw from this agreement and leave was refused. It has not been contended that there were good grounds for allowing the plaintiff to withdraw. No oath was taken. The Court refused to allow the plaintiff to adduce any further evidence and dismissed the suit. It was argued before us that the evidence which had been adduced by the plaintiff before he agreed to take the oath was sufficient to warrant a decree being given in his favour. But this point does not seem to have been taken in the Court of First Instance or before the lower Appellate Court. I do not think the decree of the lower Appellate Court, which affirmed the decree of the Munsif dismissing the suit can be upheld. The agreement between the parties is of a twofold character. It is, first, an undertaking by the plaintiff to make an oath, and, secondly, an agreement by him that if he fails to do so the suit may be dismissed. As regards the undertaking by the plaintiff to make the oath, it seems to me that the provisions of the Indian Oaths Act, 1873, are conclusive upon the question whether the fact that he afterwards refused to make the oath entitles the defendants to insist that the suit shall be dismissed. Section 8 provides that if a party offers to make the oath contemplated by the section the Court may administer it. Section 9 provides that if a party offers to be bound by such an oath, if it is made by the other party, the Court may ask the other party if he will make the oath. Section 10 provides that if the other party agrees to make the oath the Court may administer it. Section 4 provides that the

evidence so given (that is, the evidence under the oath by which the other party agreed to be bound under section 9) as against the person who offered to be bound, shall be conclusive proof of the matter stated. Section 12 enacts that if the party refuses to make the oath referred to in section 8 (as I read the section this means either the party who offered to make the oath under section 8 or the party who agreed to make the oath in response to the offer of the other party to be bound thereby under section 9) he shall not be compelled to do so, and then makes provision for what is to be done in that event. It directs the Court to record as part of the proceedings the nature of the oath proposed, the fact that the party was asked to make oath and refused, together with any reason assigned for the refusal. This section seems to contemplate that the Court shall give such weight as it may think fit to the fact that a party has offered to make an oath and has afterwards refused to make it, whilst it negatives the view that the refusal to make the oath is in itself a ground for dismissing the suit or giving the plaintiff a decree as the case may be. I do not think the undertaking by the plaintiff that if he failed to make the oath the suit should be dismissed can be regarded as an adjustment of the suit. I agree with the decision in *Vasudeva Shanbog* v. *Naraina Pai*(1). The case of *Umayammai, minor by his next friend Anaikutti Ayyakannu Nadar* v. *Muthiah Nadar and another*(2) may be distinguished upon the ground that in that case there was no refusal to make the oath by the party who had offered to make it, and section 12 of the Oaths Act did not apply. In that case the plaintiff's guardian agreed to be bound by the defendant's oath to be made in a certain form which required something to be done by the plaintiff's guardian. The defendants attended for the purpose of making the oath in the form agreed to, but the plaintiff's guardian declined to perform his part of the ceremony and the oath as agreed on was not made for this reason.

I think the decision of the lower Courts must be set aside and the case remanded to the Court of First Instance to be dealt with according to law. Costs in this and the lower Appellate Court will abide the event.

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(1) I.L.R., 2 Mad., 356. (2) 17 M.L.J., 99.

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MOYAN v. PATHUKUTTI.

MILLER, J.—I have arrived at the same conclusion. It may be doubted whether section 12 of the Oaths Act was intended to apply to a case in which the parties have arrived at an agreement that one of them shall take an oath, but whether that be so or not, it would clearly not be right, and it was not suggested before us that we ought to compel a man against his will to take an oath by which he is to allege the existence of particular facts.

The District Judge has treated the agreement here as an agreement that neither party shall call any evidence other than that which the plaintiff is to give upon the special oath. That is not an agreement by which the suit is adjusted, and I do not see how the Court trying the suit is to enforce it, if one of the parties breaks it. It is not contemplated by the Oaths Act nor is it provided for by the Code of Civil Procedure. The Court must, so far as I can see, proceed with the suit. It is not necessary to consider what course would be open if the plaintiff's action had resulted in loss of evidence to the defendants: for it is not suggested that the defendants were, after the plaintiff's refusal to take the oath, unable to secure any evidence which was available to them at the time of the agreement. It is obviously a different case where the Court trying the suit proceeds, in spite of the withdrawal of the party who has offered to be bound by the oath, to administer the oath to the opposite party who is willing to take it. The case in *Umayammai, minor son by his next friend Anaikutti Ayyakannu Nadar* v. *Muthiah Nadar and another*(1) is an instance in point though it has peculiar features. There, the person offering the oath was not allowed to withdraw because the person accepting the oath was ready to take it. That procedure is, it may well be, contemplated by the Oaths Act, but the agreement here is outside the scope of that Act, which is designed to render conclusive evidence taken by consent in a particular way.

It must be borne in mind too that in cases like that with which we are dealing, the defendant *primâ facie* sustains no injury by the refusal of the plaintiff to take the oath. In most of the cases the parties are remitted to their former position with this difference that the defendant has on his side the additional evidence offered by the conduct of his adversary. In the present case if the District Judge is right in stating that the facts to

(1) 17 M.L.J., 99.

MOYAN v. PATHUKUTTI.

which the plaintiff undertook to swear were sufficient to dispose of the suit, the defendant must, if the oath had been taken, have had a decree made against them.

Unless then by the action of the plaintiff, evidence which would have been available for the defendants has been lost to them (and that is, as I have said, not here alleged) I do not think the Court, subject, of course, to its discretion to refuse an adjournment of the trial, is entitled to refuse to receive the evidence for the plaintiff, and I therefore concur in the order proposed by my Lord, the Chief Justice.

APPELLATE CIVIL.

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

1907. October 24.

SARALA SUBBA RAU (PLAINTIFF), APPELLANT,

v.

KAMSALA TIMMAYYA AND OTHERS (DEFENDANTS AND LEGAL REPRESENTATIVES OF FIRST DEFENDANT), RESPONDENTS.*

Civil Procedure Code, Act XIV of 1882, *ss.* 278, 283—*Limitation Act, Act XV of* 1877, *sched. II, art.* 11—*Order dismissing claim for default not an order made after investigation and need not be set aside within one year under art.* 11 *of sched. II of the Limitation Act.*

An order dismissing a claim presented under section 278 of the Code of Civil Procedure for default is not an order made after investigation within the meaning of that section and is not conclusive under section 283 of the Code of Civil Procedure. Article 11, schedule II, of the Limitation Act does not apply to such orders; and the party against whom the order is made can maintain a suit to establish his right within the ordinary period of limitation applicable to such suit, although he has not had the order set aside within one year.

Koyyana Chittemma v. *Doosy Gavaramma*, (I.L.R., 29 Mad., 225), referred to.

Sarat Chendra Bisu v. *Tarivi Prosad Pal Chowdry*, (11 C.W.N., 487), approved.

SUIT to establish plaintiff's right to and to recover possession of plaint property from defendants.

* Second Appeal No. 210 of 1905, presented against the decree of A. M. Slight, Esq., District Judge of Kurnool, in Appeal Suit No. 121 of 1903, presented against the decree of M.R.Ry. J. S. Theagaraja Ayyar, District Munsif of Nandyal, in Original Suit No. 41 of 1903.

SARALA SUBBA RAU v. KAMSALA TIMMAYYA.

The plaintiff's case was that the house belonged to his aunt Krishnammal, who devised the same to him by will dated 11th August 1894. Before Krishnammal's death in February 1895 the plaint house was attached by the first defendant in execution of a decree obtained by him against the plaintiff and one Bhagamma. Krishnammal then put in a claim petition under section 278 of the Code of Civil Procedure, which was dismissed for default on 6th June 1893. The property was brought to sale and purchased by the second defendant. At the time of delivery of possession a petition was preferred by Krishnammal in which she alleged the house belonged to her. That petition was rejected under section 335 of the Civil Procedure Code on the 11th June 1894.

The present suit was brought in 1903 within twelve years of sale but more than one year after the dismissal of the claim.

The defendants contended that the suit was barred, as the order of 6th June 1893 had not been set aside within one year as prescribed in article 11, schedule II, of the Limitation Act and had thus become conclusive.

The District Munsif held that the order was not passed on investigation, and neither article 11 of schedule II of the Limitation Act, nor sections 280 to 282 of the Code of Civil Procedure applied to such orders. He accordingly decreed for plaintiff.

His judgment was reversed by the District Judge on appeal.

The plaintiff appealed to the High Court.

Dr. *S. Swaminadhan* for appellant

The respondent was not represented.

JUDGMENT.—We are of opinion that the decree of the lower Appellate Court cannot be supported. The application put in by the claimant under section 278 of the Code of Civil Procedure was dismissed for default of appearance by him. The question is, in these circumstances, does article 11 of the second schedule to the Limitation Act apply? It is impossible to hold there has been in this case any investigation on the merits so as to satisfy the test which the law requires. See *Koyyana Chittemma* v. *Doosy Gavaramma*(1).

In *Kallar Singh* v. *Toril Mahton and another*(2), an application was dismissed for default of appearance and the Court held there had been no investigation within the meaning of section 278 of the

(1) I.L.R., 29 Mad., 225.

(2) 1 C.W.N., 24.

SARALA SUBBA RAU v. KAMSALA TIMMAYYA.

Civil Procedure Code. This case was followed in *Sarat Chendra Bisu and others* v. *Tarivi Prosad Pal Chowdry*(1). We agree with these decisions. We must set aside the decree of the lower Appellate Court and remand the case to that Court for disposal on the merits.

Costs will abide the event.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Miller.

RANGASAMI NAIKEN (PLAINTIFF), APPELLANT,

v.

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

1907. September 20, 30.

Transfer of Property Act—Act IV of 1882, s. 78—Gross negligence—Failure to get possession of title-deed does not necessarily amount to gross negligence where system of registration exists—Delay, effect of, in registration of documents.

A mortgaged property to *B* on 21st December 1896 and subsequently mortgaged the same property to *C* on 20th January 1897. *A* wilfully delayed the registration of the mortgage-deed to *B*, which was finally registered on the 21st April 1897. The title-deeds of the property were not given to *B*, but were given to *C* when the property was mortgaged to him. The mortgage was executed outside Madras and was in respect of property in the mofussil. In a suit by *C* to recover the amount due on his mortgage-deed, *C* claimed priority over *B* on the ground that *B* was guilty of gross negligence in not obtaining possession of the title deeds:

Held, that the failure on B's part to obtain the title-deeds from *A* did not, under the circumstances, amount to gross negligence within the meaning of section 78 of the Transfer of Property Act and did not postpone his mortgage to that of *C*.

Held further, that the delay in the registration being due to the default of *A* which *B* could not have anticipated, did not make *B*'s failure in obtaining the title-deeds amount to gross negligence.

What amounts to gross negligence must be determined according to the circumstances of each case; and one of the circumstances to be taken into considertion in this country is that a universal system of registration is established by law. As registration puts subsequent incumbrancers in a position, with the

(1) 11 C.W.N., 487.

* Second Appeal No. 1494 of 1904, presented against the decree of M.R.Ry. T. Sadasiva Ayyar, Subordinate Judge of Coimbatore, in Appeal Suit No. 102 of 1903, presented against the decree of M.R.Ry. K. Krishnamachariar, District Munsif of Udamalpet, in Original Suit No. 803 of 1902.

exercise of reasonable care, to find out prior encumbrances, failure on the part of the prior mortgagee to get possession of the title-deeds must not be imputed to him as gross negligence.

The system of registration having caused mortgagees to attach little importance to the possession of title-deeds, the existence of a practice by which the title-deeds are left with the mortgagor must also be taken into consideration. Another fact to be considered is that the possession of title-deeds in the Presidency towns where mortgages may be created by depositing them is of greater importance than in the mofussil.

Damodara v. *Somasundara*, (I.L.R., 12 Mad., 429), considered and distinguished.

Shan Maun Mull v. *Madras Building Company*, (I.L.R., 15 Mad., 268), considered and distinguished.

Monindra Chandra Nandy v. *Troylukho Nath Burat*, (2 C.W.N., 750), followed.

The Agra Bank v. *Barry*, (L.R., 7 H.L., 135), referred to.

SUIT to recover money due on mortgage. The facts are sufficiently stated in the judgment.

T. R. Venkatrama Sastri for the Hon. Mr. *P. S. Sivaswami Ayyar* for appellant.

T. R. Ramachandra Ayyar and *T. R. Krishnasami Ayyar* for first and third respondents.

JUDGMENT.—This is a suit by the plaintiff on a mortgage executed in his favour by the first defendant. The mortgage-deed was executed and registered on the 20th January 1897 and at the same time the plaintiff obtained possession from the first defendant of the title-deed of the property mortgaged. The first defendant had previously mortgaged the same property by deed, dated the 21st December 1896, to the third defendant, who did not obtain possession of the title-deed and did not get the deed registered until the 21st April 1897 some time after the execution of the plaintiff's mortgage. Under the Registration Act, the third defendant's mortgage having been registered within time would ordinarily take priority according to the date of execution, that is to say, before the plaintiff's mortgage.

The third defendant was not at first a party to the present suit, but the Subordinate Judge ordered him to be made a party on appeal, and framed and sent down four additional issues of which the second was as to the consideration for the third defendant's mortgage, while the fourth was in the following terms:—"Is the third defendant Muthusamy Mudali not entitled to priority by reason of his not obtaining possession of the title-deed of plaint lands from the first defendant?" The District Munsif found that no consideration was proved, but the

Subordinate Judge reversed this finding on appeal, and proceeded to deal with the fourth additional issue, which raises the question whether the third defendant's mortgage though prior in time to the plaintiff's should be postponed to it under section 78, Transfer of Property Act, by reason of his gross negligence, the negligence imputed in the issue being his failure to obtain possession of the title-deeds.

The Subordinate Judge has found on a consideration of the facts and the authorities that gross negligence was not proved, and we are asked in second appeal to interfere with this finding on the ground that the admitted facts amount in law to gross negligence.

That the mortgagor was in possession of the title-deed at the time of the execution of the mortgage may be gathered from the fact that he handed it over so soon after to the plaintiff. There is no evidence that any thing was said about title-deeds when the third defendant's mortgage was executed, but, if he had insisted, he could apparently have obtained possession of them, and the fact of his not doing so under the circumstances of the case constitutes the alleged gross negligence. In support of the proposition that the third defendant's conduct amounts to gross negligence under section 78, we have been referred to the judgments of Kernan, J., in *Damodara* v. *Somasundara*(1), of Handley, J., in *The Madras Hindu Union Bank* v. *Venkatrangiah*(2), of Shephard, J., in *Madras Building Company* v. *Rowlandson*(3), and of the appellate judgment of Collins, C.J., and Handley, J., in the same case which is reported under the name of *Shan Maun Mull* v. *Madras Building Company*(4) and also to *Somasundara Tambiran* v. *Sakkarai Pattan*(5) which was decided in 1869 before the passing of the Transfer of Property Act. These decisions do undoubtedly go far to show that conduct such as that of the third defendant may amount to gross negligence, but it is to be observed with regard to them, first, that they were decisions on the facts of those particular cases; secondly, that the three cases under section 78 all related to transactions in the Presidency town where title-deeds are of much greater importance than in the distant mofussil owing to the

(1) I.L.R., 12 Mad., 429.
(2) I.L.R., 12 Mad., 424.
(3) I.L.R., 13 Mad., 383.
(4) I.L.R., 15 Mad., 268.
(5) 4 M.H.C.R., 389.

facility of creating mortgages by depositing them; thirdly, that it has not been considered in any of these cases how far the question of a registered mortgagee's negligence in not getting or retaining possession of title-deeds is affected even in a Presidency town by the fact of his registering the mortgage under the Registration law in force in this country; and fourthly, that it is not clear that these decisions do not apply a stricter rule than is laid down by the Court of Appeal in *Northern Counties of England Fire Insurance Company* v. *Whipp*(1), a point of some difficulty which it will not be necessary to consider. As observed by Mr. now (Chief) Justice Jenkins in *Monindra Chandra Nandy* v. *Troyluckho Nath Burat*(2), "the existence of gross negligence within the meaning of section 78, Transfer of Property Act, must be determined according to the circumstances of each case, and one of the circumstances to be taken into consideration is that in this country a universal system of registration exists." Although, according to the view taken in this Court, registration does not amount to notice to subsequent incumbrancers, it does put them in a position, with the exercise of reasonable care, to find out whether there is any registered prior incumbrance or not, and this consideration goes far to show that failure on the part of the prior mortgagee to get possession of the title-deed is not, in the absence of reasonable explanation, necessarily to be imputed to him as gross negligence. The observations of Lord Cairns in *Agra Bank* v. *The Barry*(3) on this question are entitled to very great weight. "Has it ever" he asks "been decided, with regard to a Register Act such as that which prevails in Ireland, that negligence in not asking for the title-deeds or not taking up the title-deeds shall postpone a registered security? I am not going to say a word with regard to the effect of negligence of that kind in a country like England, where there is no general registration of deeds and no Act of Parliament like the Irish Act. But I am unable to discover any principle upon which mere negligence and mere failure to take all the securities that might be taken, could, in any country subject to a law like the Irish Register Act, postpone a registered deed." With reference to certain English cases, such as *Hewitt* v. *Loosemore*(4), which lay down that it is the duty of the mort-

(1) L.R., 26 Ch.D., 482.
(2) 2 C.W.N., 750.
(3) L.R., 7 H.L., 135.
(4) 9 Hare., 449.

gagee to obtain possession of the title-deeds or explain why he did not do so, and that if he fails to do so the Court will impute fraud or gross negligence to him, Lord Selborne following Lord Cairns in the case already cited observes that "what is a sufficient explanation on the part of the mortgagee must always be a question to be decided with reference to the nature and circumstances of each particular case, and among these the existence of a public registry in a country in which a registry is established by statute must necessarily be very material." In the cases decided in this Court the learned Judges appear to have relied mainly on the authority of such cases as *Hewitt* v. *Loosemore*(1); the case of *Agra Bank* v. *The Barry*(2) does not appear to have been cited, and the question how the duty of a mortgagee is affected by the existence of a registration system is not considered. This question, as already observed, is quite distinct from the question considered in these cases as to whether registration amounts to notice to subsequent transferees. That the existence of this system has caused mortgagees in general to attach less importance to the possession of title-deeds is undoubted. In *Balmakundas Atmaram* v. *Moti Narayan*(3) Fulton, J., speaks to the absence of settled practice in the mofussil of the Bombay Presidency as to the custody of title-deeds. In *Monindra Chandra Nandy* v. *Troyluckho Nath Burat*(4), it was stated that the practice in the Bengal mofussil was to have the title-deeds with the mortgagor, and in the present case the Subordinate Judge appears to accept this statement as accurate with regard to the mofussil in this Presidency. Such a practice is, we think, one of the matters to be considered in a case of this kind. On the whole we are unable to interfere with the finding of the Subordinate Judge on the ground that gross negligence must necessarily be imputed to the third defendant by reason of his failure to obtain possession of the title-deeds. With regard to the delay in getting his mortgage registered which undoubtedly had the effect of enabling the first defendant to effect the second defendant's mortgage, he pleads that this delay was due to the first defendant, and has sworn that he had to threaten to take proceedings for compulsory registration before the first defendant attended to register the mortgage.

(1) 9 Hare., 449.
(2) L.R., 7 H.L., 135.
(3) I.L.R., 18 Bom., 444.
(4) 2 C.W.N., 750.

RANGASAMI NÄIKEN v. ANNAMALAI MUDALI.

When the third defendant failed to get possession of title-deed at the execution of the mortgage, he could not, we think, have anticipated that registration would be delayed in this manner, and the fact of its having been so delayed does not, in our opinion, make his failure to obtain possession of the title-deeds amount in law to gross negligence. This failure to get possession of the title-deeds is the only ground of postponement that has been pleaded or considered in the lower Courts, and as it fails the second appeal must be dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sankaran Nair.

1907. October 25.

VENKATESWARA AIYAR (PLAINTIFF), APPELLANT IN BOTH,

v.

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

Pensions Act, Act 23 of 1871, s. 4—Act does not apply to endowments for pious or religious purposes.

Endowments for religious or pious purposes do not fall within the purview of section 4 of the Pensions Act and Civil Courts have jurisdiction to entertain suits in respect of such grants made by Government.

Subrahmania v. *Secretary of State for India*, (I.L.R., 6 Mad., 361), referred to.

Athavulla v. *Gouse*, (I.L.R., 11 Mad., 283), referred to.

Miya Vali Ulla v. *Sayad Bava Santi Miya*, (I.L.R., 22 Bom., 496), dissented from.

SUIT for a declaration that Government was not entitled to levy the full assessment on the lands and chattram mentioned in the plaint. The Munsif decreed in favour of plaintiff, but his judgment was reversed on appeal. The facts are stated in the judgment of the lower Appellate Court, the material portions of which are as follows:—

"In the town of Dindigul there is a building called Barki Venkata Row's chattram. Plaintiff is the hukdar of the building. He is also in possession of certain lands which were granted 200

* Second Appeals Nos. 1612 and 1613 of 1904, presented against the decrees of H. Moberly, Esq., District Judge of Madura, in Appeal Suit Nos. 76 and 92 of 1904, presented against the decree of M.R.Ry. T. S. Krishna Ayyar, District Munsif of Dindigul, in Original Suit No. 473 of 1902.

VENKATESWARA AIYAR v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

years ago by one Barki Venkata Row as an endowment for the charitable purpose of feeding Brahmins. The Government of Madras, through its delegate the Inam Commissioner, agreed to remit the assessment on these lands so long as the conditions of the grant were fulfilled. Exhibit Z is the inam title-deed. After inquiry the Government was satisfied that the charity was not being properly administered and so it resolved to resume the inam. Now it is perfectly clear from Revenue Board's Proceedings, No. 81 (?), dated 13th February 1900 (exhibit VII), that it was never intended to deprive the plaintiff of his possession of the land or chattram, but that it was intended to resume the full assessment on the lands forming the endowment and the site of the chattram which assessment had been granted by the Government as an inam. Plaintiff sues to set aside this order."

"In the present case it is clear that what the Government has resumed is a grant of land revenue. Section 4 of the Pensions Act, 1871, distinctly forbids any Civil Court from entertaining any suit relating to a grant of land revenue. As the present suit relates to a grant of land revenue it falls within section 4 of the Pensions Act. I hold, therefore, that the Civil Courts have no jurisdiction."

The plaintiff appealed to the High Court.

K. Srinivasa Ayyangar and *N. Rajagopalachariar* for appellant.

The Government Pleader for respondent.

JUDGMENT.—The plaintiff sues to set aside a Government Order which imposes the full assessment on certain lands in his possession which he alleges were granted to his ancestors more than 200 years ago by one Barki Venkata Row as an endowment for the charitable purpose of feeding Brahmins. The Inam Commissioner has issued a title-deed in favour of one of his predecessors in title which confirms the inam to the grantee and his successors subject to a quit-rent therein specified to be held so long as the conditions of the grant are duly fulfilled. The lower Appellate Court has held that the suit will not lie as the Courts have no jurisdiction to entertain such suit under the Pensions Act 23 of 1871. It has been decided by this Court in a series of decisions in *The Secretary of State for India* v. *Abdul Hakkim Khan*(1), *Kolandai* v. *Sankara*(2), *Subramania* v. *The Secretary*

(1) I.L.R., 2 Mad., 294. (2) I.L.R., 5 Mad., 302.

VENKATESWARA AIYAR v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

of State for India(1), and *Athavulla* v. *Gouse*(2) that endowments for religious or pious purposes do not fall within the purview of section 4 of the Pensions Act and that it only applies to personal grants. It has been ruled by the Bombay High Court in *Miya Vali Ulla* v. *Sayad Bava Santi Miya*(3) that the Pensions Act applies also to endowments for religious purposes. But as this Court has in numerous decisions taken a different view, we are not prepared to follow the Bombay decisions. The decision of the Privy Council in *Maharaval Mohansingji Jeysingji* v. *The Government of Bombay*(4) which was quoted before us and relied on in the Bombay cases is not in our opinion inconsistent with the view which has been taken by this Court. Following the rulings above cited of this High Court, we hold that the Civil Courts have jurisdiction to entertain this suit. We accordingly set aside the decree of the lower Appellate Court, direct the District Judge to restore the appeals to his file and proceed to dispose of them according to law. The appellant is entitled to the costs in this Court. The costs in the lower Courts will be provided for in the revised decree.

APPELLATE CIVIL.

Before Mr. Justice Benson.

1907. August 29.

PALANIAPPA CHETTI (PLAINTIFF), APPELLANT,

v.

SITHRAVELU SERVAI AND ANOTHER (DEFENDANTS NOS. 1 AND 5), RESPONDENTS.*

Court Fees Act—Act VII of 1870, s. 7, cls. V, XI (E)—Suit against landlord and other persons claiming under him by lessee of melvaram rights falls under s. 7, cl. V, and not under clause XI (E).

A suit by the lessee of melvaram right to recover possession from his landlord and others claiming through the landlord falls within section 7, clause V of the Court Fees Act, as a suit for possession of land. Such a suit does not fall within

(1) I.L.R., 6 Mad., 361. (2) I.L.R., 11 Mad., 283.
(3) I.L.R., 22 Bom., 496. (4) L.R., 8 I.A., 77.

* Appeal No. 192 of 1904, presented against the decree of M.R.Ry. W. Gopalachariar, Subordinate Judge of Madura (East), dated 1st August 1904, in Original Suit No. 33 of 1903 in so far as it disallows the plaintiff's costs.

PALANIAPPA CHETTI v. SITHRAVELU SERVAI.

section 7, clause XI (E), as clause XI applies to suits between tenant and landlord only, and the wording of clause XI (E) makes it applicable only to persons in actual physical occupation and not to persons having the melvaram rights only.

Furzand Ali v. *Mohanth Lal Puri*, (I.L.R., 32 Calc., 268), followed.

SUIT to recover land and mesne profits.

The first defendant who had obtained a permanent lease of Akaramasi village from the Raja of Ramnad under a deed, dated 7th June 1895, agreed to lease the property to the plaintiff for 20 years, executed a registered deed, dated 25th October 1900, and put him in possession. The plaintiff alleged that in January 1901 first defendant carried away the produce by force and took possession of the village, and that on 13th March 1901 and 23rd January 1902 first defendant leased a portion of the village to fourth defendant and the remaining portion to fifth defendant. The plaintiff further alleged that these subsequent leases were fraudulently and collusively brought about by the fourth and fifth defendants with knowledge of plaintiff's prior lease. Hence the suit.

The subject-matter of the suit—the village, was valued at Rs. 75,470 under Court Fees Act, section 7, clause V (*d*), and the Court fees thereon, Rs. 1,325, was paid.

The Subordinate Judge decreed for the plaintiff; but in calculating the costs, payable to him by defendants, only Rs. 225 were allowed for Court fees on account of the claim for the village, the Subordinate Judge holding that the suit fell within the Court Fees Act, section 7, clause XI (E).

The plaintiff appealed in respect of the Court fees disallowed.

The Hon. Mr. *P. S. Sivaswami Ayyar* and *L. Narayana Ayyar* for appellant.

T. R. Krishnaswami Ayyar for *T. R. Ramachandra Ayyar* for first respondent.

V. Purushothama Ayyar for *T. Subrahmania Ayyar* for second respondent.

JUDGMENT.—The first defendant (father of defendants Nos. 2 and 3) was lessee of the *melvaram* of a certain village under the Zamindar of Ramnad. The first defendant leased his rights to the plaintiff and subsequently leased the same rights to the fourth and fifth defendants, who according to the plaint obstructed the plaintiff's enjoyment under the lease granted to him.

The plaintiff in filing the suit for recovery of possession of the village paid institution fee under section 7, clause V of the Court

PALANIAPPA CHETTI v. SITHRAVELU SERVAI.

Fees Act. He won his suit, but has been given costs only on the institution fee that would be payable under section 7, clause XI (E) of the Act. Against this decision as to costs he appeals, and the question is whether the plaint should have been stamped under clause V or under clause XI (E) of section 7 of the Act.

I think that the Subordinate Judge was wrong in applying clause XI (E). Clause XI is limited to certain "suits between landlord and tenant," and the only part of the clause which can be thought applicable to the present suit is (E) "to recover the occupancy of land from which a tenant has been illegally ejected by the landlord." But the present suit is one not merely between the plaintiff and the first defendant (the tenant and landlord), but also between the plaintiff and the fourth and fifth defendants who are persons claiming under the first defendant, and in the case (*Furzand Ali* v. *Mohanth Lal Puri*(1)) it was held that such a suit does not fall under clause XI (E). Moreover the terms of this clause and especially the words "occupancy of land" and "ejected" seem to be properly applicable to the case of ryots or persons in actual physical occupation rather than to persons like the plaintiff who is only entitled to the melvaram rights.

For these reasons, I think that clause XI (E) is not applicable, and that the suit falls under clause V, viz., "suits for the possession of land, houses and gardens."

I must therefore allow the appeal and modify the decree of the Subordinate Judge with costs on the sum now allowed.

The memorandum of objections is not pressed. It is dismissed with costs against the fifth defendant.

(1) I.L.R., 32 Calc., 268.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Miller.

KUMARU REDDI (PLAINTIFF), APPELLANT,

v.

NAGAYASAMI THAMBACHI NAIKER (DEFENDANT), RESPONDENT.*

1907. March 28. August 21. September 12.

Landlord and tenant—No charge for second crop on dry land allowable without proof of its propriety by the landlord—Custom—Isolated transactions extending over a few years not sufficient proof of custom.

An additional charge for a second crop grown on dry land without the aid of water supplied by the landlord is unusual, and it lies on the landlord seeking to impose it, to establish its propriety.

A customary right to impose such a charge is not proved when all the evidence in support of such custom is the testimony of a single witness who says he paid it and accounts extending back to 25 years which show that demands for the additional charges were made on certain tenants, but which do not show that they were ever paid.

SUMMARY suit under section 40 of Act VIII of 1865 to set aside a distraint for rent by the defendant who was the landlord of the plaintiff.

Distraint was made by the defendant for arrears alleged to be due for fasli 1313. The plaintiff's objection was that the additional charge in the patta for second crop on dry land was improper. The Deputy Collector dismissed the suit holding that the plaintiff failed to prove the illegality of the charge and that the evidence for the defence established a customary right to levy such charges. His judgment on this point was as follows:—

"There is no evidence on the plaintiff's side except his bare statement that he never before paid assessment for kodai crop. Defence witness 1 who is a pattadar in the village and defence witness 2 who is the karnam of the village state that it is customary in this village to levy assessment for kodai crop raised on punja lands. Defence witness 1 files the patta given to him for fasli 1312, which shows that second-crop assessment was charged in that

* Second Appeal No. 1420 of 1905, presented against the decree of J. Hewetson, Esq., District Judge of Madura, in Appeal Suit No. 361 of 1905, presented against the decision of M.R.Ry. V. Sreenivasa Chariar, Deputy Collector of Madura Division, in Summary Suit No. 41 of 1905.

KUMARU REDDI v. NAGAYASAMI THAMBACHI NAIKER.

fasli on one of the dry fields. He says that this extra charge was collected from him. Defence witness 2 files the enavali accounts of a number of faslis to show that half the taram assessment has all along been charged on dry lands cultivated with kodai crops."

On appeal this judgment was confirmed. The plaintiff appealed to the High Court.

S. Srinivasa Ayyangar and *C. V. Anantakrishna Ayyar* for appellant.

P. R. Sundara Ayyar and *T. Rangaramanujachariar* for respondent.

JUDGMENT.—In this case the plaintiff sued to set aside the Zamindar's distraint for rent on the ground that he was wrongly charged rent for growing a second crop on dry land with the aid of his own well. The allegation is not denied in the written statement, but the charge is said to be customary. The question is whether the Zamindar has raised the rent and the finding is that second-crop charge on 'dry' land is usual. The District Judge says it is not shown that the 'Taram' rate was intended to cover more crops than one, but the land being punjai or unirrigated land we are of opinion that the burden of proof was upon the Zamindar. There is nothing to suggest that the Tirumangalam taluk is specially favoured by nature in regard to rainfall or that unirrigated land is more likely to yield two crops there than elsewhere. The second-crop charge as ordinarily understood is a charge for water, and the written statement does not suggest that second-crops are grown without irrigation in the Periyur Zamindari. In 1854, in dealing with the settlement of another district, the Government of Madras speaks of a second-crop charge on punjai as exceptional. "He" (the Namalis renter) "has even introduced an item of demand, *unknown it is believed elsewhere*, a double-crop rate on the unirrigated or dry grain land." If the charge was unusual then it is, so far as we are aware, equally exceptional now, and it certainly lies on the Zamindar to establish its propriety if he desires to impose it, and not upon the tenant to disprove it if he desires to avoid it. The evidence adduced on behalf of the Zamindar is totally insufficient to prove a custom. One witness says he has paid the charge, and accounts dating back only to 1890 are produced, which show a demand of this charge from certain ryots, but do not show that any payments were made. Such evidence is insufficient in law to prove a custom, and there

KUMARU REDDI v. NAGAYASAMI THAMBACHI NAIKER

is no evidence from which a contract with the plaintiff can be implied.

The Zamindar not having proved that punjai land in his Zamindari is liable to a charge for second crop when irrigation is *not* provided by the Zamindar, there is in the present case a clear enhancement of the rent on account of the tenant's improvements and the case is within the ruling in *Fischer* v. *Kamakshi Pillai*(1).

The appeal is allowed and the distraint set aside with all costs.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Miller.

SUPPA PILLAI (PLAINTIFF), APPELLANT,

v.

NAGAYASAMI THUMBICHI NAICKER (DEFENDANT), RESPONDENT.*

1907. March 28. August 21. September 12.

Landlord and tenant—Rent Recovery Act (Madras), Act VIII of 1865, s. 11—Agreement to pay special rate for particular crops is not an enhancement of rent and is not invalid under s. 11.

Where the landlord and tenant, in commuting the waram into a money rate, agree that the latter should pay an increased rate for certain cultivation, such agreement, even if it secures to the landlord an increased rent in consequence of improvements effected by the tenant, is not an enhancement within the implied prohibition of section 11, proviso 1 of the Rent Recovery Act, as it only secures to the landlord the benefit he would have under the waram system, to which he could revert in the absence of a contract.

A custom by which an increased rate is payable on betel cultivation even when carried on by improvements effected by the tenant is not illegal or unenforceable as opposed to the policy of section 11 of the Rent Recovery Act.

Fischer v. *Kamakshi Pillai*, (I.L.R., 21 Mad., 136), distinguished.

Gopalasamy Chettiar v. *Fischer*, (I.L.R., 28 Mad., 328), distinguished.

THE defendant in all these suits was the Zamindar of Periyur and the plaintiffs were his tenants.

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(1) I.L.R., 21 Mad., 136.

* Second Appeals Nos. 1402 to 1417 of 1905, presented against the decrees of J. Hewetson, Esq., District Judge of Madura, in Appeal Suits Nos. 344 to 358 and 404 of 1905, presented against the decisions of M.R.Ry. V. Srinivasachariar, Deputy Collector of Madura Division, in Summary Suits Nos. 1, 3 to 6, 8 to 12, 14, etc., respectively.

SUPPA PILLAI v. NAGAYASAMI THUMBICHI NAICKER.

The suits were brought under sections 40 and 50 of the Rent Recovery Act to set aside distraints for arrears of rent made by the defendant, and the main question in all the suits was whether the defendant is entitled to charge a special rate for betel cultivation.

The Deputy Collector, and, on appeal, the District Judge, held that the defendant was entitled by custom to the said charge and dismissed the suits.

The plaintiffs appealed to the High Court.

C. V. Anantakrishna Ayyar for appellant.

P. R. Sundara Ayyar and *T. Rangaramanujachariar* for respondent.

JUDGMENT.—These are appeals from a judgment of the District Judge of Madura affirming the decrees of the Deputy Collector of Madura dismissing the plaintiffs' suits to set aside attachments made by the defendant for arrears of rent due by the plaintiffs for fasli 1313. The attachments were for rent due for land under betel cultivation, and the defendant claimed to be entitled to charge a customary rate of 60 pans or Rs. 127-4-4 for every Kalavirappudu or 78 cents. Of this 60 pans half is said to be payable in the second fasli the crop is on the ground and half in the third fasli, no charge being made in the first fasli. This rate has not been paid by each tenant directly to the landlord, but for each garden, one man called the Mukundan collects the charge from each of the cultivators and pays to the Zamindar, he being allowed to deduct a commission of two pans, one for each fasli. Both the lower Courts have held, we think rightly, that the payments must be treated as made by the tenants through the Mukundan, and the only question we have to consider is whether the special rate is payable by the tenants for betel cultivation. There is a finding by both Courts that it is payable by custom and this finding is supported by evidence going back so far as fasli 1227 or the year 1818. It is however alleged that the custom is illegal, because the cultivation is carried on with the aid of water obtained by means of the tenants' improvements and *Fischer* v. *Kamakshi Pillai*(1) and *Gopalasami Chettiar* v. *Fischer*(2) are cited to show that the custom is illegal and unenforceable. The only illegality suggested is that such a custom is opposed to the

(1) I.L.R., 21 Mad., 136. (2) I.L.R., 28 Mad., 328.

SUPPA PILLAI v. NAGAYASAMI THUMBICHI NAICKER.

statutory provision in the first proviso to section 11 of the Rent Recovery Act. That proviso reserves the right of the landholder with the Collector's consent to raise the rent in consequence of additional value imparted to the land by means of improvements effected at his own expense, or by Government where Government has required him to make an additional payment in consequence of such improvements, and by implication clearly negatives any right on the part of the landholder to claim increased rent in consequence of improvements effected by the tenant. But to bring the proviso into operation there must be a raising of the rent or enhancement, and all that was decided in *Fischer* v. *Kamakshi Pillai*(1) and *Gopalasami Chettiar* v. *Fischer*(2) as we understand them, was that the landholder could not rely on a custom entitling him to raise the rent in consequence of improvements effected by the tenant as such a custom would be illegal and unenforceable. In the present case, the District Judge has found and was justified in finding on the evidence that, when money rents were fixed on the land in substitution of the old waram or sharing system, it was settled that a special rate should be payable for betel cultivation. It cannot be said that there is anything illegal in this. Under the old waram system of the country, the landlord's share varies with the value of the crop raised and it is immaterial whether the crop is raised by the aid of tenant's improvements or not, and under clause 3, either party is entitled to insist on reverting to this waram system where there is no contract, and money assessments have not been fixed on the land as indicated in clause 2. Under these circumstances, it cannot be said to be opposed to public policy or to the provisions of the first proviso that, when money assessments were substituted for waram, this incident of the old waram system should be perpetuated by charging varying rates according to the nature of the crop without regard to the question whether the crops are raised by the aid of tenant's improvements or otherwise. The appeals are accordingly dismissed with costs.

(1) I.L.R., 21 Mad., 136. (2) I.L.R., 28 Mad., 328.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Miller.

1907. September 3.

PERIAKARUPPA PILLAI (PLAINTIFF), APPELLANT,

v.

THE MANAGER OF THE LESSEES OF THE SIVAGANGA ZAMINDARI (DEFENDANT), RESPONDENT.*

Landlord and Tenant—Distraint for larger amount than what is due not void, but will be good for amount actually due.

An attachment under the Rent Recovery Act by the landlord for a larger amount than is actually due is not, when the patta claiming the larger amount is not altered by the Court, altogether invalid, but will hold good for the amount actually due.

It may be different in the case of actual sale because by a sale the property of the tenant passes away from the tenant altogether, while in the case of an excessive attachment the aggrieved tenant can apply to the Collector for redress.

Pichu Ayyangar v. *Oliver*, (I.L.R., 26 Mad., 260), distinguished.

Ramachandra v. *Narayanasawmy*, (I.L.R., 10 Mad., 229), followed.

SUMMARY suit under section 18 of the Rent Recovery Act to set aside a distraint for arrears.

The plaintiff was a tenant of the village of Tirubhuvanam in the Sivaganga zamindari and the defendant was the manager of the lessees.

A patta for the fasli was tendered but, owing to the absence of the plaintiff, it was not personally served on him. Demand was made for rent in accordance with the terms of the patta, and the rent not being paid, the defendant attached the plaintiff's properties under the Rent Recovery Act.

The plaintiff now sued to set aside the attachment on the ground that the rent claimed for plantain and other cultivation was excessive.

The Head Assistant Collector found that several items of rent claimed in the patta and for which the properties were attached were excessive and he passed an order as follows :—

* Second Appeal No. 472 of 1906, presented against the decree of J. Hewetson, Esq., District Judge of Madura, in Appeal Suit No. 315 of 1905, presented against the decision of A. Thompson, Esq., Head Assistant Collector of Ramnad Division, in Summary Suit No. 221 of 1904.

"*Issue XIII*—is whether the demand was correct and proper? This depends on whether the patta was correct so far as it agrees with it and whether there are valid reasons so far as it does not agree and there is agreement except as regards interest which may rightly be charged. Modifications required in the patta have already been indicated and the demand must be brought into accordance therewith. The distraint will hold good for the amount so ascertained."

On appeal the District Judge modified some findings and directed that the attachment was to hold good for the amount determined according to his modified findings.

Plaintiff appealed to the High Court.

T. Rangachariar for appellant.

The Hon. The Advocate-General and the Hon. Mr. *P. S. Sivaswami Ayyar* for respondent.

JUDGMENT.—The only substantial ground of appeal argued before us is that as the Courts found that the attachment was for a larger sum than the sum actually due as rent it ought to be set aside as invalid. In support of this contention the appellant relies on the decision reported in *Pichuvayengar* v. *Oliver*(1). But in that case it was a sale that was set aside on the ground that if the proper amount only had been demanded the tenant might have been able to pay it and thus obviate the sale altogether, though unable to pay the larger sum demanded. In the present case there was no sale, but only an attachment. The effect of a sale and of an attachment are very different. By the latter the tenant's property is merely taken as security for the sum due by him and if aggrieved by an excessive attachment he can apply to the Collector for redress. In the case of a sale the property of the tenant passes from him altogether. For these reasons we think that the case in *Pichuvayengar* v. *Oliver*(1) can be distinguished from the present case. The present case is, moreover, in fact concluded by the express authority of the case of *Ramachandra* v. *Narayanasami*(2) where it was held that "there is no reason why the attachment should not hold good for the amount of such kists as may be recoverable under the Act." A similar view was taken in the case in *Bhupatirazu* v. *Ramasami*(3). These decisions

(1) I.L.R., 26 Mad., 260. (2) I.L.R., 10 Mad., 229.
(3) I.L.R., 23 Mad., 268.

FERIA-KARUPPA-PILLAI v. THE MANAGER OF THE LESSEES OF THE SIVAGANGA ZAMINDARI.

have not been overruled (so far as the present matter is concerned) by the cases reported in *Shanmuga Mudaly* v. *Palnati Kuppu Chetty*(1) or *Nallayappa Pillian* v. *Ambalavana Pandara Sannadhi*(2) relied on by the appellant's vakil. The case reported in *Vama Dava Desikar* v. *Murugesa Mudali*(3) which is also relied on by him is not on all fours with the present case, for in that case the patta had been altered. In the present case the patta has not been altered by the Courts. It has only been found that the calculation of the rent due under the patta was wrong and the attachment has been held good only to the extent of the rent found to be due on a correct calculation. We therefore dismiss the second appeal with costs.

APPELLATE CIVIL.

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

1907. August 7, 8, 13.

SAMBASIVA MUDALIAR (RESPONDENT-APPELLANT), APPELLANT,

v.

PANCHANADA PILLAI (PETITIONER-RESPONDENT), RESPONDENT.*

Limitation Act—Act XV of 1877, *sch. II, arts.* 178, 179—*Madras Revenue Recovery Act—Act VIII of* 1865, *ss.* 36, 38, 40—*Applications under s.* 40 *of the Revenue Recovery Act to Civil Courts are for purposes of Limitation governed by art.* 178 *of sch. II of the Limitation Act.*

Where the purchaser of immoveable property sold under section 36 of the Revenue Recovery Act, obtains a certificate as provided by section 38 of the Act and applies to a Civil Court for delivery of possession under section 40 of the Act, such application, for purposes of limitation is governed by article 178 and not 179 of the Limitation Act, and will be time barred if not presented within three years from the time when the right to apply accrues.

The effect of section 40 of the Revenue Recovery Act is to place the purchaser in the position of a decree-holder for the purpose of putting the machinery of the Court in motion to give effect to the certificate of the Revenue authority.

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(1) I.L.R., 25 Mad., 613. (2) I.L.R., 27 Mad., 465.
(3) I.L.R., 29 Mad., 75.

* Civil Miscellaneous Second Appeal No. 85 of 1906, presented against the decree of F. D. P. Oldfield, Esq., District Judge of Tanjore, in Appeal Suit No. 332 of 1906, presented against the order of M.R.Ry. C. V. Visvanathasastri, District Munsif of Kumbakonam, in Original Suit No. 2780 of 1905.

SAMBASIVA MUDALIAR v. PANCHANADA PILLAI.

Section 40 does not, however, by implication make the law of limitation with reference to the execution of decrees or orders of Civil Courts applicable to proceedings taken under its provisions.

The grant of a certificate under section 38 cannot be considered as a decree or order of a *Civil Court*, although for the purposes of section 40 it may be regarded as a decree or order. An application under section 40 of the Revenue Recovery Act is an application within the meaning of article 178 of schedule II of the Limitation Act.

Gnana Sambanda Pandara Sannadhi v. *David Nadar*, (14 M.L.J., 433), distinguished.

Jogemaya Dassi v. *Thockomoni Dassi*, (I.L.R., 24 Calc., 473), referred to.

Susya Pillai v. *Aiyyakannu Pillai*, (I.L.R., 29 Mad., 529), applied in principle.

APPLICATION to the District Munsif's Court under section 40 of the Revenue Recovery Act.

The petitioner purchased certain lands at a Revenue sale on 13th June 1902. He applied under section 40 to the Munsif's Court on 15th June 1903 for delivery of possession, but the application was rejected on 19th June 1903 for non-payment of batta. The present application was made on 24th November 1905. It was objected that the application was barred. The Munsif held applying article 179 of schedule II that it was in time as it was within three years of the last application. This judgment was confirmed on appeal by the District Judge, the material portion of whose judgment is as follows:—

"The application was under section 40, Revenue Recovery Act, and was allowed, the defence set up, that it was time barred, being rejected. The lower Court evidently applied article 179, schedule II, Limitation Act, and it is contended here that it should have applied article 178, because the application is not one for which a period of limitation is provided elsewhere, or by section 230, Civil Procedure Code. The only question is whether it comes, as plaintiff contends under the latter description.

Section 40 provides for the issue of 'the proper process, in the same manner as if the lands had been decreed to the purchaser by a decision of the Court.' These words have been construed in *Gnana Sambanda Pandara Sannadhi* v. *David Nadar*(1) as 'placing the purchaser in the position of a decree-holder, and, that is, entitled to such remedies, as are open to a decree-holder in execution proceedings'; and, if his remedy is co-extensive in other respects, it must be available for as long a time. The decision goes

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(1) 14 M.L.J., 433.

on to point out that the respondent there would have appealed against the order of restitution there in question a view consistent only with its being treated as passed under section 244, Civil Procedure Code; for the Revenue Recovery Act makes no provision for an appeal. When sections 230 and 244 were applied so far, I think that the lower Court was right in considering that the application of article 179 appropriate to them was entailed."

The respondent appealed to the High Court.

N. Rajagopalachariar for appellant.

K. Ramachandra Ayyar for respondent.

JUDGMENT.—The questions for determination in this appeal are, where immoveable property has been sold under section 36 of the Revenue Recovery Act, 1864 (II of 1864), and an application is made by a purchaser for delivery of possession under section 40 of the Act, is the period of limitation for making the application governed by article 179 of the second schedule to the Limitation Act? and if article 179 is not applicable, is article 178 applicable? or is there no period of limitation? The District Judge has held that article 179 is applicable. We do not take this view. Section 40 empowers a Court of competent jurisdiction on production of the certificate of sale provided by section 38 of the Act to cause the proper process to be issued for the purpose of putting the purchaser in possession in the same manner as if the purchased lands had been decreed to the purchaser by a decision of the Court. The section, as we read it, places the purchaser in the position of a decree-holder for the purposes of putting the machinery of the Court in motion in order that the certificate of sale granted by the Revenue authority may be given effect to. It does not, by implication, make the law of limitation with reference to the execution of decrees or orders of Civil Courts applicable to proceedings under section 40 of the Act. Further, article 179 applies to decrees or orders of a Civil Court, and even if the grant of a certificate by the Revenue authority can, for the purposes of section 40, be regarded as a decree or order we do not think that it can for the purposes of the section be regarded as a decree or order of a Civil Court. In the cases of *Chembre Raman Menon* v. *Patinhateeri Damodaran Nambudri*(1) and *Gnana Sambanda Pandara Sannadhi* v. *David Nadar*(2) which were relied upon on

(1) A.A.A.O. No. 27 of 1889 (unreported). (2) 14 M.L.J., 433.

behalf of the respondent this Court decided that under the section the purchaser was entitled to such remedies as are open to a decree-holder in execution proceedings and, this being so, a party could appeal against an order made by a Civil Court under the section, and, when possession had been awarded under the section, restitution could be ordered if the sale was set aside. These decisions relate to the powers of the Court after an application has been made to the Court and an order under the section has been made by the Court. They do not touch the question of limitation of time within which an application must be made. The decisions in the Calcutta Cases of *Tincowrie Dawn* v. *Debendro Nath Mookerjee*(1), and *Jogemaya Dassi* v. *Thackomoni Dassi*(2), where it was held that the period of limitation applicable to the execution of a decree transmitted by one Court to another for execution depends on the character of the Court which passed the decree, and not on the character of the Court executing it, afford a much closer analogy to the present case. In his judgment in *Jogemaya Dassi* v. *Thackomoni Dassi*(2). Trevelyan, J., points out "section 227 of the Civil Procedure Code directs this Court to execute the decree sent to it, in the same manner as if it had been made by this Court in the exercise of its Ordinary Original Civil Jurisdiction. The 'manner' of execution refers to the procedure under which the execution is to be had, and has no reference to the limitation. It simply applies the High Court machinery to the execution of the decree."

The principle of the decision of the Full Bench of this Court in *Susya Pillai* v. *Aiyakannu Pillai*(3), where it was held that the reference to section 582 of the Civil Procedure Code in article 175 (c) of the Limitation Act read with the provisions of section 587 of the Code could not be construed as by implication making the rule of limitation prescribed in that article applicable in the case of second appeals, appears to us to be applicable to the present case.

It was further contended that "applications" in article 178 meant application under the Code of Civil Procedure, and that if article 179 did not apply, article 178 also did not apply, and there was no time limit, and we were referred to *Janaki*

(1) I.L.R., 17 Calc., 491. (2) I.L.R., 24 Calc., 473 at p. 491.
(3) I.L.R., 29 Mad., 529.

SAMBASIVA MUDALIAR v. PANCHANADA PILLAI.

v. *Kesavalu*(1), and *Gnanamuthu Upadesi* v. *Vana Koilpillai Nadan*(2). The short answer to this contention is that inasmuch as an application under section 40 of the Act is an application that the machinery of the Code be put in motion, it is an application within the meaning of article 178. In the cases referred to the application had no reference to the provisions of the Code.

We are of opinion that article 178 applies. This being so, we must allow the appeal with costs throughout, and dismiss the application as time barred.

APPELLATE CIVIL.

Before Mr. Benson and Mr. Justice Wallis.

1907. August 14, September 10.

RAMASWAMI KONE (PLAINTIFF–PETITIONER), APPELLANT,

v.

SUNDARA KONE (DEFENDANT–COUNTER-PETITIONER), RESPONDENT.*

Appeal, decree in—When such decree simply confirms decree of lower Court, it does not enlarge the time fixed by the original decree for the performance of conditions precedent.

The decree of the lower Court provided that 'on the plaintiff's paying into Court the balance of consideration, Rs. 10, within a month from this date,' defendant should execute a sale-deed of the suit land. The money was not paid within the month and the defendant preferred an appeal after the expiry of the month. The Appellate Court simply confirmed the decree of the lower Court and dismissed the appeal. Within a month of the appellate decree the plaintiff deposited Rs. 10: and applied for execution of the decree:

Held, that he was not entitled to execute the decree, as he had not made payment within the time fixed by the original decree and as the appellate decree cannot under the circumstances be held to have enlarged the time fixed by the original decree. The appellate decree simply confirming the original decree cannot be read as giving the plaintiff one month from the date of the decision on appeal. Such an extension can be claimed only if expressly or impliedly given by the Appellate Court.

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(1) I.L.R., 8 Mad., 207. (2) I.L.R. 17 Mad., 379.

* Civil Miscellaneous Second Appeal No. 71 of 1906, presented against the order of Lionel Vibert, Esq., District Judge of Tinnevelly, dated 29th March 1906, in Appeal Suit No. 386 of 1905, presented against the order of M.R.Ry. V. K. Desikachariar, District Munsif of Tinnevelly, dated 17th August 1905, in Execution Petition Revision No. 465 of 1905, in Execution Petition No. 1 of 1905 (Original Suit No. 543 of 1903).

RAMASWAMI KONE v. SUNDARA KONE.

Bhup Indar Bahadur Singh v. *Bijai Bahadur Singh*, (I.L.R., 23 All., 155), distinguished.

IN this case the plaintiff obtained a decree in the District Munsif's Court, Tinnevelly, which provided that "on plaintiff paying into Court the balance of consideration Rs. 10, within a month from this date" the defendant should execute a sale-deed of the suit land in the plaintiff's favour. The amount was not paid into Court within the month and after the expiration of the month the defendant appealed. The Subordinate Judge simply confirmed the decree of the lower Court. The plaintiff then paid the amount into Court and applied for execution of his decree. The application was resisted by the defendant on the ground that the plaintiff had not complied with the terms of the original decree. The objection was upheld by the District Munsif and the petition for execution dismissed. The plaintiff then applied to the Subordinate Court to have the appellate decree modified by introducing a fresh time limit for the payment of Rs. 10. This application was refused. The plaintiff then appealed against the District Munsif's order dismissing his application for execution. This appeal was dismissed. Plaintiff further appealed to the High Court.

The appeal must be dismissed with costs.

The plaintiff appealed to the High Court.

K. Srinivasa Aiyangar for appellant.

V. C. Seshachariar for respondent.

JUDGMENT.—In this case the decree of the District Munsif provided that "on the plaintiff's paying into Court the balance of consideration Rs. 10 within a month from this date" the defendant should execute a sale-deed of the suit land in the plaintiff's favour. The plaintiff did not pay into Court the Rs. 10 within the month, and after the expiration of the month the defendant appealed. The decree of the Appellate Court simply confirmed the decree of the lower Court and dismissed the appeal. Within a month of the date of the appellate decree the decree-holder made the deposit of Rs. 10 and applied for execution of the decree. Both the lower Courts have held that as he did not make the deposit of Rs. 10 within the month fixed by the original decree he is not entiled to execute the decree. In second appeal it is contended for the decree-holder that the appellate decree although simply affirming the decree of the lower Court must be read as giving him a month from the date of the

appellate decree to make the deposit. The point is one of some difficulty as to which there has been a conflict of decisions. *Rup Chand* v. *Shamsh-ul-Jehan*(1), *Noor Ali Chowdhuri* v. *Koni Meah*(2), and *Daulat and Jagjivan* v. *Bhukandas Manekchand*(3) are authorities for holding that a decree of the Appellate Court affirming that the decree of the lower Court must be held to give the decree-holder an additional period of time for complying with the conditions of the decree. A contrary view was taken by Kernan and Parker, JJ., in this Court in *Govindan* v. *Chapputti*(4) an unreported case referred to in *Manavikraman* v. *Unniappan*(5). In the latter case it was observed by the Court that though a decree passed on an appeal preferred by the defendant may give the plaintiff a fresh starting point within which to execute, it does not necessarily, unless the appeal decree so declares, give him an extension of time during which he may fulfil the condition precedent. They accordingly held that the appellate decree had not given further time, but as they considered that in a suit for redemption the Appellate Court was bound under section 92 of the Transfer of Property Act to prescribe a date within six months of the appellate decree for payment of the redemption money, they remanded the case for that purpose. This latter point does not arise here. Subsequently a Full Bench of the Allahabad High Court in *Jaggar Nath Pande* v. *Jokhu Tewari*(6) held overruling the case in *Rup Chand* v. *Shamsh-ul-Jehan*(1) that in a suit for pre-emption where the defendant appeals and the decree of the lower Court is affirmed the time limited by the original decree for payment of the purchase money is not extended. A similar opinion was expressed by Banerji, J., in *Bhola Nath Bhuttacharjee* v. *Kanti Chundra Bhuttacharjee*(7), but Maclean, C.J., preferred to rest his decision on another ground. We may also refer to *Patloji* v. *Ganu*(8), in which it was held that the defendant by appealing did not extend the time given by the plaintiff for performing conditions precedent to execution imposed by the decree. Such an extension could only be effected expressly or impliedly by the appellate decree. To sum up, the decisions of this Court and the balance of authority in the other High Courts support the view

(1) I.L.R., 11 All., 346.
(2) I.L.R., 13 Calc., 13.
(3) I.L.R., 11 Bom., 172.
(4) A.A.A.O. No. 23 of 1888 (unreported).
(5) I.L.R., 15 Mad., 170.
(6) I.L.R., 18 All., 223.
(7) I.L.R., 25 Calc., 311.
(8) I.L.R., 15 Bom., 370.

that a merely affirming appellate decree does not give the plaintiff fresh time for performing a condition.

The appellant, however, has relied strongly on a later decision of the Privy Council in *Bhup Indar Bahadur Singh* v. *Bijai Bahadur Singh*(1) as settling the point the other way. In that case the District Court gave the plaintiff a decree dated the 12th November 1887 for possession of the suit land "with future profits." Applying the provisions of section 211 of the Code of Civil Procedure the original decree entitled the plaintiff to recover mesne profits from the date of instituting the suit until delivery of possession or until the expiration of three years from the date of the decree, the 12th November 1887, whichever event should first happen. This decree was reversed by the High Court but restored by an order of the Queen in Council dated the 11th May 1895. It was subsequently contended in execution proceedings that as the judgment of the Court of final appeal had merely restored the decree of the Court of first instance, the plaintiff was not entitled to recover mesne profits for more than three years from the date of the original decree. Their Lordships in rejecting this contention observed that the appellate decree by affirming the decree of the lower Court had adopted its terms and carried on their effect down to a later date. All they had to do was to construe the appellate decree and carry it into execution. The original decree for future mesne profits signified profits future to the date of the decree, the 12th November 1887. The appellate decree speaking with the language of the decree of 1887 clearly carried all profits up to its own date 11th May 1895. Section 211 would prevent future mesne profits being recovered for more than three years from the date of the appellate decree, but to call it into operation with reference to the earlier decree would be to deprive the appellate decree of its obvious meaning. On the construction of the appellate decree then it was held that the plaintiff was entitled to mesne profits until delivery of possession or three years from the date of the appellate decree.

As regards this case we think the observation that the appellate decree by affirming the decree of the lower Court had adopted its terms and carried on their effect to a later date must be taken to have been made with reference to the terms of the particular

(1) I.L.R., 23 All., 152.

RAMASWAMI KONE v. SUNDARA KONE.

decree for future mesne profits, and that it cannot be treated as applicable to the facts of the present case. The question as to the effect of an affirming appellate decree in enlarging the time imposed by the original decreef or the performance of conditions precedent did not arise for consideration nor were any of the Indian cases on the point referred to. The question before us is as to the construction of the appellate decree, and apart from the authority of decided cases it would, we think, be going too far to hold that an appellate decree affirming an original decree has in all cases the effect of enlarging the time limited by the original decree for the performance of conditions. Nor is it, we think, open to us to construe such a decree, as we were invited to do, in one way when the condition is imposed as here on the respondent in the appeal and in another way when it is imposed upon the appellant merely because the respondent in such a case would have a better claim to extension of time than the appellant. On the whole we are of opinion that the lower Courts were right and that the appeal must be dismissed with costs.

In future cases it is, we think, desirable that Appellate Courts should frame their decrees in such a manner as to leave no doubt as to whether it is intended to extend the time for performing conditions precedent prescribed by the original decree.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Wallis.

JIVARATHNAM MUDALIAR (SECOND DEFENDANT-SECOND RESPONDENT), APPELLANT,

v.

SRINIVASA MUDALIAR (TRANSFEREE PLAINTIFF-PETITIONER), RESPONDENT.*

1907. September 13 25.

Civil Procedure Code, Act XIV of 1882, ss. 232, 233—Transfer of Property Act, Act IV of 1882, s. 99—Transferee decree-holder cannot bring to sale property which the decree-holder could not bring to sale under s. 99 of the Transfer of Property Act.

A transferee decree-holder is only entitled, under section 232 of the Code of Civil Procedure, to execute the decree in the same manner and subject to the same conditions as if the application were made by the original decree-holder, and, under section 233, he holds the decree subject to any equities which the judgment-debtor might have enforced against the original decree-holder. A transferee decree-holder cannot in execution bring to sale property, which the original decree-holder is prohibited from bringing to sale by section 99 of the Transfer of Property Act.

Chhagan Guman v. *Lakshman Dagdu*, (9 Bom. L. Rep., 728), approved and followed.

Chundra Nath Dey v. *Burroda Shoondury Ghose*, (I.L.R., 22 Calc., 813), approved.

Bauh Bal v. *Manni Lal*, (I.L.R., 27 All., 450), dissented from.

THE facts are fully stated in the judgment.

C. Balarama Rau for appellant.

P. Doraisami Ayyangar for respondent.

JUDGMENT.—In this case the plaintiff obtained a money decree in the Small Cause Court and transferred it to the respondent, who obtained leave to execute it under section 232 of the Civil Procedure Code. The decree was then transferred to the City Civil Court and the respondent sought to execute it by the attachment and sale of property belonging to the judgment-debtor, which was mortgaged to the original decree-holder. The judgment-debtor objected that, under the provisions of section 99 of the Transfer of Property Act, the respondent was not entitled to

* Civil Miscellaneous Appeal No. 41 of 1907, presented against the order of M.R.Ry. C. V. Kumarasamy Sastriar, City Civil Judge of Madras, in Execution Petition Register No. 368 of 1906 in Suit No. 6613 of 1905 on the file of the Small Cause Court of Madras.

bring the mortgaged property to sale, but the Judge of the City Civil Court overruled the objection on the authority of *Banh Bal* v. *Manni Lal*(1), and ordered the attachment and sale of the mortgaged property. From this order the judgment-debtor appeals. Section 99 of the Transfer of Property Act provides that, where a mortgagee, in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, attaches the mortgaged property, he shall not be entitled to bring such property to sale otherwise than by instituting a suit under section 67. The disability imposed by this section is a disability imposed on the mortgagee, and, if a mortgagee were to obtain a transfer of a money decree to himself, he would clearly be debarred by the terms of the section from executing it against the mortgaged property. It might similarly be argued that, when a mortgagee obtains a money decree and transfers it, the transferee does not come within the section which is only aimed at a sale of the mortgaged property by the mortgagee otherwise than by means of a suit under section 67. The rights of a transferee decree-holder are, however, regulated by sections 232 and 233 of the Civil Procedure Code, and his right to sell in the present case must be determined by the provisions of these sections. Under section 232 of the Civil Procedure Code he is only entitled to execute the decree in the same manner and subject to the same conditions as if the application were made by the original decree-holder, and section 233 provides that he is to hold the decree subject to the equities, if any, which the judgment-debtor might have enforced against the original decree-holder. In our opinion the transferee is prohibited from selling the mortgaged property in execution of the decree transferred to him by the first if not also by the second of these sections. By virtue of section 99 of the Transfer of Property Act the original decree-holder could only execute the decree subject to the condition of not bringing the mortgaged property to sale otherwise than by instituting a suit under section 67 of the Transfer of Property Act. In our opinion the transferee decree-holder took the decree subject to this condition, and the fact that it is not open to him to institute a suit under section 67 as he is not the mortgagee, does not relieve him from the condition of not bringing it to sale otherwise. This is the view

(1) I.L.R., 27 All., 450.

taken by the Bombay High Court in *Chhagan Guman* v. *Lakshman Dagdu*(1), with which we agree. In *Chundra Nath Dey* v. *Burroda Shoondury Ghose*(2), it appears to have been taken for granted that a transferee decree-holder could not sell property which the original decree-holder was debarred from selling under section 99 of the Transfer of Property Act. With regard to *Banh Bal* v. *Manni Lal*(3), the learned Judges do not advert to the language of section 232 of the Civil Procedure Code and we are unable to agree with the conclusion at which they have arrived. There is, however, nothing in section 99 of the Transfer of Property Act to prohibit the attachment of the mortgaged property, and, in allowing the appeal, our decision is without prejudice to the earlier order of the 21st December 1906 directing the attachment of the mortgaged property. The respondent will pay costs in this and the lower Court.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Miller.

RAGHAVAN, MINOR BY GUARDIAN SANKARA SASTRIAL AND ANOTHER (DEFENDANTS—PETITIONERS), APPELLANTS,

v.

ALAMELU AMMAL AND ANOTHER (PLAINTIFFS—RESPONDENTS), RESPONDENTS.*

1907. September 19.

Contract Act—Act IX of 1872, *ss.* 69, 70—*Money paid for income-tax by the person assessed and on whom demand is made cannot under these sections be recovered from a person who is alleged to be the party really liable to pay.*

When the income-tax authorities assess a person in respect of certain income alleged to be derived by him and recover the tax so assessed from him, such person cannot, under section 69 or section 70 of the Contract Act, recover the amount so paid from another person on the ground that such other was in actual receipt of the income. Section 69 cannot apply, as the latter person, not being assessed was not legally bound to pay the tax, and section 70 cannot apply as the person paying the tax did so on his own account and not on behalf of another.

(1) 9 Bom. L. Rep., 728. (2) I.L.R., 22 Calc., 813.
(3) I.L.R., 27 All., 450.

* Appeal No. 23 of 1907, presented under section 15 of the Letters Patent against the judgment of Mr. Justice Boddam in Civil Revision Petition No. 486 of 1906, presented to the High Court to revise the decree of the Subordinate Judge's Court, Kumbakonam, in Small Cause Suit No. 132 of 1906.

RAGHAVAN v. ALAMELU AMMAL.

THE facts necessary for the report of this case are sufficiently stated in the judgment.

K. Ramachandra Ayyar for appellants.

T. R. Venkatarama Sastri for respondents.

JUDGMENT.—In this case the income-tax authorities assessed the plaintiffs who are the widows of one Kalyanarama Sastrigal, who died in 1904, for income-tax for the year 1905–1906 in respect of certain outstandings which formed part of the estate of the deceased at the time of his death.

The plaintiffs alleged that the outstandings in question had not come to them, but had been bequeathed under the will of the deceased to the present defendants. Nevertheless, the income-tax authorities persisted in their demand, and levied the tax from the plaintiffs, who now sue to recover the amount paid by them for the defendants.

The Subordinate Judge held that the case came within section 70 of the Indian Contract Act, and the learned Judge from whom the present appeal is brought refused to interfere with his judgment in revision. In this Court the respondents relied on section 69 of the Indian Contract Act as well, but in our judgment the case does not fall within either of these sections. Under section 14 of the Income Tax Act, 1886, the Collector is to determine what persons are chargeable under Part IV which includes the sources of income here in question and the amount at which every person so chargeable shall be assessed. In the present case the Collector has not determined that the defendants were chargeable under Part IV or assessed them at any amount. Consequently the defendants were not legally bound to pay the tax, and the plaintiffs cannot say that the defendants were bound to pay it so as to make the terms of section 69 applicable. Nor can the plaintiffs be said in our opinion to have made the payment for the defendants not intending to act gratuitously so as to bring the case within section 70. It was from the plaintiffs themselves that payment was demanded and enforced by the income-tax authorities, and it cannot be said to have been made by the plaintiffs for the defendants merely because the income-tax authorities ought, it is suggested, to have demanded and exacted payment from the defendants instead of from the plaintiffs. We may further observe that there is no evidence in the case that the defendants had been in receipt of income which would have rendered them liable to assessment for the year in question. We must, therefore, allow the appeal, and set aside the decree of the Subordinate Judge and dismiss the suit with costs throughout.

RAGHAVAN v. ALAMELU AMMAL.

APPELLATE CIVIL.

Before Mr. Justice Miller.

KOLINTAVITA MAMA AMMA (SECOND DEFENDANT), PETITIONER,

v.

KOLINTAVITA HAJI KANDI AND ANOTHER (PLAINTIFFS AND FIRST DEFENDANT), RESPONDENTS.*

1907. October 8, 10.

Civil Procedure Code, Act XIV of 1882, s. 244—Claim for damages by auction purchaser against judgment-debtor and others for injury done to property purchased after confirmation of sale not a question relating to execution within s. 244.

Where after confirmation of a sale of property in execution at a Court-auction and before delivery of possession to the auction purchaser, the judgment-debtor and others not parties to the decree trespass upon such property and cause injury to it, the claim of such auction purchaser for damages in respect of such injury, is not a 'question relating to the execution of the decree' within section 244 of the Code of Civil Procedure and must be enforced by separate suit and not in execution proceedings.

Obiter: Even supposing that such a claim was one relating to execution, the auction purchaser is entitled but not bound to implead all the wrong doers in one suit and ought not to be compelled to proceed against the judgment-debtor under section 244 and against those not parties by a separate suit.

THE facts are stated in the judgment on appeal, the material portion of which was as follows:—

"First defendant obtained a decree against second defendant, in execution of which plaintiff purchased the plaint property. Plaintiff alleges that the materials of the plaint house purchased by him have been removed by defendants Nos. 1 to 5. The District Munsif held that plaintiff's remedy against defendants Nos. 1 and 2 lies in an application under section 244, Civil

* Civil Revision Petition No. 246 of 1907, presented under section 622 of the Code of Civil Procedure, praying the High Court to revise the decree of W. W. Phillips, Esq., District Judge of North Malabar, in Appeal Suit No. 319 of 1906, presented against the order of the District Munsif of Kuthuparamba in Original Suit No. 846 of 1904.

KOLINTAVITA MAMA AMINA v. KOLINTAVITA HAJI KANDI.

Procedure Code, and accordingly returned the plaint for amendment by striking out the names of defendants Nos. 1 and 2.

There can, I think, be no doubt that plaintiff's present request amounts to an application relating to a question arising in relation to the execution of a decree, for he seeks to recover the property sold in execution of a decree in the same condition as it was when sold. Under section 244(*c*), Civil Procedure Code, such questions arising between parties to the suit or their representatives are to be decided in execution proceedings. The dictum of Moore, J., in *Kasinatha Aiyar* v. *Uthumansa Rowthan*(1) is authority for holding that plaintiff is the representative of the judgment-creditor, *i.e.*, first defendant. This dictum is also upheld in the case reported in I.L.R., 28 Mad., 87, although there was a decision to the contrary in an unreported case from this District. (Appeal against Appellate Order No. 77 of 1903.) I cannot however find any authority for treating plaintiff as the representative of the judgment-debtor (second defendant). The ruling reported in I.L.R., 28 Mad., 119 is not applicable here as the circumstances are quite different. Plaintiff comes into Court as the auction-purchaser and as such the representative of the judgment-creditor. He does not claim to represent second defendant who is the person in possession and against whom the decree-holder's rights are to be enforced. So far then as plaintiff and second defendant are concerned, the question between them is one arising between the parties or their representatives, but as regards first defendant the case is different. Section 244 does not apply to questions arising between parties and their representatives, that is when a party and his representative are ranged on opposite sides. Plaintiff only comes in under section 244 as representative of first defendant. I think therefore that section 244 cannot apply to a dispute between a party and his representative. Therefore so far as first defendant is concerned, plaintiff's suit is maintainable. As against second defendant his remedy is under section 244.

I therefore hold that the plaint should not have been returned for amendment and direct the District Munsif to restore it to file and dispose of it on its merits. As I have held that second defendant should not be sued, he will necessarily be exonerated in the suit."

The second defendant applied to the High Court under section 622 of the Code of Civil Procedure.

KOLINTAVITA MAMA AMINA v. KOLINTAVITA HAJI KANDI.

V. Ryru Nambiar for petitioner.

J. L. Rosario for respondent.

JUDGMENT.—The plaintiff purchased a paramba in Court-auction and the sale was confirmed, but before he obtained possession the decree-holder and judgment-debtor, so he alleges, joined with three other persons and carried away some of the materials of a building standing upon the land. He sued them all together for damages which he estimates at the value of the property removed, and the question is whether as against the parties to the decree in execution of which his purchase was made, he is entitled to maintain the suit.

He is clearly entitled though he is not bound to implead in one suit all the joint wrong doers, and that being so, he ought not to be compelled, none of the parties being improperly joined, to proceed in one proceeding (under section 244 of the Civil Procedure Code) against some of them and in another (by way of suit) against others.

It is not however necessary to decide whether the provisions of section 244 of the Civil Procedure Code are such as to necessitate this undesirable course in a case in which that section applies as to some of the parties to the dispute and not to others, for in this case I am of opinion that section 244 has no application. The question between the parties is not one relating to the execution of the decree. The plaintiff is not seeking the aid of the Court to obtain possession of what he has purchased; he is asking only for damages for injury done to that property after it had vested in him on the confirmation of the sale. He has obtained delivery of possession without obstruction and he does not say that the possession delivered to him was incomplete or that the Court could give him any thing more.

Wide as are the provisions of section 244, and liberally as the Courts have construed them, I am unable to see how they can be held to cover the present case. It may be correct to hold that in as much as it is in the power of the Court executing the decree to put the purchaser at its sale into possession of the property purchased, a question arising on the purchaser's attempt to obtain possession is a question relating to the execution of the decree. That however is not the present case. The plaintiff asks for compensation for a trespass committed by the defendants and the carrying off of his property, and there is no connection that I can

KOLINTAVITA MAMA AMINA v. KOLINTAVITA HAJI KANDI.

see between that trespass and the execution of the decree. Again it does not appear that the legislature contemplated the decision of such questions as this by the Court executing the decree, for even when the decree is for possession of the property in question a suit for mesne profits is expressly saved by the section, and such a suit is not altogether dissimilar from the present action so far as the present order is against the second defendant. I therefore agree with the District Judge that the plaint ought not to have been returned for amendment and that the District Munsif must dispose of it on the merits, but I do not agree with his view that it will be the duty of the District Munsif to exonerate the second defendant or to treat the plaint in his case as an application under section 244 of the Civil Procedure Code. I do not say that there would be any objection to his so treating it if the section was applicable, and the fact that another application subsequently made under this section has been held to be barred by limitation, would not effect the question, but the second defendant is a proper party to the suit and the suit must proceed against him accordingly.

APPELLATE CRIMINAL.

Before Mr. Justice Benson and Mr. Justice Boddam.

1907. September 19.

THE SESSIONS JUDGE OF MANGALORE

v.

MALINGA *alias* SOMAPPA.*

Criminal Procedure Code, Act V of 1898, *ss*, 436, 287, 288—*District Magistrate may, under the section himself, commit for trial—Committing Magistrate in ss.* 287, 288 *means Magistrate who held preliminary enquiry.*

Under section 436 of the Code of Criminal Procedure, it is competent to a District Magistrate to make a committal himself or to direct a Subordinate Magistrate to make a committal.

The words "Committing Magistrate" in sections 287, 288 mean merely the Magistrate holding the preliminary inquiry. Where, therefore, the District Magistrate himself commits for trial, the evidence recorded by the Subordinate Magistrate who held the preliminary inquiry will be receivable as evidence under sections 287, 288 of the Code.

* Criminal Miscellaneous Petition No. 190 of 1907, praying that, in the circumstances stated therein, the High Court will be pleased to issue orders as to whether the commitment in Sessions Case No. 28 of 1907 should be quashed and fresh commitment ordered or what should be done.

THE SESSIONS JUDGE OF MANGALORE v. MALINGA.

THE facts are sufficiently stated in the Letter of Reference to the High Court which is as follows:—

"I have the honour to refer the following case for orders under section 215, Criminal Procedure Code. A man was tried for murder and grievous hurt and discharged by the Sub-Magistrate, who heard the defence evidence and believed it. The Divisional Magistrate referred the records under section 435 to the District Magistrate, who took action under section 436, and, after due notice to accused, committed him himself to this Court for trial. On the case coming on, the defence object that section 346 does not authorise a District Magistrate to commit a case himself but only order it to be committed. That is so. If the words have their ordinary meaning the only power the District Magistrate has is to order commitment to be made by the trying Magistrate. This, of course, could easily have been done but the District Magistrate relying on *Queen-Empress* v. *Surendra Nath Sarkar*(1) made the commitment himself. There is no Madras ruling on this point. It is important. In my opinion the words can only have their ordinary meaning. If the Legislature meant the District Magistrate himself to commit it could and would have said so.

As things are, the case was tried by one Magistrate and committed by another. No evidence was taken in the presence of the committing Magistrate—hence the record of the lower Court which did not commit accused cannot be admitted in evidence under section 288. Neither can the examination of accused be read under section 287. I am sure the Legislature never contemplated such a state of things. In these circumstances it seems proper to ask for the orders of the High Court as to whether this commitment should be quashed and fresh commitment ordered by the trying Magistrate or what should be done."

Mr. *P. R. Grant* for the Public Prosecutor in support of the reference.

K. Narayana Rao for accused.

ORDER.—The words "order him to be committed" in section 436 of the Code of Criminal Procedure do not, in our opinion, mean more than "pass an order for his committal" and enable the District Magistrate himself, to make a committal, or to direct a Subordinate Magistrate to make a committal. The same view of

(1) I.L.R., 28 Calc., 397.

THE SESSIONS JUDGE OF MANGALORE v. MALINGA.

the section has been taken by the High Courts of Bombay (*Queen-Empress* v. *Krishna Bhat*(1) and Calcutta *Queen-Empress* v. *Surendra Nath Sarkar*(2)). No case to the contrary has been cited. It is argued that in those cases the attention of the Court was not called to sections 287 and 288 of the Code of Criminal Procedure, which enable the evidence of witnesses and the examination of the accused duly recorded "before the committing Magistrate" to be used at the trial, and it is suggested that, when the commitment is made by the District Magistrate on evidence recorded by a Sub-Magistrate, as in the present case, the evidence of the witnesses and the statement of the accused cannot be treated as evidence at the trial as the Sub-Magistrate is not "the committing Magistrate." We do not think that this contention is valid. We think that the phrase "committing Magistrate" in sections 287 and 288 is merely a compendious way of referring to the Magistrate or Magistrates who held the preliminary enquiry on which the committal was made. In this connection a reference to section 350 of the Code of Criminal Procedure may be made. That section enables a commitment to be made by a Magistrate who succeeds to the jurisdiction of another Magistrate, on evidence recorded by that other Magistrate. In such a case the Magistrate actually making the order of commitment need not have himself recorded any of the evidence or the statement of the accused, yet it can hardly be supposed that the Legislature intended in such a case to make sections 287 and 288 inapplicable. The Sessions Judge should proceed to deal with the case in accordance with law.

(1) I.L.R., 10 Bom., 319. (2) I.L.R., 28 Calc., 397.

APPELLATE CRIMINAL.

Before Mr. Justice Miller.

1907. September 16.

KRISTNA PILLAI (COMPLAINANT), PETITIONER,

v.

KRISHNA KONAN AND ANOTHER (ACCUSED), RESPONDENTS.*

Criminal Procedure Code, Act V of 1892, ss. 195, 235—No sanction required when the actual offence charged is not one for which sanction is necessary under s. 195 of the Code of Criminal Procedure, though the facts alleged disclose an offence for which no prosecution can be entertained without sanction under that section.

The agent of a decree-holder accompanied an Amin to execute the decree and was obstructed and assaulted in endeavouring to effect execution. The agent applied to the Court for sanction to prosecute for an offence under section 186, Indian Penal Code, and on the sanction being refused, he presented a complaint against the party who assaulted him for offences under sections 323 and 355 and Indian Penal Code:

Held, that no sanction under section 195 of the Code of Criminal Procedure was necessary, although the facts alleged disclosed an offence under section 186 of the Indian Penal Code.

When in the course of the commission of an offence for which no prosecution can be entertained without sanction, other offences, which may form the subject of separate charges under section 235 of the Code of Criminal Procedure, and for which no sanction is required, are committed, a complaint in respect of the latter offences can be entertained without sanction being obtained for the former.

THE complainant was the agent of the judgment-creditor in Small Cause No. 2017 of 1905 in the Kumbakonam Sub-Court. He accompanied an Amin of the Court to execute a warrant of attachment in execution of the decree and in attempting to do so he was obstructed and assaulted by the accused (counter-petitioner). He applied to the Subordinate Judge for sanction to prosecute accused under section 186, Indian Penal Code, which was refused. He thereupon presented a complaint for offences under sections 323 and 355, Indian Penal Code, to the Second-class Magistrate, who considered that the facts disclosed an offence under sections 183 or 186, Indian Penal Code, for which sanction was required by section 195 of the Code of Criminal Procedure and discharged the accused.

The Sessions Judge, who was moved under section 437 of the Code of Criminal Procedure, refused to interfere.

* Criminal Revision Case No. 278 of 1907, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the order of F. D. P. Oldfield, Esq., Sessions Judge of Tanjore, in Criminal Revision Petition No. 4 of 1907, Calendar Case No. 100 of 1907 on the file of the Second-class Magistrate of Kumbakonam.

KRISTNA PILLAI v. KRISHNA KONAN.

The complainant thereupon moved the High Court.

Mr. *T. Richmond* and *S. Gurusami Chetty* for petitioner.

K. Ramachandra Ayyar for respondent.

ORDER.—The complainant alleges that he was assaulted when trying under the orders of the Amin to open the door of the judgment-debtor's house. The Subordinate Judge has told him that if his allegations are true he can complain without a sanction and I think that the Subordinate Judge was right. Assuming that an offence punishable under section 183 or section 186, Indian Penal Code, or both, was committed, and that in committing it offences under sections 355 and 323 were also committed, then, under section 235 of the Code of Criminal Procedure, those offences may be separately charged, and if they may be separately charged it seems to follow that it is not necessary to cover with a sanction those charges in respect of which the law does not require a sanction. The cases to which the Sessions Judge refers are different. No doubt if a complainant states facts disclosing an offence which the Magistrate receiving his complaint is unable to try, but which some other Magistrate or Court is able to try, he ought to send the case to the Magistrate or Court which is able to try all the offences disclosed in the complaint. Even in such a case there may be circumstances which would warrant the trial only of such offences as are within the jurisdiction of the Magistrate receiving the complaint, and when, as here no other Magistrate or Court can try the offences requiring sanction because sanction has been refused, there would seem to be no objection to the Magistrate's proceeding with the trial of such offences as may be separately charged, and in respect of which no sanction is necessary, as may be disclosed by the complaint.

On the other hand, there would seem to be no warrant for his refusal to do so, especially when, as here, the offences requiring no sanction are more serious than those requiring sanction.

In some of his remarks the Sessions Judge seems to have failed to recognize that the Court's sanction was not necessary in this case, the sanction of the Amin would have been sufficient warrant for the Magistrate, and the considerations set out by the Sessions Judge on the policy of the law may not perhaps have been within the contemplation of the Legislature.

I set aside the orders of the Courts below and direct the Second-class Magistrate to receive and dispose of the complaint.

APPELLATE CIVIL.

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

VENKATASUBBIAH CHETTY (PLAINTIFF), APPELLANT,

v.

GOVINDARAJULU NAIDU (SECOND DEFENDANT), RESPONDENT.*

1907. November 29.

Evidence Act, Act I of 1872, s. 91—Oral evidence admissible to show that a contract made by a person in his own name was made on behalf of himself and his partners.

Under English Law, in an action on a written contract, oral evidence is admissible to show that the party liable on the contract contracted for himself and as the agent of his partners. Such partners are liable to be sued on the contract, though no allusion is made to them in it.

This is also the law in India as there is nothing in section 91 of the Evidence Act to show that the Legislature intended to depart from this settled rule of English Law.

SUIT to recover the amount due on a bond executed by the first defendant. The plaintiff alleged that the first and second defendants were partners, and that the money was borrowed for the partnership and for partnership purposes.

The learned Judge held that oral evidence was inadmissible to show that the second defendant was liable on the bond which was executed by the first defendant alone.

The judgment of the learned Judge is as follows :—

"I stop the case. If the claim is for money lent to the second defendant on the 25th October 1901, it is barred. If it is not for money lent, but on the bond, the first defendant alone is liable and the terms of the bond cannot be altered by oral evidence of what occurred prior to the execution of the bond.

In those circumstances, the plaintiff is entitled to a decree for the amount sued for against the first defendant with costs, etc., and the suit must be dismissed with costs against the second defendant."

The plaintiff appealed.

S. Guruswami Chetty and *S. Venkatachariar* for appellant.

P. Anandacharlu for respondent.

* Original Side Appeal No. 68 of 1906, presented against the judgment of Mr. Justice Boddam, dated 4th October 1906, in Original Suit No. 13 of 1905.

VENKATA-SUBBIAH CHETTY v. GOVINDA-RAJULU NAIDU.

JUDGMENT.—The plaint alleges that the first and second defendants were partners and that they borrowed from the plaintiff the amount for which the bond was given.

The bond was signed by the first defendant only. We are unable to agree with the learned Judge that it was not open to the plaintiff to give evidence of circumstances which went to show that the first defendant signed the bond on his own behalf and as the agent of his partner, the second defendant, assuming the first and second defendants were partners. The law is thus laid down in Lindley on 'Partnership,' edition 7, page 207, "If, therefore, one partner only, enters into a written contract, the question whether the contract is confined to him, or whether it extends to him and his co-partners, cannot be determined simply by the terms of the contract. For supposing a contract to be entered into by one partner in his own name only, still, if in fact, he was acting as the agent of the firm, his co-partners will be in the position of undisclosed principals; and they may therefore be liable to be sued on the contract, although no allusion is made to them in it. This was expressly decided in the well-known case of *Beckham* v. *Drake* (*S.*)(1). There, *Drake*, *Knight* and *Sturgey* were in partnership as type founders; but *Drake* was a secret partner. A written agreement relative to the partnership business was entered into between the plaintiff and *Knight* and *Sturgey*, and for a breach of this agreement by them the action was brought. Drake's name did not appear in the agreement; he did not sign it; nor when the contract was made was he known to the plaintiff to be a partner. It was nevertheless held that all three partners were liable jointly for a breach of the agreement, inasmuch as the agreement itself was clearly entered into by the firm, and *Drake*, like any other undisclosed principal, was liable to be sued as soon as his position was discovered." In Roscoe's 'Nisi Prius Evidence' the law is stated thus:—

"In an action on a written contract between plaintiff and B, oral evidence is admissible, on behalf of the plaintiff, to show that the contract was in fact, though not in form, made by B, as agent of the defendant; for the evidence tends not to discharge B, but to charge the dormant principal; *Wilson* v. *Hart*(2), and it is

(1) 9 M. & W., 79.

(2) 7 Taunt, 295.

VENKATA-SUBBIAH CHETTY v. GOVINDA-RAJULU NAIDU.

admissible although B named his principal at the time he entered into the contract (*Calder* v. *Dobell*(1)).

In our opinion there is nothing in section 91 or section 92 of the Indian Evidence Act which is inconsistent with these decisions, since a question as to who the contracting parties are is not in our opinion one of the "terms of a contract" within the meaning of these sections. We may further remark that none of the illustrations to the sections deal with this question. It would seem therefore it was not the intention of the Legislature to depart from what would appear to be the settled rule under the English law.

We must, therefore, set aside the decree and send the case back to the Court of First Instance in order that the evidence may be admitted. Costs will abide the event.

APPELLATE CIVIL.

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

SRIMATH DAIVASIKAMANI PANDARASANNIDHI *alias* NATARAJA DESIKAR (DEFENDANT), APPELLANT,

1907. October 18.

v.

NOOR MAHOMED ROUTHAN AND ANOTHER (PLAINTIFF), RESPONDENTS.*

Mutt, head of—Power to bind mutt property—Income of mutt in the hands of successor liable for debts properly contracted.

The position of the head of a mutt in reference to the mutt is analogous to that of the manager of an infant heir. *Konwar Doorganath Roy* v. *Ramchunder Sen*, (L.R., 4 I.A., 52), referred to. Where debts are contracted by the head of a mutt for purposes binding on the mutt, a decree in respect of such debts may be passed against his successor charging the income of the mutt property though such debts were not expressly charged on the income of the mutt.

THE plaintiffs were traders and the defendant was the head of the Kunnakudi mutt.

(1) L.R., 6 C.P., 486; Ex. Ch., 18.

* Second Appeal No. 174 of 1905, presented against the decree of M.R.Ry. W. Gopalachariar, Subordinate Judge of Madura (East), in Appeal Suit No. 244 of 1904, presented against the decree of M.R.Ry. V. R. Kuppusami Ayyar, District Munsif of Sivaganga, in Original Suit No. 56 of 1903.

SRIMATH DAIVA-SIKAMANI PANDARA-SANNIDHI v. NOOR MAHOMED ROUTHAN.

The plaintiffs sued to recover from the defendant and from the property of the Piranmalai Kunnakudi mutt, the sum of Rs. 1,788-8-3 being principal and interest due on account of the value of articles purchased from plaintiffs by the defendant's predecessor in office for the use of the said mutt up to 2nd May 1901, and subsequently up to the 13th September 1901. It was stated in the plaint that accounts were settled between the plaintiffs and the defendant's predecessor in office up to 2nd May 1901; that the defendant's predecessor in office had signed the same; and that the present defendant was liable to pay the debt, as the articles were purchased for the use and benefit of the mutt.

The defendant contended that the debt was not contracted for the benefit of the mutt, but for illegal purposes; that a subsequent trustee was not bound to discharge the personal debt of a previous trustee contracted for illegal purposes; and that neither he nor the mutt property was therefore liable for the plaint debt.

The District Munsif passed a decree in favour of the plaintiff against the income of the mutt properties, and this was confirmed on appeal by the Subordinate Judge.

The defendant appealed to the High Court.

C. V. Anantakrishna Ayyar for *P. R. Sundara Ayyar* and *S. Srinivasa Ayyangar* for appellant.

T. V. Seshagiri Ayyar for respondents.

JUDGMENT.—We are of opinion that the decree in this case as modified by the lower Appellate Court, so as to limit it to the income of the mutt property, should be upheld.

The debt on which the plaintiffs sued was incurred by the defendant's predecessor in office as manager of the mutt. The finding of the lower Appellate Court is that the debt was incurred for purposes necessary for the maintenance of the institution. In so finding, the lower Appellate Court would seem to have followed the language of the learned Judges in the judgment of *Vidyapurna Tirthaswami* v. *Vidyanidhi Tirthaswami*(1), and to have applied the test therein prescribed. We are certainly not prepared to hold that there was no evidence that the debt was incurred for a purpose necessary for the maintenance of the institution. We think the finding of the lower Appellate Court upon this question is a finding of fact which is binding on us in second

(1) I.L.R., 27 Mad., 435.

SRIMATH DAIVA-SIKAMANI PANDARA SANNIDHI v. NOOR MAHOMED ROUTHAN.

appeal. A further point was raised on behalf of the appellant viz., that as no express charge over the income of the mutt was created by the defendant's predecessor, the decree against the income of the mutt is bad in law. We were asked to apply the rule in the case of executors to the present case. The analogy which is properly applicable, as pointed out by the Privy Council in *Konwur Doorganath Roy.* v. *Ramchunder Sen*(1) is that of the manager of an infant heir. The estate of an infant may be liable for a contract by his guardian without any express charge over the estate having been given. See for instance *Sundararaja Ayyangar* v. *Pattanathusami Tever*(2), *Maharana Shri Ranmal Singji* v. *Vadilal Vakhatchand* (3) on which the appellant relied, merely decided that an infant could not be made personally liable for a contract entered into by his guardian. Here it is not sought to make the defendant personally liable.

The second appeal is dismissed with costs. The memorandum of objections also is dismissed with costs.

APPELLATE CIVIL.

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

GOPALA AIYAR (DEFENDANT), APPELLANT,

v.

RAMASAMI SASTRIAL (PLAINTIFF), RESPONDENT.*

1907. October 30.

Civil Procedure Code, Act XIV of 1882, *ss.* 584, 591, 623, 629—*When review granted, no appeal lies against the final decree on grounds other than those mentioned in s.* 629—*Sufficiency of the reason on which review granted no ground for appeal against the final decree.*

Sections 584 and 591 of the Code of Civil Procedure do not control section 629, and do not, where a review is granted and a final decree passed, confer a right of appeal when such appeal is not based on one of the grounds mentioned in section 629.

Where an application for review of judgment is granted 'for any other sufficient reason' under section 623 of the Code, the sufficiency or otherwise of

(1) L.R., 4 I.A., 52. (2) I.L.R., 17 Mad., 306.
(3) I.L.R., 20 Bom., 61.

* Second Appeal No. 1334 of 1904, presented against the decree of F. D. P. Oldfield, Esq., District Judge of Tanjore, in Appeal Suit No. 554 of 1900, presented against the decree of M.R.Ry. T. R. Kuppuswamy Ayyangar, District Munsif of Tiruvalur, in Original Suit No. 402 of 1899.

GOPALA AIYAR v. RAMASAMI SASTRIAL.

the reason is not a good ground of appeal against the order and is not, notwithstanding the general provisions of sections 584 and 591, a good ground of appeal against the final decree.

THE facts are sufficiently stated in the judgment.

Of the grounds in the memorandam of appeal to the High Court, all except the third were based on the merits of the case. The third ground was that the Subordinate Judge ought not to have granted a review on the facts alleged in the application for review. The defendant appealed to the High Court.

Sir *V. C. Desika Chariar* for *T. R. Ramachandra Ayyar* and *T. R. Krishnaswami Ayyar* for appellant.

The Hon. The Acting Advocate-General and *T. R. Venkatarama Sastri* for respondent.

JUDGMENT.—In this case the Munsif gave the plaintiff a decree, and the Subordinate Judge on appeal, in the first instance, reversed this decree and dismissed the plaintiff's suit. The plaintiff then applied to the Subordinate Judge for an order of review, and the Subordinate Judge granted a review. In his order granting the review, the Subordinate Judge states certain reasons which go to show that in his opinion in reversing the Munsif's decree he had been wrong on the facts, and he then states "For these and other reasons there has probably been a failure of justice, and I think there are sufficient reasons in the terms of section 623 of the Civil Procedure Code to grant a review and have the appeal reargued."

The appeal was reheard by the District Judge and the decree of the Munsif was affirmed.

The defendant now appeals to this Court against the decree of the District Judge.

On behalf of the plaintiff it has been contended that no appeal lies since objection to the admission of the review has not been taken under any of the grounds mentioned in section 629 of the Code of Civil Procedure. This is no doubt so, and the question for our determination is—when the objection is taken in the appeal against the final decree, does an appeal lie on any ground other than one of the grounds mentioned as ground for objections in section 629? We do not think that either section 584, or section 591, controls section 629 so as to confer a right of appeal in a case where the appeal is not based on one of the objections mentioned in section 629, and, in our opinion in the present case, no appeal lies. Section 629 expressly provides that the objections mentioned

GOPALA AIYAR v. RAMASAMI SASTRIAL.

in the section may be made either by an appeal against the order or may be taken in appeal against the final decree. It was held in *Ali Akbar* v. *Khurshed Ali*(1) that where an application for review of judgment was granted "for any other sufficient reason" the sufficiency or otherwise of the reason is not a good ground of appeal against the order. The same view was taken in *Munni Ram Chowdhry* v. *Bishen Perkash Narain Singh*(2). The principle of these decisions appears to us to be applicable to cases where the objection is taken in the appeal against the final decree notwithstanding the general provisions of section 584 and section 591. The contention that the decree of the District Judge is bad because the appeal in the first instance was heard by, and the order for review was granted by, the Subordinate Judge, does not seem to us to be sustainable. The case of *Kumarasami Reddiar* v. *Subbaraya Reddiar*(3) does not apply.

The second appeal must be dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Miller.

MOGERA NANDI (PLAINTIFF), APPELLANT,

v.

PARAMESWARA UDPA AND OTHERS (DEFENDANTS), RESPONDENTS.*

1907. December 20.

Limitation Act, Act XV of 1877, sched. II, art. 144—Suit for possession under an Arthamulgeni lease governed by art. 144.

A suit to recover possession of land leased under an *Arthamulgeni* lease is not based on the *contract* to deliver possession contained in the lease deed, but on the completed *title* to possession acquired under the lease.

The period of limitation applicable to such a suit is that provided in article 144 of schedule II of the Limitation Act.

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(1) I.L.R., 27 All., 695. (2) I.L.R., 24 Calc., 878.
(3) I.L.R., 23 Mad., 314.

* Second Appeal No. 1048 of 1905, presented against the decree of H. O. D. Harding, Esq., District Judge of South Canara, in Appeal Suit No. 160 of 1904, presented against the decree of M.R.Ry. V. B. Ramaswami Ayyar, District Munsif, Kundapur, in Original Suit No. 50 of 1904.

MOGERA NANDI v. PARAMESWARA UDPA.

THE suit, which was instituted on 4th February 1904, was for the recovery of land leased to plaintiff under an Arthamulgeni lease executed by defendants Nos. 1 and 2 on 17th December 1891. Defendants Nos. 3 to 5 were co-parceners of defendants Nos. 1 and 2, and the sixth defendant was the tenant in possession of the lands. The plaintiff prayed for a partition and delivery of plaintiff's share of the lands under the terms of the lease.

Defendants pleaded limitation and that question was tried as a preliminary issue.

The terms of the lease and the further facts will appear from the judgment of the Munsif on this issue which was as follows :—

Supplemental issue 11. "This suit is based on the plaint-mentioned *Arthamulgeni* lease deed, exhibit A of 17th December 1891, which runs as follows :—

"*Arthamulgeni* deed executed to Nandi (plaintiff) by Parameswara Udpa (first defendant) and his son Subraya Udpa (second defendant) on the 17th December 1891 in consideration of Rs. 320. We have given to you on *Arthamulgeni* that portion of our *Muli* property which has fallen to the share of the first amongst us, (*i.e.*, Parameswara Udpa, first defendant). From the 30th Magha of the year Khara (28th February 1892) you are to get possession of and enjoy the property leased to you, etc. As plots Nos. 1, 5 and 6 (plaint items 1, 2 and 3) have not been separated by metes and bounds we shall get them separated by the 30th Phalguna of the year Khara (29th March 1892), and in the event of our failure to do so we shall be liable to pay you damages which you might incur in consequence thereof."

In this document defendants Nos. 1 and 2 undertake to get the plaint items of property separated by metes and bounds so that the plaintiff might take possession of the same and, in default, to pay damages. The plaintiff's remedy, therefore, is to bring a suit against the defendants Nos. 1 and 2 for specific performance of the contract embodied in exhibit A, or to sue them for damages as stipulated therein. Both these remedies appear to have been time-barred (*vide* articles 113 and 116, schedule II of the Limitation Act). The wording of exhibit A makes it clear that so far as the plaint items are concerned there has only been a contract for lease. And a suit for *possession* of property in such a case is essentially a suit for specific performance of contract, because the right to possession springs out of the contract of lease, and the

MOGERA NANDI v. PARAMESWARA UDPA.

relief by giving possession is comprised in the relief by specific performance. The main relief claimable in a suit for specific performance of a contract of the above nature is *possession of the property*, any other relief that may be sought for being only incidental and ancillary to such main relief. In the present case the partition sought for is only incidental to the main relief, viz., possession of the property, and the defendants Nos. 3 to 6 are only *pro formâ* defendants impleaded for the purpose of securing a relief ancillary to the main relief prayed for. This suit cannot therefore be governed by any but article 113, schedule II to the Limitation Act. Assuming the suit might, so far as limitation is concerned, be entertained, still, as the right to possession is dependent on the contract of lease, if the suit cannot be maintained for specific performance of contract by reason of the lapse of three years allowed by the said article it cannot be maintained for possession of the property agreed to be leased under that contract (I.L.R., 6 Allahabad, page 231)."

The suit was accordingly dismissed.

The Munsif's judgment was confirmed on appeal by the District Judge who held that the suit fell within article 113 or 116 of schedule II of the Limitation Act. The judgment of the latter Court was as follows :—

"Plaintiff's suit as regards specific performance of damages is long since barred by articles 113 and 116 of the Limitation Act, and clearly to sue for specific performance or damages is plainitff's only remedy in such a case. He cannot sue for the land since the land is not known until the separation thereof is performed as per contract. That has not been done. Then he can claim damages. But he has come too late. Why he slept over his rights from 1892 to 1904 is not clear, but he did. The appeal must be dismissed with costs."

B. Sitarama Rau for appellant.

The respondent was not represented.

JUDGMENT.—We think that the Courts below are in error in applying articles 113 and 116 of the second schedule of the Limitation Act.

The suit is not a suit based merely on the contract in the Arthamulgeni lease to put the plaintiff in possession. The plaintiff by virtue of the Arthamulgeni lease acquired a completed title to the possession of the land. The suit is a suit for possession

MOGERA NANDI v. PARAMESWARA UDPA.

based on this title, and the article applicable is, in our own opinion, article 144—see the decision of the Privy Council in *Rani Mewa Kuwar* v. *Rani Hulas Kuwar*(1).

We therefore set aside the decrees of the Courts below based on these findings on this preliminary question, and remand the suit to the District Munsif for decision in accordance with law. Costs in this and in the lower Appellate Court will abide the result.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice.

1906. July 19, 20, 24.
1907. October 14.

THE PRESIDENT OF THE TALUK BOARD, KUNDAPUR (PLAINTIFF), PETITIONER,

v.

BURDE LAKSHMINARAYANA KAMPTHI (DEFENDANT), RESPONDENT.*

Contract Act, Act IX of 1872, s. 74—Bond given for the performance of public duty, but not under the provisions of any law not within exception to s. 74 of Contract Act—Right of suit—Civil suit maintainable in respect of act amounting to criminal offence—Limitation Act, Act XV of 1877, sch. II, arts. 6, 115—Local Board's Act (Madras), ss. 162-C and 162-D do not bar a civil suit on contract.

An agreement between a contractor and a Local Board contained the following terms:—

As I have taken over under contract for Rs. 406 the right to collect the fees on the articles brought for sale in Udipi market from 1st April 1902 to 31st March 1903, I am bound to act according to the following conditions:—

I am not entitled to collect more than the undermentioned rate of fees from the persons seated and trading on the site of the fair.

Rate of fees.

	RS.	A.	P.
Each head-load	0	0	2
„ cart-load	0	2	0

I am bound to put up a board with the rates of fees to be collected by me and my name in English and Canarese in a public place in the market.

If I, my agent, or servant were to act contrary to the above regulations, I shall be liable to pay a fine not exceeding Rs. 50 imposed by the President of

(1) 13 B.L.R., 312 at p. 322.

* Civil Revision Petition No. 412 of 1905, presented under section 25 of Act IX of 1887, praying the High Court to revise the decree of the District Munsif of Udipi, dated 31st March 1905, in Small Cause Suit No. 170 of 1904.

THE PRESIDENT OF THE TALUK BOARD, KUNDAPUR, v. BURDE LAKSHMINARAYANA KAMPTHI.

the Taluk Board, or I am not entitled to object if my gutta is put up for auction again subject to the loss that may be sustained by the Taluk Board.

Under the terms of the above contract, the President of the Taluk Board imposed on the defendant a fine of Rs. 20 on 4th November 1902 in respect of illegal excessive collections made by his agent. The defendant not having paid the fine, the President instituted a civil suit for the amount of the fine on 4th January 1904:

Held, that the suit was maintainable although the acts of the defendant's agent amounted to a criminal offence and no criminal proceedings were taken against the agent.

It is doubtful whether the doctrine that a person injured by a felonious act cannot seek civil redress without prosecuting the felon in the criminal courts, applies in India; and the doctrine does not apply where a principal is sued in the civil courts in respect of the wrongful acts of his agent.

Held also, that the agreement in question was not a bail bond, or recognisance, within the meaning of the exception to section 74 of the Contract Act, and though given for the performance of a public duty, it was not given under the provisions of any law. The exception to section 74 did not apply and the plaintiff was entitled to reasonable damages under the section.

Held also, that the suit was based on contract; and for purposes of limitation fell within article 68 or 115 of schedule II of the Limitation Act and not under article 6 of the schedule.

Held further, that the penal clauses of sections 162-C and 162-D of the Local Board's Act did not preclude the plaintiff from suing the defendant on his contract.

THE facts necessary for the report are those stated in the judgment of the Lower Court which was as follows:—

"In these suits the President of the Taluk Board sues to recover certain fines imposed on the farmers (contractors) of the right of collecting fees (from 1st April 1902 to 31st March 1903) from vendors of goods, and from cartmen, in certain markets and cart-stands. The fines appear to have been imposed for the collection of fees, in excess of the prescribed rates, from the vendors, and for not putting up boards with rates of fees and name of the farmer for the information of the vendors, etc.

* * * *

Defendants in these suits state that they are the farmers and contractors of the markets and cart-stands for the year 1902–03, and urge that the fines were imposed behind their back on the strength of an enquiry conducted behind their back without a notice to them. They urge that the Madras Local Board's Act does not authorize the institution of a suit and that as such, the suit is liable to be dismissed.

* * * *

THE PRESIDENT OF THE TALUK BOARD, KUNDAPUR, v. BURDE LAKSHMI-NARAYANA KAMPTHI.

Issues.

I. Whether plaintiff's suit is sustainable under the Local Board's Act V of 1884 ?

(1) Whether the President, Local Board, is entitled under the Local Board's Act to levy the fine ?

(2) Whether the President, Local Board, can levy such fine through Court by recourse to a civil suit ?

II. Whether there was any breach of contract as alleged by plaintiff ?

III. To what relief, if any, is plaintiff entitled ?

* * * *

In addition to the points on which the parties have proceeded to trial, it is urged for defendants that the question of limitation should also be tried as it is a point which, under the Limitation Act, a Court is bound to consider, even though the parties have not pleaded it."

The lower Court held that the suit fell within article 68 of the Limitation Act and was not barred. But it dismissed the suit on the ground that the act in respect of which the suit was brought, was a criminal offence and no civil action was maintainable until the offender was criminally prosecuted. He accordingly dismissed the suit.

Plaintiff filed a revision petition under section 25 of Act IX of 1887 and counter-petitioner filed a memorandum of objection in respect of the points decided against him.

The Government Pleader for petitioner.

K. P. Madhava Rau and *K. S. Ramaswami Sastri* for respondent.

JUDGMENT.—Mr. K. S. Ramasawmi Sastry, who appeared for the respondent in this case conceded, that the judgment of the Munsif could not be supported upon the ground which was taken by him and upon which he dismissed this suit. Even if it be an established principle of the Law of England that, the policy of the law will not allow a person injured by a felonious act to seek civil redress if he has failed in his duty of bringing or endeavouring to bring the felon to justice, as to which there seems to be some doubt (see the judgment in *ex-parte* Ball *In re Shepherd*(1), the principle does not apply to a case like the present. The defendant in this case is not criminally liable for the offences alleged to have been

(1) L.R., 10 Ch.D., 667.

THE PRESIDENT OF THE TALUK BOARD, KUNDAPUR, v. BURDE LAKSHMI-NARAYANA KAMPTHI.

committed by his agent, and the suit is not brought against the party who is alleged to have been guilty of offences under section 165 of the Local Boards Act (V of 1884). The view taken by the Munsif, as it seems to me, so far from furthering what is said to be the policy of the law, would tend rather to defeat it. If the conviction of the offending agent were a condition precedent to the plaintiff's right to sue on his contract with the defendant, it would be the interest, at any rate, of the defendant not to prosecute the offender. On the other hand, if the plaintiff's right to sue is independent of the question whether or not the offender has been convicted, a decree against the defendant would naturally make him desirous of obtaining some satisfaction by securing the conviction of the offender. Further, it would seem very doubtful, whether the principle referred to above is applicable under Indian Law. See the judgment in *Adamson* v. *Arumugam*(1).

The main ground upon which it was sought to uphold the decision of the Munsif was that the provision for the payment of Rs. 50 was a provision by way of penalty and could not be enforced. The material parts of the agreement are as follows :—

"As I have taken over under contract for Rs. 406 the right to collect the fees on the articles brought for sale in Udipi market from 1st April 1902 to 31st March 1903, I am bound to act according to the following conditions" :—

* * * *

2. "I am not entitled to collect more than the undermentioned rate of fees from the persons seated and trading on the site of the fair."

Rates of fees.

	RS.	A.	P.
Each head-load	0	0	2
„ cart-load	0	2	0

3. "I am bound to put up a board with the rates of fees to be collected by me and my name in English and Canarese in a public place in the market."

* * * *

7. "If I, my agent, or servant were to act contrary to the above regulations, I shall be liable to pay a fine not exceeding Rs. 50 imposed by the President of the Taluk Board, or I am

(1) I.L.R., 9 Mad., 463.

not entitled to object if my *gutta* is put up for auction again subject to the loss that may be sustained by the Taluk Board."

I am not prepared to hold that the agreement in question is an instrument of the same nature as a bail bond or recognizance within the meaning of the exception to section 74 of the Contract Act, although it seems to me to partake more of the nature of a bail bond or recognizance than the instrument in question in *Krishnamma* v. *Suranna*(1). I think it is a bond given for the performance of a public duty, or act, in which the public are interested As to whether the bond is given "under the provisions of any law" there is no section in the Act which authorises or requires the giving of such a bond, and there is no evidence before me that a bond of this nature is authorised or required by any bye-law made under the Act. Under section 74 of the Contract Act it is open to the Court to award to the party complaining of the breach reasonable compensation not exceeding the amount named in the bond. By his contract the defendant made himself civilly liable for any offence which it might be proved his agent had committed under section 165 of the Local Board's Act. In a case like this it is, of course, impossible to assess the damages with reference to any actual loss sustained by the plaintiff. The section expressly provides that it is not necessary to prove any actual damage or loss. The extortion of unauthorised tolls from the class of persons who make use of the market is a serious offence, and the amount of the penalty specified in the bond (Rs. 50) certainly cannot be said to be exorbitant. I think both these matters may be taken into consideration in determining whether Rs. 50 is more than the reasonable compensation which the plaintiff is entitled to recover from the defendant. The assessment of damages, however, is a matter for the Munsif. In *Srinivasa* v. *Rathanasabapathi*(2) no question arose as to the amount of compensation to which the plaintiff was entitled, and no assistance is to be derived from that case in connection with this point.

As regards the question of limitation, I am of opinion that the article applicable is not article 6 as the vakil for the respondent contended, but article 68 or article 115 of schedule II to the Limitation Act.

(1) I.L.R., 16 Mad., 175.

(2) I.L.R., 16 Mad., 475.

I am also of opinion that the penal clauses of the Local Boards Act, sections 162-C and 162-D do not preclude the plaintiff from recovering against the defendant under his contract with him.

As regards the construction of paragraph 7 of the agreement I am of opinion that the provision authorising the plaintiff to put the defendant's "*gutta*" up to auction, does not preclude the plaintiff from recovering under his contract.

The point that the suit ought to have been brought in the name of the Local Board was not taken in the Court below and I decline to go into it on revision.

The case must go back to the Munsif for (1) a distinct finding as to whether the defendant's agent collected fees at higher rates than those specified in paragraph 2 of the agreement between the plaintiff and the defendant, (2) if his finding as to this is in the affirmative, for a finding as to whether the contract is made under any bye-law made under the Local Boards Act, (3) if his finding as to (1) is in the affirmative, and as to this is in the negative, for a finding as to the amount of compensation due to the plaintiff.

Findings should be submitted within 6 (six) weeks from this date, and 7 (seven) days will be allowed for filing objections.

[On the findings submitted by the Munsif, the petition was dismissed.]

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Miller.

1907. October 29, 30.

SOMASUNDARAM CHETTIAR AND ANOTHER (PLAINTIFFS—RESPONDENTS), PETITIONERS,

v.

MANICKA VASAKA DESIKA GNANA SAMMANDA PANDARA SANNIDI (DEFENDENT-PETITIONER), RESPONDENT.*

High Court powers of superintendence under s. 15 of Charter Act—Civil Procedure Code, Act XIV of 1882, ss. 386, 622—High Court can interfere under s. 15 of Charter Act when lower Court issues commission to examine a witness on grounds other than those mentioned in the Code.

An order, under section 386 of the Code of Civil Procedure for the examination of a witness on commission, can only be made on one of the grounds mentioned in the Code, and a Court usurps a jurisdiction not vested in it by law when it orders such examination in the absence of any such ground.

The High Court has power to interfere with such an order under section 15 of the Charter Act.

Obiter: The High Court may also interfere with such an order under section 622 of the Code of Civil Procedure, although the order is only interlocutory.

THE plaintiff in Original Suit No. 21 of 1907 on the file of the Munsif's Court at Mayavaram cited the defendant as a witness to appear and give evidence. The defendant thereupon applied to be examined on commission and his application was supported by an affidavit, stating that he had been summoned as a witness on the side of the plaintiffs; that he personally knew nothing of the matters connected with the case; that his evidence was unnecessary; that it had not been the practice for him to appear before the Court to give evidence; and that he had been examined on commission in several cases by this and other Courts.

The defendant prayed that if the Court should deem his evidence necessary, that he be examined on commission.

The District Munsif passed an order for the examination of the defendant on commission.

* Civil Revision Petition No. 304 of 1907, presented under section 622 of the Code of Civil Procedure, praying the High Court to revise the order of M.R.Ry. T. A. Narasimha Chariar, District Munsif of Mayavaram, in Interlocutory Application No. 482 of 1907 (Original Suit No. 21 of 1907).

The plaintiffs applied to the High Court under section 15 of the Charter Act, and section 622 of the Code of Civil Procedure, to set aside the order.

S. Srinivasa Ayyangar for petitioner.

V. Krishnaswami Ayyar and *S. Muthia Mudaliar* for respondent.

JUDGMENT.—It has been held in *Veerabadran Chetty* v. *Nataraja Desikar*(1) that a Civil Court has no jurisdiction to issue a commission for the examination of a witness on the grounds put forward in the present case, as such jurisdiction is only conferred in the case of persons who are exempted under the Civil Procedure Code from attendance, or are unable from sickness, or infirmity, to attend. The lower Court has therefore usurped a jurisdiction not vested in it by law.

The ruling of the Calcutta High Court that the High Court has power to interfere under section 15 of the Charter Act with the orders of Subordinate Courts passed without jurisdiction has been approved by the Privy Council in *Nilmoni Singh Deo* v. *Taranath Mukerjee*(2) and is sufficient to authorize our interference in this case. It is therefore unnecessary to rely on section 622 of the Code of Civil Procedure; but after the careful argument which we have listened to, we desire to say that, we are not to be understood as holding that section 622 would not authorize us to interfere as the order of the lower Court was an interlocutory one. The evidence taken on the commission which the District Munsif has ordered to issue would not, in our opinion, be legal evidence in the case, and under these circumstances we think we ought to interfere. We, accordingly, set aside the order of the District Munsif as made in excess of his jurisdiction, dismiss the application, and direct the respondent to pay the costs of the petitioner, here, and in the lower Court.

We express no opinion on any other question.

(1) I.L.R., 28 Mad., 28. (2) I.L.R., 9 Calc., 295.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Miller.

1907. October 30.

KIDAMBI VENKATACHARIAR (PETITIONER), APPELLANT,

v.

LAKSHMI DOSS (RESPONDENT), RESPONDENT.*

Res judicata—*Finding of Revenue Court that there was no proper tender of patta is not* res judicata *in a civil suit for rent for the fasli.*

A landlord tendered a patta twice to his tenant, the second tender being made two months after the first. In an action by the landlord in the Revenue Court to enforce acceptance of the second patta, the Revenue Court held that the second tender made more than a month after the first with a view to taking proceedings under section 9 of the Madras Rent Recovery Act, was not legal. In a suit in the Civil Court by the landlord under section 7 of the Rent Recovery Act to recover rent for the fasli on proving the second tender:

Held, that the decision of the Revenue Court, even if it amounted to a decision that there was no proper tender of patta, would not operate as *res judicata*, as the Revenue Court had no jurisdiction to decide the suit brought in the Civil Court.

Vedachella Gramany v. *Boomiappa Mudaliar*, (I.L.R., 27 Mad., 65), distinguished.

THIS was an appeal under section 15 of the Letters Patent against an order passed by Boddam, J.

The facts are fully stated in the learned Judge's order which was as follows:—

"I think the decree is right. The landlord appears to have twice tendered a patta to the defendant, the second patta being tendered two months after the first. Having done so, he brought an action against the defendant to enforce the acceptance of the second patta, and the Deputy Collector dismissed his suit holding that he could not, for the purpose of proceedings under section 9 of the Rent Recovery Act, tender a second patta having already allowed a month to expire after the first patta was tendered. The landlord now sues the tenant for rent and proves the second tender of patta. The defendant contends that the landlord is estopped by the decision of the Deputy Collector whose decision on this point is *res judicata*. The decision of the Deputy Collector,

* Appeal No. 26 of 1907, presented under section 15 of the Letters Patent against the order of Mr. Justice Boddam in Civil Revision Petition No. 393 of 1906.

however, has nothing to do with the question now at issue. It was only for the purpose of determining whether the suit under section 9 was maintainable that the question of the plaintiff's right to tender a second patta was decided, and the Deputy Collector did not decide the question which now arises between the parties, nor does his decision in any way estop the plaintiff from maintaining this action. He did not decide that it was illegal to tender a second patta, nor, is it the law, so far as I know, that because a landlord has tendered a patta he cannot in the same fasli tender another patta (See *Krishna Doss Balumukunda Doss* v. *Guruva Reddi*, (9 M.L.J., 183) and *Arunachellam Chetti* v. *Ganapathi Aiyar*, (I.L.R., 28 Mad., 379).

The only question in a suit under section 7 of the Rent Recovery Act is, whether the landlord has tendered a patta which the tenant was bound to accept, and he is not the less able to prove this if in fact he has tendered more than one. The petition is dismissed with costs.

T. Rangachariar for *T. Narasimha Ayyangar* for appellant.

M. K. Narayanasami Ayyar for *K. Kuppuswami Ayyar* for respondent.

JUDGMENT.—We think the conclusion at which the learned Judge arrived is correct. Even supposing, as has been argued before us, that the judgment of the Revenue Court amounts to a decision that there had been no proper tender of patta by the plaintiff, we do not think it would operate as *res judicata* in the present suit in the Civil Court to recover rent leased on the tender of the patta. The Revenue Court had no jurisdiction to decide a suit for rent such as the present, and its decision cannot operate as *res judicata* in the present suit (*Rangayya Appa Row* v. *Ratnam and others*(1), *Gokul Mandar* v. *Padmanund Singh*(2) and *Gomti Kunwar* v. *Gudri*(3)). If, instead of dismissing the plaintiff's suit to enforce the acceptance of a patta, the Revenue Court had settled the terms of the patta, the terms so settled would have constituted the final contract between the parties as to rent for the fasli, and this the Civil Courts would have been bound to enforce by virtue of section 72 of the Rent Recovery Act. In *Vedachala Gramani* v. *Boomiappa Mudaliar*(4) the learned Judges did not, in our opinion,

(1) I.L.R., 20 Mad., 392.
(2) I.L.R., 29 Calc., 707 (P.C.).
(3) I.L.R., 25 All., 139.
(4) I.L.R., 27 Mad., 65.

KIDAMBI VENKATACHARIAR v. LAKSHMI DOSS.

mean to proceed on any ground of *res judicata*, but merely, as they say, to give due effect to the provisions of section 72 of the Rent Recovery Act. The appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Wallis.

1907. October 11. November 11.

VADLAMANNATI VENKATRAMIAH PANTULU (PETITIONER—FIRST PLAINTIFF), APPELLANT,

v.

SRI RAJAH VENKATA RANGIAH APPA ROW (RESPONDENT—DEFENDANT), RESPONDENT.*

Landlord and Tenant—Patta, grant of—Where tenant's interest is transferred to another, the transferee is entitled to a grant of patta if his transfer is in proper order and if the old tenant, after notice from the Zamindar, does not object.

A person who claims to have a patta granted to him as transferee from a tenant is bound to produce the transfer for the inspection of the landlord, if so desired. When such transfer is in proper order and the old tenant, to whom the landlord is bound to and did give notice, does not appear to contest the validity of the transfer, it is the duty of the landlord to grant a patta to the new tenant.

Orr v. *Rakkumarathi*, (I.L.R., 29 Mad., 83), explained.

THIS was an appeal presented under section 15 of the Letters Patent against an order passed by Boddam, J.

The facts are sufficiently set out in the judgment.

P. Nagabhushanan for appellant.

K. Subrahmania Sastri for *V. Ramesam* for respondent.

JUDGMENT.—In this case the Subordinate Judge of Kistna at Ellore dismissed the plaintiffs' suit without taking evidence, apparently, on the ground that, on the admitted facts, the plaintiffs had no cause of action. The suit was brought to recover damages for the wrongful attachment of the plaintiffs' crops for arrears of rent, for fasli 1314, without a previous tender of patta, and the plaintiffs alleged that they were the persons to whom the tender ought to have been made because the rights of the previous tenants had been

* Appeal No. 25 of 1907, presented under section 15 of the Letters Patent against the order of Mr. Justice Boddam in Civil Revision Petition No. 542 of 1906.

VENKATRAMIAH v. RAJAH VENKATA RANGIAH APPA ROW.

transferred to them before the beginning of the fasli, and that they had frequently called upon the defendant to tender a patta to them. The defendant pleaded that there had been a good tender to the previous tenants, and, whilst not denying the alleged transfer nor averring that there was any dispute about it, pleaded in paragraph 6 of the written statement, that the plaintiffs, in answer apparently to an application for a patta, had been informed that, on production of the sale certificates and other instruments of transfer, their names would be entered in the village accounts and a patta granted, but that they had failed to produce them. It was the duty of the plaintiffs to produce the documents of transfer and get the names of the former pattadars removed, and the plaintiffs' names entered in the accounts. In this state of the pleadings the Subordinate Judge dismissed the plaintiffs' suit without taking evidence, holding on the authority of *Orr* v. *Rakkumarathi*(1), that a landholder could not, of his own authority, and without being moved by the registered tenant, recognize a third party as tenant and grant a patta to him, and that until so moved the landholder was entitled to go on tendering pattas to the registered tenant. All that is decided in *Orr* v. *Rakkumarathi*(1) is, that where there is a *bonâ fide* dispute as to the transfer of the tenancy the landlord cannot refuse to grant a patta to the old tenant on the ground of such transfer, until the new tenant has established his right to recognition in a court of law. The rule so laid down does not rest on any statutory basis, but is in accordance with the custom of the country, and in conformity with the practice of Government as to transfers of ryotwari holdings. The rule must, however in our opinion, be confined to cases where there is a *bonâ fide* dispute between the old and new tenants. A person claiming to have a patta tendered him as transferred from a tenant is, no doubt, bound, if called on, to produce the transfer in his favour for the Zamindar's inspection in proof of his claim, but if it is apparently in order and if after notice, which it is the Zamindar's duty to give, the old tenant does not contest the validity of the transfer, it is, we think, the duty of the Zamindar to grant a patta to the new tenant, even though there is no petition from the old tenant asking him to recognize the transfer. Under these circumstances we think the Subordinate Judge was wrong in

(1) I.L.R., 29 Mad., 83.

VENKATRAMIAH v. RAJAH VENKATA RANGIAH APPA ROW.

dismissing the plaintiffs' suit without taking evidence and recording findings, and we accordingly set aside his decree and remand the case to him for disposal according to law. The costs in this Court will abide and follow the result.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Miller.

1907. September 5.

VAIDISWARA AYYAR AND OTHERS (CONTRIBUTORIES), APPELLANTS,

v.

SIVA SUBRAMANIA MUDALIAR AND ANOTHER (PETITIONERS AND OFFICIAL LIQUIDATOR), RESPONDENTS.*

Indian Companies Act, Act VI of 1882, *s.* 61—*Contributory liable in respect of unpaid portions of calls even when the company's right to recover them is barred by limitation.*

Section 61 of the Indian Companies Act creates a new liability in the shareholders in respect of unpaid calls; and such calls can be recovered though barred by limitation before the order for winding up was made.

THE Tinnevelly Sarangapani Sugar Mills Company was ordered to be compulsorily wound up and an official liquidator was appointed. A list of contributories was submitted to the Court and the appellants who were placed on the list applied to the Court to be removed from the list on the ground, *inter alia*, that they had committed default in respect of calls prior to 1897, and proceedings in winding up having commenced only after the lapse of more than six years after such default, the right of the Company to recover such calls was barred at the commencement of the winding up and the official liquidator was not in a better position than the Company. This application was rejected by the District Judge.

The contributories appealed to the High Court.

K. Ramachandra Ayyar for *P. R. Sundara Ayyar* for appellant.

Mr. *K. Ramanatha Shenai* for respondents.

* Civil Miscellaneous Appeal Nos. 159 to 162 of 1906, presented against the order of C. G. Spencer, Esq., District Judge of Tinnevelly, dated 16th October 1906, declining to exclude the names of the appellants in these appeals from the list of contributories passed in the course of the proceedings in Civil Miscellaneous Petition No. 265 of 1903.

VAIDISWARA AYYAR v. SIVA SUBRAMANIA MUDALIAR.

JUDGMENT.—We agree with the District Judge that on a construction of the Articles of Association a resolution of the Directors was necessary to effect a forfeiture of the appellants' shares, and there is no proof or indication that there was any such resolution. The appellants, therefore, continued to be members of the Company until the date of the winding up. That being so, section 61 of the Indian Companies Act renders them liable to the extent of the unpaid portions of their shares. This section corresponds with section 38 of the English Companies Act of 1862, the effect of which was fully considered by Sir George Jessel, M.R. in *re Whitehouse & Co.*(1). It was there pointed out that, the liability under section 38 was a new liability and it was added "it is true that a call made before the winding up is a debt due to the Company, but that does not affect the new liability to contribute." Sir Charles Sargent in a case, precisely on all fours with the present case, after referring to the decision of the Master of the Rolls in that case added "Nor can it in this view of the section affect the liability created by the section that the debt was barred" (*Sorabji Jamsetji* v. *Ishwardas Jugjiwandas*(2)). We think that this view of the law is correct, and that even though the recovery of the unpaid portions of the calls might have been barred under article 112 of the Limitation Act, if the Company had sued for them, yet this does not affect the new liability created by section 61 when the Company has gone into liquidation.

We therefore dismiss the appeals with costs.

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(1) L.R., 9 Ch.D., 595. (2) I.L.R., 20 Bom., 654 at p. 658.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Miller.

1907. October 31. November 6.

RAMAYYAN AND OTHERS (PETITIONERS—PLAINTIFFS, NOS. 2 TO 6), APPELLANTS,

v.

KADIR BACHA SAHIB (DEFENDANT), RESPONDENT.*

Transfer of Property Act, Act IV of 1882, *s.* 89—*Limitation Act, Act XV of* 1877, *sched. II, art.* 179—*Application under s.* 89 *of the Transfer of Property Act is an application for execution and s.* 235 *of the Code of Civil Procedure applies to it—Unverified application substantially in accordance with law sufficient to save limitation.*

An application for an order absolute under section 89 of the Transfer of Property Act, is an application for execution of the decree and is subject to the provisions of section 235 of the Code of Civil Procedure and falls within article 178 or 179 of schedule II of the Limitation Act. Such an application, when defective, cannot be treated as a mere step in aid of execution, neither can it, when no notice is prayed for or issued, be treated as an application for issue of notice under section 248, which, as a step in aid of execution, will save the bar of Limitation.

When such an application unverified but filed with the decree does not fully comply with the requirements of section 235 of the Code of Civil Procedure, and is defective only in minor particulars which can be easily gathered from the decree filed therewith, it may be treated as substantially an application for execution in accordance with law, sufficient to save limitation under article 179 of schedule II of the Limitation Act.

THE decree in this case was one for sale, dated 14th February 1901 and provided four months for payment of the amount. An application, dated 12th August 1903, styled an execution application, was put in by the decree-holder praying that the decree should be made absolute. This application was not verified, and was not in the form prescribed by section 235, Code of Civil Procedure. It was rejected as the defects in form were not rectified although returned for amendment. The present execution application was put in on 25th October 1905. A plea of limitation was taken in bar of this execution petition.

* Civil Miscellaneous Second Appeal No. 5 of 1907, presented against the order of Arthur F. Pinhey, Esq., District Judge of Madura, in Appeal Suit No. 24 of 1906, presented against the order of M.R.Ry. V. Swaminatha Ayyar, Subordinate Judge of Madura (West), in Civil Miscellaneous Petition No. 140 of 1905 (Original Suit No. 2 of 1901).

The Munsif held that the application was not barred and ordered execution. The District Judge reversed his judgment.

The petitioners appealed to the High Court.

T. Rangachariar and *S. Venkatachariar* for appellant.

The Hon. the Acting Advocate-General for respondent.

JUDGMENT.—In this case the appellants who are the holders of a mortgage decree in order to save limitation seek to rely on an unverified petition put in by them under section 89 of the Transfer of Property Act praying that the decree should be made absolute, which petition was returned to them by the Court as not being in accordance with the Civil Rules of Practice. It has been contended on their behalf that even accepting the decision of the majority of the Full Bench (by which we are bound) as to the scope of section 89 in *Mallikarjunadu Setti* v. *Lingamurti Pantulu*(1) still an application for an order absolute under section 89 is something different from an application for execution of the decree, and may be made separately, and that, when so made separately, it amounts to a step in aid of execution, and that as no special form is provided for making such application the present petition is an application to take a step in aid of execution sufficient to save limitation. All that was actually decided, it is said, in *Mallikarjunadu Setti* v. *Lingamurti Pantulu*(1) was that an application under section 89 relates to the execution of the decree and is appealable under section 244 of the Civil Procedure Code. We are unable to accept this contention. In our opinion the effect of the decision of the majority is that, an application under section 89 is an application for execution of the decree subject to the provisions of section 235 of the Civil Procedure Code, and falling as an application for execution under article 179 of the Limitation Act when that article can be applied and under article 178 when it cannot—as to which see the judgment of Sir Bhashyam Ayyangar, J., in *Rungiah Gounden & Co.* v. *Nanjappa Row*(2).

It was next contended that, as the decree was more than a year old, the application must be regarded as an application for notice to the judgment-debtor, although it does not specifically ask for notice, because the Court would in the ordinary course send notice. There was in fact no application for notice and the Court did not

(1) I.L.R., 25 Mad., 244. (2) I.L.R., 26 Mad., 780.

RAMAYYAN v. KADIR BACHA SAHIB.

send any, and the case does not, in our opinion, fall within the rule laid down in *Pachiappa Achari* v. *Poojali Seenan*(1) and followed in *Nagireddi* v. *Venkatareddi*(2).

Lastly; it was contended that, even as it stands, the present petition, filed as it was with the decree, was an application for execution in accordance with law sufficient to save a limitation. Although it asks in terms for an order to make the decree absolute, it is put in under section 89 and must be construed as asking for the only proper order under section 89 which, according to the majority of the Full Bench, is an order for execution. The petition does not state, as required by section 235 of the Civil Procedure Code, whether there had been an appeal or any previous application for execution, but these defects, it is said, are not material as there had not in fact been any such appeal or application. All the other particulars required by the section, it is said, either appear in the petition or may be readily gathered from the decree filed therewith, and rule 163 of the Civil Rules of Practice does not add substantially to the requirements of section 234 of the Civil Procedure Code. Under these circumstances it is contended that, in spite of the defective statement of particulars and the absence of the requisite verification, the petition is none the less substantially a petition for execution in accordance with law and so sufficient to save limitation. The defects are not, to use the language of *Rama* v. *Varada*(3), calculated to prejudice the judgment-debtor or mislead the Court and we think, following the decisions of this Court in *Ramanadan Chetti* v. *Periatambi Shervai*(4), *Rama* v. *Varada*(3) and *Samia Pillai* v. *Chockalinga Chettiar*(5), by which we are bound, that, in spite of these defects, the application must be regarded as substantially in accordance with law. We accordingly allow the appeal, set aside the order of the District Judge and restore that of the Subordinate Judge with costs in this and the lower Appellate Court.

(1) I.L.R., 28 Mad., 557.
(2) C.M.S.A., No. 87 of 1905 (unreported).
(3) I.L.R., 16 Mad., 143.
(4) I.L.R., 6 Mad., 250.
(5) I.L.R., 17 Mad., 76.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Munro.

CHALAVADI KOTIAH AND OTHERS (COUNTER-PETITIONERS—JUDGMENT-DEBTORS), APPELLANTS IN BOTH,

v.

POLOORI ALIMELAMMAH AND ANOTHER (PETITIONERS—ATTACHING-CREDITORS), RESPONDENTS IN BOTH.*

1907. November 21. December 13.

Limitation Act—Act XV of 1877, *sched. II, arts.* 178, 179—*No limitation as long as proceedings initiated by decree-holder are pending—Fresh application barred if presented more than three years after removal of bar.*

Where a bar to execution proceedings is removed by the order of a lower Court, the fact that an appeal is preferred against such order will not, when execution is not stayed in consequence of such appeal, prevent limitation from running against the execution-creditor until the disposal of the appeal. A fresh application for execution presented more than three years after the date of the order of the lower Court will be barred by limitation.

The dismissal of an execution-petition without notice to the parties and without removing the attachment made thereunder, is a mere direction to the officers of Court to remove the application from the pending list. The execution proceedings are not closed thereby and must be considered pending. The decree-holder's right to apply for their continuance accrues from day to day and will not be barred till three years have elapsed after such proceedings cease to be pending.

When an execution application is dismissed as aforesaid, a subsequent application, in so far as it asks for the sale of properties already attached under the former application is one for continuance of proceedings and not a fresh application for execution.

Kedarnath Dutt v. *Harra Chand Dutt*, (I.L.R., 8 Calc., 420), followed.

EXECUTION petition.

The facts are briefly these:

One P. Rajam Setti obtained a decree in Civil Suit No. 94 of 1896 in the High Court against one C. Kondiah, and another decree, in Civil Suit No. 180 of 1906, against one K. Papiah. Those decrees were transferred to Nellore for execution. In Original Suit No. 260 of 1893, C. Kondiah and K. Papiah were joint

* Civil Miscellaneous Second Appeal Nos. 16 and 17 of 1907, presented against the appellate orders of M.R.Ry. T. M. Rangachariar, District Judge of Guntur, in Appeal Suit Nos. 36 and 37 of 1906, respectively, presented against the orders of M.R.Ry. D. Venkoba Row, District Munsif of Ongole, in Execution Petition Nos. 609 and 610 of 1905 (Original Suit No. 260 of 1893).

decree-holders. In execution of the decrees in Civil Suit No. 94 of 1896, and Civil Suit No. 180 of 1906, P. Rajam Setti attached the interests of C. Kondiah and K. Papiah in Original Suit No. 260 of 1893. On the 3rd October 1899, P. Rajam Setti applied (Petition No. 1086 of 1899) to execute the decree in Original Suit No. 260 of 1893. Thereupon the judgment-debtors presented a petition stating that the decree had been satisfied even before it was attached. That petition was dismissed on the 31st October. The judgment-debtors appealed to the District Court and obtained an order for stay of execution until the disposal of the appeal. On receipt of that order the Munsif passed the following order on the execution application: "Execution ordered to be stayed. Petition dismissed." The application showed that certain immoveable property had been attached.

The case was remanded by the District Judge. The Munsif now (25th January 1901) held that judgment-debtors' contention should prevail. Upon that Rajam Setti appealed to the District Court with the result that the order of the Munsif was reversed on 11th December 1901. There was an appeal to the High Court which was dismissed on 29th October 1903. Rajam Setti having died his executors have put in the present execution application on 10th July 1905.

The point for decision is whether the application is within time.

The Munsif held that the application was barred. His decision was reversed by the District Judge who allowed the application in its entirety.

The judgment-debtors appealed.

Dr. *S. Swaminadhan* for appellant.

V. V. Srinivasa Ayyangar for respondent.

JUDGMENT.—On the 3rd October 1899 an application was made to execute the decree in Original Suit No. 260 of 1893 by attachment and sale of certain immoveable property mentioned in the application. An order was obtained on the 7th October 1899. The judgment-debtor objected that the decree had been satisfied, but that objection was disallowed on the 31st of October. The judgment-debtor appealed to the District Judge, and obtained an order for stay of execution pending the hearing of the appeal. Upon this the District Munsif, on the 15th of December 1899, passed the following order on the execution petition, "Execution

ordered to be stayed, petition dismissed." On the same day as a diary entry shows the immoveable property was attached. The District Judge disposed of the appeal on the 20th July 1900, remanding the matter for further enquiry, and on the 25th of January 1901 the District Munsif decided that the decree had been satisfied before attachment. On the 11th December 1901 the District Judge reversed this order, and, on the 29th of October 1903, his decision was confirmed by the High Court.

The execution-petition now under consideration was presented on the 10th of July 1905; it asks for a notice under section 248 of the Code of Civil Procedure for the attachment of certain immoveable property; for the issue of a proclamation of sale of the property already attached; for the attachment of moveables and for the arrest of the defendant.

The question for our decision is whether this petition is barred by limitation as held by the District Munsif, or not so barred as held by the District Judge in appeal from him.

There is no doubt that when on the 11th December 1901 the District Judge reversed the District Munsif's order declaring the decree already satisfied, it was open to the decree-holder to proceed with the execution, and the fact that an appeal was preferred to the High Court presented no obstacle, no order for stay of execution having been obtained. It is impossible therefore to accede to the contention that limitation commences to run from the date of the decree of the High Court, and the petition of the 10th July 1905 is clearly barred so far as it is a fresh application for execution, that is to say, so far as it asks for the attachment of property not proceeded against in the proceedings instituted by the application of the 3rd of October 1899. In so far as it asks only for a proclamation of the sale of the property already attached in pursuance of the petition of 1899, the case is different. For the appellant, it is contended that, the order of the 15th December 1899 dismissing the petition, closed the proceedings, that the attachment closed with them, and the subsequent application is throughout a new petition for execution. If that be the true position the respondents must fail not merely on the ground of limitation but also because they do not ask for reattachment of the property previously attached. But that is not the position. There is nothing to show that the order of the 15th December 1899 was passed after notice to either party. It is not stated in the

CHALAVADI KOTIAH v. POLOORI ALIMEL-AMMAH.

order that either party was heard, and the diary entry does not indicate any hearing on the 15th of December. It has been held in *Sasivarna Tevar* v. *Arulnandam Pillai*(1) that the Court has no legal authority to dismiss a petition for execution simply because execution has been stayed, but if that is so, the order of dismissal is not necessarily ineffective to dispose of the proceedings. If wrong, an appeal might be to set it right. But here the order being made without notice and in the absence of both parties cannot be regarded as an order between the parties at all. It amounts to no more than a direction to the officers of the Court to remove the proceedings from the pending list (compare the case of *Narayan* v. *Sono*(2)). Indeed it appears not improbable that this is the view taken of the matter by the District Munsif himself, for the record contains no indication of any order to remove the attachment or for costs.

However that be, the order had not the effect of closing the proceedings and they must be considered to have been still pending when the application was made in 1905.

The question then arises whether, even in that view, it was not necessary, in order to save limitation to present the application within three years of the District Judge's order, dated the 11th of December 1901. A number of cases have been cited at the bar in which applications similar to that in question have been treated as applications to revive or continue earlier proceedings, and, in some of those cases, article 178 of schedule II of the Limitation Act is referred to as applicable to the matter, while in others no reference is made to any particular provision of the law. The cases establish the position that, when execution has been stopped by the interposition of some obstacle, the proceedings may be "revived" or "continued," by an application made within three years of the removal of the obstruction, and though in some cases, notably in the decision of the Privy Council in *Qamar-Ud-Din Ahmad* v. *Jawahir Lal*(3), the application is referred to as reviving a pending execution, it was not necessary in any of them to decide whether article 178 ought to be applied to the case. It is not clear what course the proceedings took in *Narayan* v. *Sono*(2), whether execution was stayed pending the decision of the High

(1) I.L.R., 21 Mad., 261. (2) I.L.R., 24 Bom., 345 at p. 349.
(3) I.L.R., 27 All., 334.

CHALAVADI KOTIAH v. POLOORI ALIMEL-AMMAH.

Court in *Nagamma* v. *Raja Rangayya Appa Row*(1) or whether the Court of First Appeal replaced the obstacle removed by the Court of First Instance. It seems to have been assumed on both sides that the obstacle was not removed until the date of the decision of the High Court and the petition under the consideration of the learned Judges was within three years from that date. No doubt there is a remark in the judgment to the effect that there was no bar under article 178 because the application was not a "fresh application for execution"; but it is not quite clear as the report stands what is the precise import of that remark, for if the application was a fresh application for execution it would *primâ facie* be governed by article 179.

There are however cases not cited before us from which we may derive the rule that article 178 ought not to be applied, when the Court is asked to do something, which it is bound to do (vide *Kylasa Goundan* v. *Ramasami Ayyan*(2) and *Vithal Janardan* v. *Vithojirav Putlajirav*(3)), and that so long as proceedings are pending, limitation will not begin to run against an applicant (vide *Kedarnath Dutt* v. *Harra Chand Dutt*(4)). In *Venkatappiah* v. *Jagannadahrao*(5) an application made in 1898 was held to be made in proceedings initiated in 1886, and still undisposed of in 1898, and so not barred, and that case is also authority for the rule that, if in an execution petition a decree-holder asks for sale as well as attachment of the property of the judgment-debtor, a subsequent application for sale of the same property will not be barred by article 178, though not made within three years of the attachment. The decision in *Joobraj Singh* v. *Buhooria Alumbasee Koer*(6), seems to proceed on the assumption that in that case a separate application for sale was necessary; the question is not discussed.

It may be somewhat difficult to reconcile the view taken in *Kylasa Goundan* v. *Ramasami Ayyan*(2), with that taken in *Pachaippa Achari* v. *Poojali Seenan*(7), where it was held that an application for execution not as such, in accordance with law, will suffice to save limitation if it contains an application for the issue of a notice under section 248 of the Code of Civil Procedure. The Court is by section 248 directed to issue a notice, and by section

(1) S.A. No. 133 of 1892 (unreported). (2) I.L.R., 4 Mad., 172.
(3) I.L.R., 6 Bom., 586. (4) I.L.R., 8 Calc., 420.
(5) 12 M.L.J., 24. (6) 7 C.L.R., 424.
(7) I.L.R., 28 Mad., 557.

CHALAVADI KOTIAH v. POLOORI AZIMEL-AMMAH.

316 to order a certificate, and in neither case is any application required by the Code. If then an application for a notice is an application within the meaning of article 179, it is not very easy to see why an application for a certificate is not an application within the meaning of article 178.

Possibly we are on safer ground if we hold with Wilson, J., in *Kedarnath Dutt* v. *Harra Chand Dutt*(1) that so long as proceedings initiated by the decree-holder are pending, his right to apply for their continuance accrues from day to day, *i.e.*, on every day on which the Court does not *suo motu* continue them. The right to apply will then not be barred till three years have elapsed after the proceedings have ceased to be pending.

Whichever be the better view the result is the same and the petition under our consideration is not barred in so far as it asks for sale of the property attached under the petition of the 3rd October 1899.

The decree of the District Judge must be modified accordingly. Execution must proceed only against the immoveable property described in the execution-petition of the 3rd October 1899 (Execution Petition No. 1086 of 1899). The parties will bear their own costs throughout.

(1) I.L.R., 8 Calc., 420.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sankaran Nair.

ALAGIRISAMY NAIDU (PETITIONER—ASSIGNEE PLAINTIFF), APPELLANT,

v.

VENKATACHELLAPATHY AYYAR AND OTHERS (DEFENDANTS), RESPONDENTS.*

1907. October 21, 23, 29.

Limitation Act, Act XV of 1877, sch. II, Art. 179—'Application in accordance with law'—Application by representative of decree-holder whose name is not brought on record is an application in accordance with law—Civil Procedure Code, Act XIV of 1882, ss. 232, 365, 366.

A decree, dated 26th March 1898, in a certain suit ordered 'that plaintiff do recover the sum of . . . against defendants Nos. 1, 2 and 3 and the hypothecated property' and it further ordered 'that the plaintiff is not entitled to execute the decree till fifth defendant's hypothecation is discharged by him.'

The decree-holder having died, his widow who was not brought on the record applied on the 12th February 1901 to execute the decree. The application was dismissed as the fifth defendant's hypothecation was not then discharged, but was only satisfied on the 29th October 1901. The question arising in subsequent execution proceedings whether the application of 12th February 1901 was one 'in accordance with law' within the meaning of article 179 of schedule II of the Limitation Act:

Held, that the application was in accordance with law. The terms of the decree only precluded recovery of the decree amount from defendants Nos. 1, 2 and 3 and the hypothecated property before the fifth defendant's debt was discharged, and such discharge was not a condition precedent to an application for a conditional order directing a sale on plaintiff paying off such debt.

On the death of the decree-holder the right to execute the decree devolved on his widow, who was entitled without being brought on the record to apply under section 232 of the Code of Civil Procedure for execution, as sections 365 and 366 of the Code of Civil Procedure apply only to the case of a plaintiff dying before judgment.

Narayana Naik v. *Karuppa Pillai* (Rfd. C. No. 18 of 1880 unreported), followed.

THE decree in this case was passed on 4th November 1897, and was confirmed on appeal on 26th March 1898. The decree ordered 'that plaintiff do recover the sum of . . . against

* Civil Miscellaneous Second Appeal No. 19 of 1907 presented against the decree of Arthur F. Pinhey, Esq., District Judge of Madura, in Appeal Suit No. 39 of 1906, presented against the order of M.R.Ry. T. A. Ramakrishna Ayyar, District Munsif of Madura, in Original Suit No. 711 of 1906.

ALAGIRISAMY NAIDU v. VENKATA-CHELLAPATHY AYYAR.

defendants Nos. 1, 2 and 3 and the hypothecated property', and it further ordered 'that the plaintiff is not entitled to execute the decree till fifth defendant's hypothecation is discharged by him.' The widow of the decree-holder applied for execution on 12th February 1901, and her application was rejected, because the hypothecation of the fifth defendant was undischarged. She assigned the decree in May 1901 to petitioner, who applied on various occasions in 1903 and 1904 for execution. These applications were dismissed for default. The present application was made on 21st March 1905. Objection was taken that it was barred as the application of 12th February 1901 was not in accordance with law and did not save limitation.

The Munsiff allowed execution, but on appeal the District Judge held the application to be barred.

Further facts appear in the judgment of the High Court. The petitioner appealed to the High Court.

T. V. Seshagiri Ayyar for appellant.

T. Rangachariar for respondent.

JUDGMENT.—The Judge has held that the application to execute the decree is barred by limitation because the application that was made on the 12th February 1901 is not valid, on two grounds, to save limitation; firstly, it was not an application that could have been legally granted by the Court at the time and was therefore not in accordance with law: secondly, it was made by the widow of the decree-holder as his legal representative when she had not been placed on the record, and had not even applied in her petition to be placed on the record.

The decree ordered "that the plaintiff do recover the sum of Rs. 338-5-4 and costs and subsequent interest on the principal Rs. 250 at 6 per cent. per annum from the 8th December 1896, the date of plaint, to date of payment against the defendants Nos. 1, 2 and 3 and the hypothecated property" and it was further ordered that "the plaintiff is not entitled to execute the decree till fifth defendant's hypothecation is discharged by him."

The fifth defendant's hypothecation was not discharged before the application of the 12th February 1901 to execute the decree but only on the 29th October 1901, and that application having been dismissed on the ground that such discharge was a condition precedent to execution under the wording of the decree itself, the Judge holds that, it cannot be treated as one made according

ALAGIRISAMY NAIDU v. VENKATA-CHELLAPATHY AYYAR.

to law under article 172, second schedule, Limitation Act. We are unable to agree with the Judge. The decree only makes the discharge of the fifth defendant's claim a condition precedent to the recovery of the money from defendants Nos. 1, 2 and 3 and by the sale of the hypothecated property. There was nothing to prevent an order directing a sale on the plaintiff's depositing the mortgage money due to the fifth defendant in Court. Such payment therefore cannot be treated as a condition precedent to the application for a conditional order see *Syed Hussain Sahib Rowthen* v. *Rajagopala Mudaliar*(1). The Judge is therefore wrong in holding that for this reason it must be held to be not in accordance with the law.

The next question is whether the application was in accordance with law as the applicant widow's name was not on the record when she made the application. The Madras High Court in 1881 (see *Narayana Nayak* v. *Karuppa Pillai*(2), answered that question in the affirmative. Kindersley and Muthusamy Ayyar, JJ. in that judgment say "the question is whether this last application was barred by Act XV of 1877, article 179, and this depends upon the determination of the question, whether the application made on the 31st March 1880 by the decree-holder's son, whose name was not then on the record was an application made in accordance with law for execution or to take some step in aid of execution. We are of opinion that the application made on the 31st March 1880 was an application made in accordance with law for execution. Sections 365 and 366 of the Code of Civil Procedure have reference to the death of a plaintiff before judgment and have no reference to the case of a decree-holder dying and his representative applying for execution. On the death of a decree-holder, the right to execute devolves by operation of law on his representatives, and he may apply for execution under section 232 of the Code. It is proper, and perhaps necessary, that the name of the representative should be entered on the record in the place of that of the plaintiff or defendant whom he represents, but the Code does not make this a condition precedent to the attaching of the representative's right to apply for execution." The decree is kept alive by the application and that an order was passed rejecting the same is immaterial.

(1) I.L.R., 30 Mad., 28. (2) Refd. C. No. 18 of 1880 (unreported).

ALAGIRISAMY NAIDU v. VENKATA-CHELLAPATHY AYYAR.

The same view has been taken in *Hafizuddin Chowdhry* v. *Abdool Aziz*(1), which was followed in *Balkishanshiva Bakas* v. *Wagarsing*(2). The case *Mangal Khan* v. *Salim-ulla h Khan*(3), appears to have been decided on the same principle.

Following therefore the above decisions we hold that the application by the widow is in accordance with law.

We accordingly set aside the order of the District Judge, direct him to restore the appeal to his file and dispose of it in accordance with law. The appellant is entitled to the costs of this appeal.

APPELLATE CRIMINAL.

Before Mr. Justice Benson and Mr. Justice Sankaran Nair.

1907. October 18.

PERUMALLA NAYUDU

v.

EMPEROR.*

Criminal Procedure Code, Act V of 1898, ss. 195, 537—No sentence of competent Court to be reversed for want of sanction under s. 195.

The words 'subject to the provisions hereinbefore contained' in section 537 of the Code of Criminal Procedure must not be construed in such a way as to nullify the provisions of clause (*b*) of the same section that no sentence of a Court of competent jurisdiction shall be reversed on appeal 'for want of any sanction required by section 195.'

Want of sanction under section 195 is no ground on appeal for setting aside a conviction after trial for any offence mentioned in the section.

THE accused a Station-house officer was committed to the Sessions of Kurnool on charge of offences under sections 342, 195, 211 and 216 of the Indian Penal Code. No sanction was given under section 195 of the Code of Criminal Procedure in respect of the offences under sections 195 and 211. The objection was not taken at the preliminary trial. It was taken before the Sessions Court and overruled and the accused was convicted.

(1) I.L.R., 20 Calc., 755. (2) I.L.R., 20 Bom., 76. (3) I.L.R., 16 All., 26.

* Criminal Appeal No. 481 of 1907, presented against the conviction and sentence of M. Ghose, Esq., Sessions Judge of Cuddapah Division, in Case No. 20 of the Calendar for 1907.

PERUMALLA NAYUDU v. EMPEROR.

Accused appealed to the High Court.

K. Ramachandra Ayyar for The Hon. Mr. *L. A. Govindaragava Ayyar* for appellant.

The Public Prosecutor in support of the conviction.

JUDGMENT.—It is argued for the appellant that the conviction for offences punishable under sections 195 and 211 of the Indian Penal Code is illegal because the sanction required by section 195 of the Code of Criminal Procedure was not obtained. In support of this argument the case of *Raj Chunder Mozumdar* v. *Gour Chunder Mozumdar*(1) is relied upon; but that case has been expressly dissented from by a Bench of this Court in the case of *Ismal Rowther* v. *Shunmugavelu Nadan*(2) where it was held that the special provision in section 537(*b*) of the Code of Criminal Procedure cannot be nullified by the general provision in section 195 of the Code of Criminal Procedure. We agree with this view. The words "subject to the provisions hereinbefore contained" which occur at the beginning of section 537 cannot be construed in such a way as to nullify the express provision of the latter part of the section, which in clause (*b*) enacts that no sentence passed by a Court of competent jurisdiction shall be reversed on appeal "for want of any sanction required by section 195." There are other sections besides section 195, such as sections 132, 196 and 197 of the Code of Criminal Procedure, which require sanction to be obtained in certain cases, and these sections are not affected by section 537(*b*). Full effect, therefore, can be given to the opening words of the section without construing them as referring to section 195. Moreover, on principle, it is difficult to see why the want of sanction under section 195 should be held to be a good ground for setting aside a conviction after trial. Before trial, no doubt, a man is presumed to be innocent, and it is reasonable to protect him from prosecution for the offences specified in section 195 unless and until a competent authority is of opinion that there is sufficient ground for an enquiry and sanctions the prosecution. But it is different when the result of the trial has shown that the guilt of the accused is no longer a matter of doubt, but has been proved in a formal trial. We therefore overrule the preliminary objection. On the merits we agree with the Sessions Judge. There is a large

(1) I.L.R., 22 Calc., 176. (2) I.L.R., 29 Mad., 149.

PERUMALLA NAYUDU v. EMPEROR.

body of direct evidence that Subbadu, and not Santivadu, was the thief who was arrested in the house of the first prosecution witness. The defence is that all this evidence was concocted at the instance of the Police Inspector owing to his enmity towards the accused. We are, however, unable to say that the evidence shows that there was any such enmity on the part of the Inspector as to render it likely that he would bring a false charge of this kind against the accused, or that he did, in fact concoct the case.

We dismiss the appeal.

APPELLATE CRIMINAL.

Before Mr. Justice Wallis.

1907. October 23.

ARUMUGA GOVINDAN AND OTHERS (COUNTER-PETITIONERS), PETITIONERS,

v.

VENKATASUBBIER AND ANOTHER (PETITIONERS), RESPONDENTS.*

Criminal Procedure Code, Act V of 1898, section 145—Magistrate holding inquiry under section 145 cannot direct Subordinate Magistrate to take evidence—order based on such evidence void as made without jurisdiction.

A Magistrate holding an inquiry as to possession under section 145, clause 4 of the Code of Criminal Procedure, is bound to take the evidence himself and cannot delegate to a Subordinate Magistrate the duty of recording such evidence.

An order of such Magistrate based solely and substantially on evidence recorded by a Subordinate Magistrate is not an order based on legal evidence and is void as made without jurisdiction.

In re Baikant Kumar, (3 C.L.R., 134), referred to.

Kolha Koer v. *Muneswar Tewari*, (I.L.R., 34 Cal., 840), referred to.

THE respondents (petitioners), presented a petition to the Sub-Magistrate of Perundurai alleging that the counter-petitioners were causing disturbances in respect of certain land in their possession and that as there was a likelihood of a breach of peace,

* Criminal Revision Case No. 230 of 1907 presented under clause 15 of the Letters Patent, praying the High Court to revise the order of Deputy Magistrate of Erode division in Miscellaneous Case No. 5 of 1907—*vide* Criminal Revision Case No. 367 of 1907.

ARUMUGA GOVINDAN v. VENKATA-SUBBIER.

an inquiry might be held to determine the possession of the disputed lands. The Sub-Magistrate thereupon sent a report to the Deputy Magistrate of Erode that there was a likelihood of a breach of the peace and requesting that action may be taken under section 145 of the Code of Criminal Procedure.

The Deputy Magistrate after issuing notices to the parties and recording statements, directed the Stationary Sub-Magistrate to record the evidence adduced by the parties and to submit a report. On the evidence recorded and submitted by the Sub-Magistrate and on his report, the Deputy Magistrate decided that the petitioners were entitled to be maintained in possession.

The counter-petitioners moved the High Court.

Mr. *John Adam* for petitioners.

The Public Prosecutor for respondents.

ORDER.—In both these cases the First-class Magistrate instead of receiving the evidence of the parties as he is required to do by section 145, clause 4 of the Code of Criminal Procedure, referred it to a Subordinate Magistrate to take the evidence and in one case to report. It has not been seriously argued that this procedure could be justified by the provisions of section 148, Criminal Procedure Code, which empowers him to depute the holding of a merely local inquiry to a Subordinate Magistrate, and it is quite clear that the First-class Magistrate had no right to make this reference, *In re Baikunt Kumar*(1), *Hanumanthappa* v. *Hussain Saib* alias *Aiyah*(2).

It has been recently held that where a Magistrate omitted to take evidence as required by section 145, clause 4, his order was without jurisdiction, and that the parties were prejudiced thereby *Kolha Koer* v. *Muneswar Tewari*(3). In the present case the evidence sent up by the Subordinate Magistrate was not evidence in the case, and in Criminal Revision Case No. 230 there was no other evidence taken, and the Magistrate must in my opinion be regarded as having passed his order without any evidence. In Criminal Revision Case No. 367 after the Sub-Magistrate had submitted his report some of the witnesses of the present petitioners

(1) 3 C.L.R., 134.

(2) Weir's Law of Offences and Crl. Pro., Fourth edition, vol. II, page 118, and also *ibid.*, page 97.

(3) I.L.R., 34 Cal., 840.

ARUMUGA GOVINDAN v. VENKATA-SUBBIER.

were cross-examined on the depositions given by them before the Sub-Magistrate and re-examined, but there the order was substantially passed on what was not legal evidence. In my opinion under these circumstances both the orders of the First-class Magistrate were made without jurisdiction and must be set aside; and the Magistrate must be directed to take the cases again on his file and hold a fresh inquiry as to possession under section 145, clause 4 of the Code of Criminal Procedure.

APPELLATE CRIMINAL.

Before Mr. Justice Benson and Mr. Justice Sankaran Nair.

1907. October 17.

THE PUBLIC PROSECUTOR—PETITIONER.*

Criminal Procedure Code, Act V of 1898, ss. 394, 395—Magistrate cannot award imprisonment in lieu of whipping when on certificate of the Medical officer before infliction of whipping the sentence of whipping is reduced.

The power of a Magistrate under section 395 of the Code of Criminal Procedure to award imprisonment in lieu of whipping is confined to cases in which under section 394 a sentence of whipping is wholly or partially prevented from being executed.

Such power only exists when, under section 394 (1), a Medical officer present certifies that the offender is not in a fit state of health to undergo such punishment or when, under section 394 (2) during the execution of the sentence, a Medical officer certifies that the offender is not in a fit state of health to undergo the remainder of the sentence.

There is no provision of law which authorises a Medical officer to certify, *before the infliction* of whipping, that the prisoner is fit to undergo only a smaller number of stripes than that actually ordered.

Where in consequence of such a certificate a smaller number of stripes is inflicted, the Magistrate has no power to award imprisonment in lieu of the whipping not inflicted.

THE facts of this case are sufficiently stated in the judgment.

JUDGMENT.—The accused Mahomed Kutti was found guilty of theft and sentenced by the District Magistrate of the Nilgiris to

* Criminal Revision Case No. 417 of 1907 presented under sections 435 and 439 of the Code of Criminal Procedure praying the High Court to revise the judgment of the District Magistrate of the Nilgiris, dated 30th July 1907, in Summary Case No. 4 of 1907

THE PUBLIC PROSECUTOR.

receive 20 stripes. The Medical officer certified that he was unfit to receive 20 stripes but was fit to receive 6 stripes. These have been inflicted and, in lieu of the balance of 14 stripes, the District Magistrate has sentenced the prisoner under section 395 of the Criminal Procedure Code to 3 months' rigorous imprisonment.

We are of opinion that the District Magistrate was not authorized by the terms of section 395 of the Criminal Procedure Code to pass this sentence.

Under the above section, a Court may sentence the offender to imprisonment in lieu of whipping or in lieu of so much of the sentence of whipping as was not executed in any case in which under section 394 a sentence of whipping is wholly or partially prevented from being executed. It is wholly prevented from being executed when under section 394, clause (1), a Medical officer certifies that the offender is not in a fit state of health to undergo the punishment of whipping: as in that case the section enacts that the punishment of whipping shall not be inflicted. The certificate in the case now before the Court is obviously not such a certificate. The sentence of whipping is partially prevented from being executed if, during the execution of a sentence of whipping, the Medical officer certifies that the offender is not in a fit state of health to undergo the remainder of the sentence. In the present case the Medical officer did not certify that the offender was unfit to undergo further punishment after the sentence of whipping was partially executed and the certificate is therefore not one granted under the terms of section 394, clause (2).

There is no provision of law authorizing a Medical officer to give such a certificate as was given in this case before the whipping commenced, and as we are unable to accept the certificate in this case as one granted either under section 394, clause (1), or section 394, clause (2), the sentence was not prevented from being carried out under that section. Section 395 does not therefore apply and the Magistrate was not empowered to sentence Mahomed Kutti to imprisonment.

The sentence of imprisonment is therefore set aside, and as the remainder of the sentence of whipping cannot be carried out, Mahomed Kutti will be discharged.

APPELLATE CIVIL.

1907.
October 3, 16.

Before Mr. Justice Wallis and Mr. Justice Miller.

VEERAPPA CHETTY AND OTHERS (PLAINTIFFS),

v.

TINDAL PONNEN AND OTHERS (DEFENDANTS AND HIS LEGAL REPRESENTATIVES).*

Jurisdiction—Where suit instituted against a deceased person, Courts have no jurisdiction to allow the plaint to be amended by substituting the names of the representatives of the deceased.

There is nothing in the Code of Civil Procedure to authorise the institution of a suit against a deceased person and the Courts have no jurisdiction to allow the plaint in such a case to be amended by substituting the names of the representatives of the deceased, even when the suit is instituted *bonâ fide* and in ignorance of the death of the defendant.

Mohun Chunder Koondoo v. *Azeem Gazee Chowkeedar*, (12 W.R., 45), followed.
Mallikarjuna v. *Pullayya*, (I.L.R., 16 Mad., 319), distinguished.

THE facts are thus stated in the judgment of the lower Court.

"The plaintiffs filed this suit on 5th September 1905 against one Tindal Ponnen on two promissory notes, exhibits A and B, dated 25th September 1902 and 16th October 1902, respectively, executed by him in favour of V. M. V. Sundarasekhara Iyer. V. M. V. is plaintiff's *Vilasam*, and Sundarasekhara Iyer is their duly constituted agent under power-of-attorney, exhibit II.

On 19th April 1906, a petition was put in to the effect that the defendant was dead, and asking for the minor defendants Nos. 2 and 3 to be brought on the record with their mother as guardian. Notice was sent to her but she did not appear and Lakshmana Row, the Court Interpreter, was appointed their guardian on 27th April 1906, and the plaint was amended accordingly.

Mr. Dorasamy Iyengar appeared, subsequently, as vakil for the guardian of the said minors, and put the plaintiffs to proof of the claim, and took the objection that the suit was filed against

* Referred Case No. 7 of 1907 stated under section 69 of the Presidency Small Cause Courts Act XV of 1882 and Rule 428 of the Rules of Procedure of the said Court by the Chief Judge of the Presidency Court of Small Causes, Madras, in Suit No. 12582 of 1905.

first defendant after his death, of which fact plaintiffs were then cognizant and that defendants Nos. 2 and 3 were added without notice and, at a time, when, the claim was barred against them.

With regard to the other question it is proved by the evidence of Murugan that first defendant died in Pulania Deli, Sumatra, on 4th September 1905. Exhibit I supports his evidence; it is written by Ker.Veera Pillai to the wife of the deceased, and dated 13th September 1905 from Deli, informing her of his (her husband's) death on the said date and is proved by Murugan. It however contradicts Murugan's evidence that he was present after the death, but I have no reason to doubt its genuineness. I find it proved that first defendant died on 4th September 1905, the day before the suit was filed, but there is nothing to show that the plaintiffs were aware of his death at that time.

Under these circumstances the question arises whether the suit lies, having been originally instituted against a defendant who was dead at the time of the filing of the suit.

The plaintiffs' vakil applied under section 69, Presidency Small Cause Courts Act XV of 1882, for a reference to the High Court, and as there is no direct authority reported in the Law Reports on the point, I dismiss the suit with costs and vakil's fee Rs. 46, subject to the opinion of the High Court on the following question:—Whether the Court has jurisdiction to allow a plaint filed against a deceased person to be amended by bringing his legal representatives on to the record?"

Accordingly the following reference was made to the High Court:—

Whether the plaintiff, who institutes a suit *bonâ fide*, and in ignorance of the fact of the death of the defendant before the institution of the suit, is entitled, on his subsequently becoming aware of the defendant's death, to have the plaint amended and the legal representatives of the deceased defendant brought on record as defendants, when a fresh suit against the said representatives of the deceased would not be barred by limitation?

Whether the Court has jurisdiction to allow a plaint filed against a deceased person to be amended?

C. V. Anantakrishna Ayyar and *S. E. Sankara Ayyar* for plaintiff.

The defendants were not represented.

VEERAPPA CHETTY v. TINDAL PONNEN.

JUDGMENT.—The question for our decision is whether, when a plaint is presented by a plaintiff for the purpose of instituting a suit against a defendant in accordance with the provisions of the Code, and it afterwards turns out that the defendant had died before the presentation of the plaint, the Court has jurisdiction to substitute the representatives of the deceased as defendants and allow the suit to proceed as against them. In *Mohun Chunder Koondoo* v. *Azeem Gazee Chowkeedar*(1), it was held by Sir Barnes Peacock and Mr. Justice Mitter that, owing to the death of the defendant before the filing of the plaint, the Court had no jurisdiction to decide upon the case, or, in other words, to entertain the suit. The Code of 1859, Act VIII of 1859, was then in force, but the modifications introduced into the present Code, Act XIV of 1882, do not appear to affect the question. The point appears to have arisen subsequently in *Mallikarjuna* v. *Pullayya*(2) but it was unnecessary to decide it as the case was disposed of on the ground that such an amendment ought not to be allowed on appeal if it might preclude the defendant from pleading limitation. We do not consider that the decision in any way shakes the authority of *Mohun Chunder Koondoo* v. *Azeem Gazee Chowkeedar*(1) as it was unnecessary for the Court to express any opinion on the present point and they appear to have intentionally abstained from so doing. In our opinion the decision of the Calcutta High Court was right and should be followed. At common law the Courts had no jurisdiction to entertain a suit against a dead man, and on the death of the defendant the action abated. To mitigate this hardship, a rule based on the supposed equity of the statute of limitations was introduced under which the issue of a writ against a defendant during his life-time, even if not served before his death, was allowed to stop time running and prevent a fresh suit against the representatives of the deceased from being barred (*Swindell* v. *Bulkeley*(3)). It does not appear to have ever been suggested that the issue of a writ against a dead man could be anything but a nullity, and we see no reason for regarding the presentation of a plaint, which under our system corresponds to the issue of the writ, as anything more. Although

(1) 12 W.R., 45.
(2) I.L.R., 16 Mad., 319.
(3) L.R., 18 Q.B.D., 250.

VEERAPPA CHETTY v. TINDAL PONNEN.

the rule that on the death of the defendant the action abated and the Court lost jurisdiction over it, was abolished, in England, by the Common law Procedure Act, it is still retained in a modified form in the Code of Civil Procedure which provides in section 368 that unless the plaintiff applies within the prescribed time to substitute the representatives of the deceased defendant the suit shall abate. Not only then is there nothing in the Code to authorize the institution of a suit against a dead man as distinct from a suit against his legal representatives, but the death of the defendant puts an end to the suit within a prescribed period unless steps are taken within that period for bringing in the legal representatives. Under these circumstances we agree with the decision of the Calcutta High Court, and are of opinion that, the question referred to us must be answered in the negative.

APPELLATE CIVIL—FULL BENCH.

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

RAMU AIYAR (PLAINTIFF), PETITIONER.

1907. August 2, 13, October 23.

v.

SANKARA AIYAR, MINOR BY GUARDIAN LATCHUMI AMMAL (DEFENDANT), RESPONDENT.*

Court Fees Act, Act VII of 1870, s. 7, cl. (4) c, and art. 17 (6), sched. II—Registration Act, s. 77—Suits Valuation Act, s. 8—Suit for registration of document under s. 77 of Registration Act does not fall for purposes of Court fees within s. 7, cl. (4) c of the Court Fees Act, but under art. 17 (6) of sched. II of the Act—Such suit to be valued for purposes of jurisdiction on the value of the property.

A suit for registration of a document under section 77 of the Registration Act is not, for the purposes of payment of Court fees, a suit for a declaratory decree with consequential relief within section 7, clause (4) *c* of the Court Fees Act, but is a suit in which it is not possible to estimate at a money value the

* Civil Revision Petition No. 513 of 1904, presented under section 622 of the Code of Civil Procedure, praying the High Court to revise the order of L.G. Moore, Esq., District Judge of Trichinopoly, in Civil Miscellaneous Appeal No. 10 of 1903, presented against the order of M.R Ry. S. Doraiswami Ayyar, District Munsif of Trichinopoly, in Original Suit No. 133 of 1903.

RAMU AIYAR v. SANKARA AIYAR.

subject matter in dispute, within article 17 (6) of schedule II of the Act. The Court fee payable in such cases is a fixed fee of 10 rupees.

Jantoo v. *Radha Canto Doss*, (I.L.R., 8 Calc., 515), followed.

Savarimuthu Pillai v. *Alagiam Pillai* (12 M.L.J., 88), followed.

The question of valuation for purposes of jurisdiction is not in such cases to be decided under section 8 of the Suits Valuation Act. The value in such cases will be the value of the interest created by such document.

Ramakrishnamma v. *Bhagamma*, (I.L.R., 13 Mad., 56), followed.

THE facts necessary for this report are sufficiently set out by (Sir S. Subrahmania Ayyar, Officiating Chief Justice, and Miller, J.) in the order of reference to the Full Bench which was as follows :—

"The alleged will, the registration of which it was sought to enforce, makes disposition in respect of property of a value of more than Rs. 2,500. In *Pydal Nambiar* v. *Kannan Nambiar*(1) it was held that a suit instituted to enforce the registration of an instrument was a suit to which section 7, clause 4 (*c*) of the Court Fees Act is applicable ; in other words, is a suit for a declaration in which consequential relief is prayed. In *Savarimuthu Pillai* v. *Alagiam Pillai*(2), a case in the same volume at page 88, another Division Bench, dissenting from the previous case, held that a Memorandum of Appeal in such a suit was to be stamped with a stamp of Rs. 10 under article 17 (6) of schedule II of the Court Fees Act.

If the view in the former case is correct, the valuation of the suit for purposes of jurisdiction would be the valuation adopted by the plaintiff in the plaint ; but if, on the other hand, the later decision is right, the question of jurisdiction will depend on the value of the property which is the subject of the transaction having regard to the decision in *Ramakrishnamma* v. *Bhagamma*(3).

In the present case the plaintiff in the plaint valued his claim at Rs. 130 and presented the plaint in the District Munsif's Court. The lower Courts held that, as the value of the property disposed of by the will exceeded Rs. 2,500, the District Munsif had no jurisdiction.

We refer for the opinion of the Full Bench the question whether the District Munsif had jurisdiction over the suit."

(1) 12 M.L.J., 87. (2) 12 M.L.J., 88.
(3) I.L.R., 13 Mad., 56.

RAMU AIYAR v. SANKARA AIYAR.

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

T. R. Ramachandra Ayyar and *T. R. Krishnaswami Ayyar* for petitioner.

The Hon. Sir *V. C. Desikachariar* for respondent.

The Court expressed the following

OPINION (Sir ARNOLD WHITE, C.J.).—The question which has been referred to us is—Has a District Munsif jurisdiction to try a suit brought under section 77 of the Registration Act to direct registration of a will, where the will in question disposes of property more than Rs. 2,500 in value ?

As regards the question of valuation for the purposes of payment of Court fees I am of opinion that the present suit is one to which article 17 (6) of the second schedule to the Court Fees Act applies, that is to say, it is a suit in which it is not possible to estimate at a money value the subject-matter in dispute, and which is not otherwise provided for by the Act. On this question I am prepared to follow the ruling of Garth, C.J., in *Jantoo* v. *Radha Canto Doss*(1), and of this Court in *Savarimuthu Pillai* v. *Alagiam Pillai*(2). This, however, is not conclusive as regards the question of valuation for the purposes of jurisdiction. I have had the advantage of reading the judgments which have been written by my learned brothers, and on this question, although I have had considerable doubt in the matter, I am not prepared to differ from the conclusion at which they have arrived, and I would answer the question which has been referred to us in the negative.

SUBRAHMANIA AYYAR, J.—The appellant presented for registration an instrument purporting to be the last will and testament of his deceased father. The Sub-Registrar before whom the instrument was presented refused to register it on the 25th October 1902. This refusal was upheld by the District Registrar on the 31st January 1903. The present suit for a decree directing the document to be registered was instituted in the Court of the District Munsif of Trichinopoly, within whose local limits the office in which the document was sought to be registered is situate. The plaint was returned for presentation to the proper Court as the Munsif was of opinion that it was not competent to him to entertain the suit, having regard to the value of the property

(1) I.L.R., 8 Calc., 515. (2) 12 M.L.J., 88.

comprised in the will being admittedly in excess of Rs. 2,500, the pecuniary limit of his jurisdiction. The order was confirmed on appeal to the District Court. The question submitted for our opinion is whether the District Munsif had jurisdiction over the suit.

It has been argued on behalf of the appellant that the suit was one for a declaratory decree with consequential relief and that, the value of the relief sought having been stated in the plaint to be within Rs. 2,500, viz., Rs. 130, the Munsif had jurisdiction with reference to the provisions of section 8 of the Suits Valuation Act. The decision of the Division Bench in *Pydal Nambiar* v. *Kannan Nambiar*(1) no doubt supports this contention. But that decision was dissented from in *Savarimuthu Pillai* v. *Alagiam Pillai*(2), where it was held that a suit for a decree directing the registration of a document brought in pursuance of section 77 of the Registration Act was one which it was not possible to estimate at a money value, and that the Court fee payable was, under article 17 (6) of the second schedule to the Court Fees Act, the fixed fee of Rs. 10. This followed the decision of Garth, C.J., in *Jantoo* v. *Radha Canto Doss*(3) which had not been brought to the notice of the learned Judges who decided the other case *Savarimuthu Pillai* v. *Alagiam Pillai*(2). The order of Garth, C.J., was, as stated by him, in accordance with the general opinion of the then Judges of that Court and, for the reasons briefly put by him, I think his ruling embodies the better conclusion.

The question of jurisdiction raised cannot, therefore, be decided with reference to section 8 of the Suits Valuation Act. If the conclusion that a suit such as the present is one which cannot be estimated at a money value for purposes of Court fees would involve the view that the suit is incapable of valuation for purposes of jurisdiction also, it would follow, according to the reasoning on which the decision in *Aklemannessa Bibi* v. *Mahomed Hatem*(4) proceeded, that the Munsif had no jurisdiction, inasmuch as it could not consistently be affirmed that the value of the suit was under Rs. 2,500. This reasoning of the learned Judges, however, has not met with approval

(1) 12 M.L.J., 87.
(2) 12 M.L.J., 88.
(3) I.L.R., 8 Calc., 515.
(4) I.L.R., 31 Calc., 849.

in later decisions, and a different view has been adopted in *Jan Mahomed Mandal* v. *Mashar Bibi*(1). With reference to the observations of Aikman, J., in *Zair Husain Khan* v. *Khurshed Jan*(2), where the case of *Aklemannessa Bibi* v. *Mahomed Hatem*(3) was first dissented from, it was urged, on behalf of the appellant before us, that though for Court-fee purposes the subject-matter of the suit was to be viewed as incapable of being estimated in money, yet the proper course is to hold that for purposes of jurisdiction the plaintiff's valuation should be the guide. This contention is opposed to the *ratio decidendi* of *Ramakrishnamma* v. *Bhagamma*(4), where Muthusami Ayyar and Shephard, JJ., proceeding on what appears to me the right principle, held that the Court of the District Munsif, before which the suit for a decree directing the registration of certain instruments was brought, had jurisdiction, as the value of the interest created by the instruments was below Rs. 2,500. In the absence of specific statutory provisions, the jurisdiction of Courts with reference to the pecuniary value of the subject-matter ought, having regard to the general considerations underlying the constitution of the Mofusil Courts in this country, to depend upon a basis ascertainable and determinable by the Court itself, wherever that is practicable, and not upon the mere will of one of the parties to the litigation, viz., the plaintiff, as it will be if his valuation is to be the conclusive test. Of course, there is nothing in a case such as this, which presents any peculiar difficulty in the way of the Court easily settling the question of the value of the interest affected by the document so as to bring it within the class of cases in which it is expedient to leave the plaintiff to put on his own valuation of the subject-matter.

I would therefore answer the question submitted for our opinion in the negative.

MILLER, J.—The suit is under section 77 of the Registration Act to direct registration of a will disposing of property worth, it is said more than Rs. 50,000, and at any rate worth more than Rs. 2,500.

It is to my mind clear that it is not a suit for a declaratory decree within the meaning of section 7, clause 4 (*c*) of the Court

(1) I.L.R., 34 Calc., 352.
(2) I.L.R., 28 All., 545.
(3) I.L.R., 31 Calc., 849.
(4) I.L.R., 13 Mad., 56.

RAMU AIYAR v. SANKARA AIYAR.

Fees Act. The plaint does not pray for any declaration, the law does not require the Court to make any declaration, and there is no necessity before making the order prayed for, to make any declaration of title or right in favour of the plaintiff.

If the argument before us were to be accepted, it is difficult to conceive of any suit which is not a suit for a declaratory decree, but it is obviously not the case that a suit is a suit for a declaratory decree merely because, before making its decree, the Court has to decide certain issues of fact. In the present case it is quite unnecessary, and would be superfluous for the Court to embody *in the decree* any declaration that the will is genuine.

In *Pydal Nambiar* v. *Kannan Nambiar*(1), the question decided was that a suit under section 77 of the Registration Act was not a suit in which no consequential relief is claimed. It seems to have been assumed that it was a suit for a declaratory decree, and it may be of course that there are cases in which a declaration in the decree may be required. But the present suit is not one of them, and I am clearly of opinion that it is not a suit for a declaratory decree within the meaning of section 7, clause 4 (*c*) of the Court Fees Act. I am prepared therefore to adopt the only other view presented to us, and the view adopted by this Court in *Savarimuthu Pillai* v. *Alagiam Pillai*(2), that it is a suit in which it is not possible to estimate at a money value the subject-matter in dispute.

How then is it to be valued for purposes of jurisdiction?

Before discussing this question I will deal with an argument which suggests that the point does not really arise. The suit it is contended is a special suit, and the section of the Act which authorises the suit prescribes also the Court in which it is to be instituted.

The Act prescribes that the Court shall be the Civil Court having original jurisdiction over the locality of the office in which registration is sought, but in this Presidency that Court might be (if a village Court is not a Civil Court) any one of three Courts—a District Munsif's Court, a Subordinate Judge's Court or a District Court. The Act does not, therefore, prescribe the Court where there is more than one. In answer to this it is contended that section 15 of the Civil Procedure Code fixes the

(1) 12 M.L.J., 87. (2) 12 M.L.J., 88.

RAMU AIYAR v. SANKARA AIYAR.

Court, but, if that is so, there is no reason why the Civil Courts' Act, the Act by which Civil Courts are constituted and established, should not also be called in aid. If the Civil Procedure Code refers us to the Court of lowest grade competent to try the suit, the Civil Courts Act defines the competency of the Courts of different grades.

I have no doubt that the jurisdiction to try the suit is to be determined by the same rules as apply to other suits.

It has then to be decided whether the subject-matter of the suit exceeds or does not exceed in value Rs. 2,500.

Now, if it is impossible to estimate in money the value of the subject-matter in dispute, it follows that the subject-matter of the suit does not admit of being satisfactorily valued, but as no rules have been framed under section 9 of the Suits Valuation Act to meet this case, and as the suit must be valued for jurisdiction, we have to find and apply some method of valuation, the least unsatisfactory that can be devised.

In this predicament the High Courts of Calcutta and Allahabad have decided that the plaintiff is to be allowed to put his own value on the subject-matter, but that this valuation is to be open to revision by the Court on grounds of *mala fides* or impropriety—*Zair Husain Khan* v. *Khurshed Jan*(1) and *Jan Mohamed Mandal* v. *Mashar Bibi*(2). These decisions which were arrived at in suits for restitution of conjugal rights, have no doubt the advantage that they lay down a general rule applicable to all suits of which the subject-matter cannot be satisfactorily valued in money; but have also the disadvantage that they entail or may entail if the plaintiff's valuation is questioned an expensive and unsatisfactory preliminary enquiry before the suit can be heard. In an earlier case (*Aklemannessa Bibi* v. *Mahomed Hatem*(3)), the view was taken that when the subject-matter cannot satisfactorily be valued in money, it cannot be found that its value does not exceed the pecuniary limit of the jurisdiction of the District Munsif, and it follows that all such suits must be brought in the District Court or the Subordinate Judge's Court having jurisdiction: but in the later cases this view was departed from partly on the ground that its adoption might work great hardship on poor plaintiffs, and

(1) I.L.R., 28 All., 545. (2) I.L.R., 34 Calc., 352.
(3) I.L.R., 31 Calc., 849.

partly in the view that the assumption might as well be put the other way, *i.e.*, there is nothing to show that the value of the subject-matter exceeds the District Munsif's limit. I do not think we are reduced to the adoption of a rule which will put all the suits under section 77 of the Registration Act into the same class of Court, nor are we compelled for such suits to adopt the rule which may well be in spite of its disadvantages the best rule in suits for restitution of conjugal rights. We may permit the plaintiff to value his plaint and to require the Courts to accept his valuation, or we may value the suit according to the value of the interest created by the instrument sought to be registered.

The first alternative is, in my opinion, less satisfactory than the second; it is not, I think, desirable to extend the class of cases in which the plaintiff is allowed to select his Court.

The rule of valuation based on the value of the interest created by the instrument was adopted in the case of compulsorily registrable instruments by Sir T. Muttusami Ayyar in *Ramakrishnamma* v. *Bhagamma*(1). His reasoning in that case is, no doubt, not applicable to the case of a will which does not derive any part of its validity from registration, and it is open to argument whether the same reasoning would not support a claim for an *ad valorem* Court fee proportionate to the value of the interest created; there are nevertheless reasons which I think are sufficient to warrant us in adopting the same rule in the present case.

It is desirable that there should be only one rule whether the instrument is registrable compulsorily or not: though it is not possible satisfactorily to estimate the value of registration to the plaintiff, still it is not going too far to assume that that value will ordinarily vary directly with the value of the interest created by the document; it is *ex hypothesi* impossible to fix the ratio correctly, so we must assume a ratio; we assume an equality; by so doing, we adopt a rule which can be applied without difficulty, which leaves nothing to the plaintiff, and which is in harmony with the system under which pecuniary limits are fixed to the jurisdiction of certain Courts.

Principally for these reasons I would answer the question referred to us in the negative.

(1) I.L.R., 13 Mad., 56.

The petition came on for final hearing before (Sir S. Subrahmania Ayyar, Officiating Chief Justice, and Miller, J.) when the Court delivered the following

JUDGMENT.—Following the decision of the Full Bench, we dismiss the revision petition with costs.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Sankaran Nair.

MUNISAMI MUDALIAR (PLAINTIFF), APPELLANT,

v.

SUBBARAYAR AND OTHERS (DEFENDANTS), RESPONDENTS.*

1907. December 11, 18.

Trust Act, Act VI of 1882, *s.* 84—*Benami sale to defraud creditors—Where no creditor defrauded, vendee holds property for the benefit of vendor.*

Where a benami sale is effected to defraud creditors but no creditor is actually defrauded thereby, the transferee, under section 84 of the Trust Act, holds the property for the benefit of the transferor. A suit for the specific performance of a contract to sell made by the transferee can be successfully resisted by the transferor.

Section 84 of the Trust Act embodies the principles recognised by English Courts at the time the Act was passed; and the fact that English Courts subsequently doubted the soundness of these principles will not justify the Courts in India in departing from the rule of law laid down by the section. Judgment of Benson, J., in *Yaramati Krishnayya* v. *Chundru Papayya*, (I.L.R., 20 Mad., 326), not followed.

Lidlingappa v. *Hirasa*, (I.L.R., 31 Bom., 405), distinguished.

SUIT by plaintiff for specific performance of a contract to sell executed by first defendant.

The first defendant and the deceased husband of third defendant were the sons of second defendant. In 1890, the second defendant executed a deed of release in favour of his sons, whereby he relinquished all his rights in the family properties in favour of his sons. In 1901, the first defendant entered into an agreement with the plaintiff to sell some of the properties so relinquished, and the sale not having been completed, the plaintiff now sued for specific performance of the agreement.

* Appeal No. 72 of 1904, presented against the decree of M.R.Ry. K. Ramachendra Ayyar, Subordinate Judge of Negapatam, in Original Suit No. 9 of 1902.

MUNISAMI MUDALIAR v. SUBBARAYAR.

The second defendant contended that the release was nominal and made with a view to induce the creditors to accept a composition ; that he was all along enjoying the lands and that the first defendant had no interest in them. On the evidence the Subordinate Judge found that the sale-deed was *benami* as alleged by second defendant. He also found that first defendant was not absolute owner and that second defendant's co-parcenary rights were not effected. There was, however, no evidence of any creditors having been defrauded.

The Subordinate Judge decreed that the first defendant should sell the properties to plaintiffs, which sale was not to prejudice the rights of second or third defendant.

The plaintiff appealed to the High Court.

The sixth and seventh grounds of appeal were as follows :—

"Assuming that the finding of the lower Court as to the nature of exhibit G is correct, still the second defendant should not be allowed to take advantage of his own wrong and plead his own fraud in defence.

The lower Court ought to have held that, as the second defendant effectually defrauded his creditors by means of exhibit G, he should not be allowed to set up his own fraud as a defence to this suit."

P. R. Sundara Ayyar and *T. Narasimha Ayyangar* for appellant.

T. V. Seshagiri Ayyar for third and fourth respondents.

JUDGMENT (WALLIS, J.).—I agree with the conclusion arrived at on the evidence by the Subordinate Judge that the deed exhibit G executed by the second defendant in favour of his son the first defendant and of his other son, the deceased husband of the third defendant, was a benami transaction entered into with a view to defraud the creditors of the second defendant, but it does not appear that any of the creditors were in fact defrauded, and, under these circumstances, the question before us is, whether a suit for specific performance of a contract by the first defendant to sell the lands included in exhibit G to the plaintiff can be successfully resisted by the second defendant so far as regards his share in the lands is concerned on the ground that exhibit G was a mere benami transaction? If any creditor had been defrauded, he would, it is well settled, have been debarred from going behind exhibit G. (*Rangammal* v. *Venkatachari*(1) and *Yaramati Krishnayya*

(1) I.L.R., 18 Mad., 378.

MUNISAMI MUDALIAR v. SUBBARAYAR.

v. *Chundru Papayya*(1)), but where the fraud has not been carried into effect he is not so debarred according to the decision of Lord Romilly, M. R., in *Symes* v. *Hughes*(2), and of the Court of Appeal in *Taylor* v. *Bowers*(3). Following these decisions, section 84 of the Indian Trusts Act provides that, where the owner of property transfers it to another for an illegal purpose and such purpose is not carried into execution the transferee must hold the property for the benefit of the transferor. In my opinion this section sufficiently declares the law and policy which ought to guide us in India, and it is, therefore, immaterial that subsequently to the passing of the Act doubts have been expressed by the Court of Appeal in *Kearley* v. *Thomson*(4) as to the soundness of the rule of law embodied in the section. This rule was recognised by Subrahmania Ayyar, J., in *Rangammal* v. *Venkatachari*(5). The provisions of section 84 of the Indian Trusts Act are not referred to in the judgment of Benson, J., in *Yaramati Krishnayya* v. *Chundru Papayya*(1), and in so far as that judgment lays down a stricter rule than is embodied in the section I am unable to agree with it. That case, it should further be observed, was disposed of by Subrahmania Ayyar, J., the other Judge, on other grounds. The Indian decisions on this question have been reviewed in great detail in *Jadu Nath Poddar* v. *Rup Lal Poddar*(6), and it is unnecessary to go over them again. The recent case of *Lidlingappa* v. *Hirasa*(7), relied on for the appellant, does not come within the rule, as there the illegal purpose had been carried into execution and a decree-holder, it was found, had been cheated out of his just rights. The question argued and decided in that case was whether in such case the rule which debars a plaintiff from obtaining relief on the ground of his own fraud equally debars a defendant from pleading it in answer to a suit against him. The answer which was in the affirmative does not affect the present question, and it is to be observed that the learned Chief Justice who delivered the judgment of the Court was one of the Judges who decided *Goberdhan Singh* v. *Ritu Roy*(8), in which the distinction between cases in which the fraud has or has not been

(1) I.L.R., 20 Mad., 326.
(2) L.R., 9 Eq., 475.
(3) 1 Q.B.D., 291.
(4) 24 Q.B.D., 742.
(5) I.L.R., 18 Mad., 378.
(6) I.L.R., 33 Calc., 976.
(7) I.L.R., 31 Bom., 405.
(8) I.L.R., 28 Calc., 962.

MUNISAMI MUDALIAR v. SUBBARAYAR.

carried into effect was recognized. For these reasons I am of opinion that the appeal must be dismissed with costs.

SANKARAN NAIR, J.—I agree.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Sankaran Nair.

1907. December 2, 3, 12.

VEDAMMAL (DEFENDANT), APPELLANT,

v.

VEDANAYAGA MUDALIAR (PLAINTIFF), RESPONDENT.*

Hindu Law—Mother party to murder of her son cannot succeed as heir to such son—Unchastity of mother no bar to her succeeding as heir to her son—Degradation does not involve loss of proprietary rights.

A mother who has been a party to the murder of her son, cannot succeed by inheritance to the property of such son.

Under the Mitakshara Law, female heirs other than the widow are not precluded from inheriting by reason of unchastity.

Kojiyadu v. *Lakshmi*, (I.L.R., 5 Mad., 149), followed

Degradation, without exclusion from caste does not involve loss of proprietary rights; neither has aggravated unchastity that effect.

Per WALLIS, J.—The unchastity of the widow is expressly laid down as a ground of exclusion in numerous texts, but there is no such authority in favour of excluding other females.

Degradation does not affect proprietary rights of the degraded person since the passing of Act XXI of 1850.

Per SANKARAN NAIR, J.—The mother's claim to succession rests on consanguinity and not on religious merit, and incapacity to inherit due to inability to perform sacrifices cannot therefore be presumed.

Texts of Hindu Law considered.

SUIT for a perpetual injunction to restrain the defendant from interfering with the plaintiff's possession and enjoyment of the plaint properties.

The last full-owner of the properties was the late Sankaramurthi Mudaliar. The defendant was his mother and the plaintiff was his father's sister's son.

* Appeal No. 228 of 1905, presented against the revised decree of M.R.Ry. T. V. Anantan Nayar, Subordinate Judge of Tinnevelly, dated the 21st September 1905, in Original Suit No. 28 of 1904.

VEDAMMAL v. VEDANAYAGA MUDALIAR.

The plaintiff brought this suit for a perpetual injunction against the defendant to restrain her from interfering with the deceased's estate on the grounds that she has forfeited her right to succeed to the estate because she had been guilty of an illicit intercourse with one Sheik Abdul Khadir Rowther and had consequently lost her caste, and because she had abetted the murder of her son.

The further facts necessary for this report are stated in the judgment of the High Court.

The Subordinate Judge held that the defendant having been acquitted of the charge of murder by a competent Court, no evidence was receivable to prove her guilt, and he accordingly dismissed the suit.

On appeal the High Court remanded the suit to be disposed of after taking evidence on the issues raised.

The Subordinate Judge found that the defendant was guilty of complicity in the murder of her son and that she was living on terms of criminal intimacy with Sheik Abdul Khadir Rowther. He held that the defendant was debarred from the inheritance on the former but not on the latter ground and passed a decree in favour of the plaintiff.

The defendant appealed to the High Court.

Mr. *T. Richmond*, Mr. *E. R. Osborne*, *T. R. Ramachandra Ayyar*, *T. V. Seshagiri Ayyar* and *T. V. Vydyanatha Ayyar* for appellant.

Sir *V. Bhashyam Ayyangar*, the Hon. Mr. *V. Krishnaswami Ayyar* and *A. K. Sundaram Ayyar* for respondent.

JUDGMENT (WALLIS, J.).—It has been decided by this Court that, if the defendant was a party to the murder of her son, she must be excluded from the inheritance and that the plaintiff, as next reversioner, is entitled to succeed. It is also clear that the fact that the defendant has been acquitted of the charge of murder is no answer to the present suit. But, in order to entitle the plaintiff to succeed, it is of course necessary that he should establish the complicity of the defendant by clear and satisfactory evidence, and it is not enough to raise a case of suspicion against her. In the present case there can be no doubt that the connection formed by the defendant with the Muhammadan, Sheik Abdul Khader, who has been convicted of the murder of her minor son, was the original cause of trouble; and it may be that the attitude of the minor in regard to his mother's conduct was such as to give

VEDAMMAL v. VEDANAYAGA MUDALIAR.

her as well as the Muhammadan a motive for desiring to get rid of him. But in order to enable the plaintiff to succeed, it is necessary that he should connect her by satisfactory evidence with the murder, and this, I think, he has failed to do. [The learned Judge after discussing the evidence continued.] Under these circumstances, I think, it would be very unsafe to draw inferences against her from her unwillingness to obey the Tahsildar's summons, or the other conduct spoken to by the witnesses for the plaintiff. The judgment of the Subordinate Judge, in my opinion, proceeds too much on grounds of mere suspicion, and accepts, and acts, on the evidence of the approver, plaintiff's witness No. 7, which, in my opinion, is not sufficiently corroborated. I am therefore unable to agree with his finding on the second issue as to the defendant's complicity in the murder.

It is, however, further argued for the respondent that the defendant is debarred from succeeding to her son by reason of her unchastity which, we agree with the lower Court, has been established by the evidence in the case. The Subordinate Judge overruled this contention on the authority of *Kojiyadu* v. *Lakshmi*(1), which is directly in point; but in this Court it has been argued that the learned Judges who decided the case (*Kojiyadu* v. *Lakshmi*(1)), erred in following *Adviyapa* v. *Rudrava*(2), as that case merely lays down the law applicable in Western India, and a different rule prevails in Southern India. Although the Mitakshara says nothing expressly about women other than widows being debarred from succession by unchastity, it is contended that it must be read with the Smriti Chandrika which is applicable to Southern India, and that, according to this authority, unchastity is a bar. I am unable to accept this contention. It is true that in Chapter XI, section 2, *pl.* 26, p. 190 of Krishnasami's translation, the Smriti incorporates the text of Vrihaspati as to the qualifications of a daughter to succeed, one of which is that she is to be "virtuous and devoted to obedience," but in Chapter V, *pl.* 15, the same authority adopts a text of Vrihaspati excluding sons destitute of virtue from inheritance. It cannot now be argued that a son could be excluded on the ground that he was destitute of virtue, and I fail to see why a different rule should be applied to daughters. The unchastity

(1) I.L.R., 5 Mad., 149. (2) I.L.R., 4 Bom., 104.

VEDAMMAL v. VEDANAYAGA MUDALIAR.

of the widow is expressly laid down as a ground of exclusion in numerous texts, but there is no such clear authority in favour of excluding other females, and in the absence of clear authority such exclusion ought not, in my opinion, to be enforced. For these reasons, and for the reasons given by my learned brother whose judgment I have had the advantage of reading, I see no grounds for refusing to follow the decision (*Kojiyadu* v. *Lakshmi*(1)). It was further argued that illicit intercourse with a person not belonging to an equal or superior caste *ipso facto* produces degradation without any formal exclusion from caste, but, even if this be so, degradation does not affect merely proprietary rights of the degraded person since the passing of Act XXI of 1850 (*Subbaraya Pillai* v. *Ramasami Pillai*(2)), and there is no authority for the contention that aggravated unchastity has that effect. In the result, I think, the appeal must be allowed and the plaintiff's suit dismissed with costs throughout.

SANKARAN NAIR, J.—This is an appeal from the decision of the Subordinate Judge, declaring that the plaintiff is entitled, as the nearest reversioner, to the properties of Sankaramurthi Mudali in preference to his mother, the defendant, who, it is contended, has forfeited her rights on account of her having been a party to the murder of her son Sankaramurthi "and owing also to her unchastity and loss of caste."

It has been already decided by the High Court that the defendant would not be entitled to any beneficial interest in inheritance, if she is proved to have been a party to the murder as alleged by the plaintiff. That question, therefore, is not open to us for consideration. We have only to see whether the facts proved justify the conclusion of the lower Court.

Sankaramurthi Mudali's father died in 1887, leaving a valuable estate to his only son, who was then only two years old. The latter lived with his mother, the defendant, till 1897 when she appointed a Muhammadan, Sheik Abdul Kadir Saheb, as an agent under a general power of attorney. This agent lived with the defendant in her house; Sankaramurthi objected to it, and went to live with his mother's sister's son Sankaralinga Mudali at Thiruppudaimaruthur, while the defendant, his mother, continued to live with her Muhammadan agent in his house at Vikremasingapuram.

(1) I.L.R., 5 Mad., 149. (2) I.L.R., 23 Mad., 171.

VEDAMMAL v. VEDANAYAGA MUDALIAR.

Sankaralinga early in 1897 applied to the District Court for the removal of the defendant from the guardianship of her son, the deceased, and the appointment of another guardian (exhibit S). The Court appointed the defendant's brother as guardian (exhibit U). The High Court on appeal by the defendant ordered that the defendant should be joint guardian with her brother (exhibit BB). Subsequently, the brother refused to act as a guardian and the defendant then prayed for the appointment of another joint guardian. The District Judge, finding that there was no proper person to be appointed as guardian, ordered the appointment of a Receiver to the estate. The High Court on appeal held (exhibit NN) that the District Judge had exceeded his powers and called for a finding. Among the witnesses examined by the Judge was the deceased who deposed that he had to leave his house as the Muhammadan agent was living with his mother in that house (exhibit P). This was on the 14th July 1900. On the 18th July, the District Judge submitted his finding to the High Court in which he recommended that the defendant might be appointed sole guardian.

On the night of the 25th August, the deceased left the house of Sankaralinga Mudali and disappeared. On the morning of the 27th his body was found lying partly in the water in the river at Athalanallur, just south of the village in which he was living. It was buried by order of the Village Magistrate. But on Sankaralingam's complaint setting out his suspicions against the defendant and her agent, Sheik Abdul Khader, the body was exhumed on the 2nd September in the presence of the Magistrate, the Station House Officer, and the Medical Officer. The *post mortem* showed that the deceased met his death by strangulation. Sheik Abdul Khader, his brother Kuppai Rowther, one Manikam, and the defendant were tried, the first three for murder and the last for abetment thereof. The defendant was acquitted and the others convicted and sentenced to transportation for life.

It is also in evidence that there was a proposal, shortly before his alleged murder, to marry the deceased to a girl of an influential family in the locality. [The Judge discussed the evidence at length and continued.] For these reasons I am unable to hold that the defendant has been proved to have been a party to the murder of her son.

VEDAMMAL v. VEDANAYAGA MUDALIAR.

It is then argued that as the defendant has been proved to have been unchaste before the death of her son, she is not entitled to succeed to him under the Hindu Law. This question has been decided by this High Court in favour of the appellant, defendant, in *Kojiyadu* v. *Lakshmi*(1), which has been approved in *Angammal* v. *Venkata Reddy*(2). This Court followed a decision of the Bombay High Court (*Adyapa* v. *Rudrava*(3)). In Allahabad, though the point did not arise directly for decision, the only opinion that has been expressed on the point is in favour of that view (*Musammat Ganga Jati* v. *Ghasita* (4)). In Calcutta a different view has been taken in *Ramnath Tolapattro* v. *Durga Sundari Debi*(5); *Ramananda* v. *Raikishori Barmani*(6); *Sundari Letani* v. *Pitambari Letani*(7). These cases refer to the daughter's claim. But that does not make any material difference. The learned Judges refused to follow the Madras and Bombay decisions as "they are all under Schools of Hindu Law other than the Bengal School and were decided with reference to authorities different from those that are specially followed in the district with which we have now to deal" (*Ramananda* v. *Raikishori Barmani*(6)). These decisions therefore form no ground for a review of the decision of this Court. In my opinion we are therefore concluded by authority.

But as the question has been argued at great length before us, I proceed to give my opinion. After giving full weight to the arguments advanced, I see no reason to differ from the conclusion arrived at by the learned Judges of this Court, that unchastity is not a ground for excluding any female heir except a widow from succession. Mr. Mayne is of opinion that the causes entailing civil disability are reduced to those originally stated by Manu with the addition of lunacy and idiocy and any incurable disease which is now limited to the worst form of leprosy—§ 592. Neither Manu nor Yagnavalkya refers to 'unchastity' as a disability. 'Vice' is stated to be a ground of exclusion of heirs by Narada and this is made applicable by Vignaneswara to females also in *pl.* 8, section X, Chapter II of the Mitakshara. But the High Courts in India have refused to treat it as such and it is

(1) I.L.R., 5 Mad., 149.
(2) I.L.R., 26 Mad., 509.
(3) I.L.R., 4 Bom., 104.
(4) I.L.R., I All., 46.
(5) I.L.R., 4 Calc., 550.
(6) I.L.R., 22 Calc., 347 at p. 354.
(7) I.L.R., 32 Calc., 871.

VEDAMMAL v. VEDANAYAGA MUDALIAR.

only relied upon before us to support the probability of unchastity being regarded as a legal disqualification by the Hindu Lawgivers. 'Unchastity' is not mentioned as a bar to succession in the Mitakshara, and the full discussion of several grounds of exclusion including some which are not now recognized as such in Chapter X, section II, without any reference to unchastity, and the express reference to it as a preliminary condition to succession in the case of a widow in *pl.* 6 and *pl.* 18, section I, Chapter II, strongly support the view that, in the case of other heirs, like the daughter and the mother, no such disqualification exists.

That unchastity by itself is not a disqualifying cause has been decided also by the Calcutta High Court in *Nogendra-Nandini-Dassi* v. *Benoy Krishna Deb*(1), in which it was held that a woman is not thereby disqualified from inheriting *stridhan*, as in that case inheritance depends on consanguinity.

The rule of exclusion is deduced from the theory of Hindu Law that the heir takes the inheritance for the performance of the ceremonies essential to the spiritual welfare of the deceased and his incapacity therefore to perform his obligations excludes him from succession. Now what are the grounds on which the mother's right of inheritance is based ?

In the digest the following old texts are cited :

"A mother surpasses a thousand fathers, for she bears and nourishes the child in her womb: therefore is a mother most venerable."

Vyasa—"Ten months a mother bore her infant in her womb, suffering extreme anguish; fainting with travail and other pangs, she brought forth her child." "Loving her sons more than her life, the tender mother is justly revered: who could recite all her merits, even though he spoke a hundred years?"

Other texts are also cited showing the superiority of one parent to the other.

Coming now to the commentaries, the author of the Mitakshara after declaring the right of the parents to succeed to the property of a deceased son in the absence of nearer heirs, in sloka (1) which run thus:—"On failure of those heirs, the two parents, meaning the mother and the father, are successors to the property"

(1) I.L.R., 30 Calc., 521.

VEDAMMAL v. VEDANAYAGA MUDALIAR.

proceeds to discuss the question of preference of the mother over the father. He draws an inference in favour of the mother from the compound term *Matapitarau* which has been reduced to '*Pitarau*' and then proceeds thus:

Chapter II, section 3:—(3) "Besides, the father is a common parent to other sons, but the mother is not so: and since her propinquity is consequently greatest, it is fit that she should take the estate in the first instance conformably with the text "To the nearest *Sapinda* the inheritance next belongs."

(5) "Therefore since the mother is the nearest of the two parents, it is most fit that she should take the estate. But on failure of her, the father is successor to the property."

The author defines *sapindaship* to arise "between two people through their being connected by particles of the one body" without any reference to the capacity to offer religious oblations. Thus the mother's right of succession is not made to depend upon her capacity to perform any ceremonies, or on the ground she may have a son to offer oblations as a condition precedent to succession. There is no reference to her chastity. It is based on the ground of her having borne and nourished the son in the womb. The author of the Mitakshara bases her right to take her place before the father upon her nearer relationship to the deceased. The Smriti Chandrika also has no reference to the capacity of the mother to confer spiritual benefits on the son.

This view of Vigneswara that the mother's claim to inherit is based on consanguinity is in harmony with his doctrine which prefers family relationship to efficacy of religious offerings as pointed out by Mr. Mayne § 512, pp. 692 and 510, 511, 512, 513 and § 521 at p. 708, and also in various decisions of this Court.

Jimutavahana, no doubt, introduces the religious element. Dayabhaga, Chapter XI, section IV, sl. 2, contains the following reasons of her succession :

"It is necessary to make a grateful return to her for benefits which she has personally conferred by bearing the child in her womb and nurturing him during his infancy, and also because she confers benefits on him by the birth of other sons who may offer funeral oblations in which he will participate." The additional ground here given would not apply to the widowed mother of an only son, who is nevertheless acknowledged to be an heir, or, as Mr. Mayne observes, "to the mother of an only son or of a son

whose brothers had died before him without leaving issue." The birth of other sons is clearly not indispensable for a recognition of the right, and religious efficacy is not the main cause even according to the Dayabhaga. In fact, Jimutavahana was only trying to justify by spiritual considerations in accordance with his principle that the test of heirship is religious merit, a right of succession already well established. This will also appear from the principle of succession with reference to daughters laid down in the Dayabhaga.

If we now compare the case of the daughter with that of the mother, it will be found as in the case of the mother that while the Mitakshara, Chapter II, section 2, section 2 bases such right on the simple ground of consanguinity, the Bengal lawyers put it on the ground that she produced sons who could present oblations, and Jimutavahana accordingly, unlike Vignaneswara, lays down that no daughter could inherit unless she had or was capable of having male issue with the result that daughters who are widows or barren or who appeared to have an incapacity for bringing any but daughters into the world were excluded—Dayabhaga, Chapter XI, section 2, § 1. The failure of Jimutavahana to push to its natural and logical conclusion his theory in the case of the mother by similarly excluding widowed mothers and those who only had the capacity for bringing daughters into this world, is remarkable, and shows that in his opinion it is only, as pointed out already, an additional argument advanced in support of the mother's claim. The Smriti Chandrika follows this doctrine of religious efficacy in this respect and similarly excludes barren daughters, and insists upon the daughter being "virtuous and devoted to obedience." This is only a moral precept. Further, this Court has, after a full consideration, rejected the authority of the Smriti Chandrika with reference to the principles on which the daughter's right of succession is based, and has held, subsequent to the decision in *Adviapa* v. *Rudrava*(1) that, consanguinity alone is the cause of her succession (*Simmani Ammal* v. *Muttammal*(2)). This comparison with the daughter's right of succession shows very strongly that the mother's claim rests on consanguinity and not on religious merit, and incapacity to inherit, due to inability to perform sacrifices cannot therefore be presumed.

(1) I.L.R., 4 Bom., 104. (2) I.L.R., 3 Mad., 265 at p. 269.

This view receives confirmation from the texts relating to the widow's right of succession.

The texts which are relied upon to exclude the unchaste widow are the following:—

Mitakshara, Chapter II, section I, *pl.* 18 and 6.

Dayabhaga, Chapter XI, section 7.

Vridha Manu—"The widow of a childless man, keeping unsullied her husband's bed, and persevering in religious observances, shall present his funeral oblation and obtain his entire share."

Katyayana—"Let the childless widow, keeping unsullied the bed of her lord and abiding with her venerable protector, enjoy with moderation the property until her death."

It will be observed that chastity is made a preliminary condition in the case of the widow while it is not referred to in the texts relating to the mother. Further, it seems to be also clear that they are not intended to apply to the mother succeeding to her son. Accepting the view that prevailed in Bengal that an unchaste mother or daughter is excluded, their Lordships of the Judicial Committee of the Privy Council say "It seems clear that such exclusion is not by virtue of either the abovementioned texts of Vridha Manu or that of Katyayana. These texts have reference to the deceased owner of the estate. The words 'his funeral oblation' and 'his share' and 'the property' have reference to the oblation, the share and the property of the lord, or husband mentioned in the preceding parts of the texts, whose estate is to be inherited, and not to the husband or lord whose estate is not to be inherited, such as the husband or lord of the daughter or the mother, as the case may be, of the deceased owner, who in default of a widow may be next in succession to inherit an estate."

These verses, though not applicable to the succession of the mother in so far as they impose the condition of chastity, it is contended, are extended to the succession of females generally by verses 30 and 31 of Chapter XI, section II, of the Dayabhaga. But the Privy Council have held that they so extend only the rule applicable to a wife that a gift, sale, or mortgage of the estate is not to be made and that after her death the heirs of the deceased owner are to take, and not that part of the rule, which

VEDAMMAL v. VEDANAYAGA MUDALIAR.

is included in the words "keeping unsullied the bed of her lord" (*Moniram Kolita* v. *Keri Kolitani*(1)).

The theory of religious efficacy is thus only extended to other female owners to restrict their powers of alienation and to make their succession only an interposition to pass the estate to the next heir of the last male owner. It is not so extended by these texts as to impose the obligation of chastity as a condition precedent to succession. This is admitted by the Calcutta High Court, but they hold that it is the commentary of Raghunandana, "a high authority in the Bengal School" according to that High Court, read with the other texts that leads to the exclusion of the unchaste mother and daughter.

When the texts and the Dayabhaga according to their Lordships of the Privy Council do not lead to that conclusion, their extension by a recent commentator—for Raghunandana is believed to have lived in Bengal in the sixteenth century—cannot be followed unless he has been accepted as an authority in this Presidency. He wrote for a different state of society under Muhammadan rule or influence, while Southern India was under Hindu rule and I am not aware that his sole authority has been accepted on any questions in this Presidency. I see therefore no reason to differ from *Kojiyadu* v. *Lakshmi*(2).

The only other ground of exclusion alleged in the plaint is loss of caste. That the defendant is expelled from caste is not found by the lower Court, nor is it proved by any evidence in this case.

It was then argued that though adultery with a person of the same or higher caste might not cause degradation, yet in its aggravated form, that is, with a person of a lower caste or with one not a Hindu, it makes the person 'degraded' according to the Hindu Law and is therefore a legal disqualification.

For this proposition no authority has been cited. It was not apparently raised in the lower Court and no evidence adduced to show that the defendant has been treated as one 'degraded' by her caste on account of her unchastity; and evidence of 'degradation,' if true, should have been forthcoming, as her son appears to have left his house in 1897 on account of her criminal intimacy

(1) I.L.R., 5 Calc., 776 at p. 787. (2) I.L.R., 5 Mad., 149.

VEDAMMAL v. VEDANAYAGA MUDALIAR.

with Sheik Abdul Khader, which seems from the plaintiff's evidence to have been open and notorious.

Further, when this case came before this Court for decision on the preliminary questions, it was held that the rules regarding loss of proprietary rights as incident to degradation cannot now be treated as otherwise than obsolete. I agree in that view and in the reasoning that led to it.

I would therefore reverse the decree of the lower Court and dismiss the suit with costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Munro.

THE CHAIRMAN, MUNICIPAL COUNCIL OF RAJAHMUNDRY (PLAINTIFF), APPELLANT,

1907. November 29. December 10.

v.

SUSURLA VENKATESWARLU *alias* VENKATAKRISHNA BRAHMA SASTRULU AND ANOTHER (DEFENDANTS), RESPONDENTS.*

District Municipalities Act (Madras)—Act IV of 1884, s. 26—Power of Municipality conferred by the section wider than that conferred by Regulation VII of 1817 on Revenue Board—Municipality has under s. 26 of Act powers of actual management and can maintain suit on bonds in the name of the superseded trustee without obtaining an assignment.

The powers conferred on a Municipality in respect of charitable endowments when action is taken under section 26 of the District Municipalities Act are wider than those conferred on the Board of Revenue by Regulation VII of 1817. Under the Regulation, the Board has only powers of superintendence but Municipalities have, under the Act, powers of actual management in addition to the power of superintendence vested by the Regulation in the Board of Revenue. It is competent to a Municipality which has taken action under section 26 in respect of a charitable endowment to maintain a suit on a bond standing in the name of the superseded trustee without obtaining an assignment of such bond.

THIS was a suit brought by the Chairman of the Rajahmundry Municipal Council to recover the amount due under a mortgage bond executed by the mother and guardian of first defendant in

* Second Appeal No. 716 of 1905, presented against the decree of J. H. Munro, Esq., District Judge of Kistna at Musulipatam, in Appeal Suit No. 531 of 1901, presented against the decree of M.R.Ry. S. Ramaswami Ayyar, District Munsif of Masulipatam, in Original Suit No. 414 of 1899.

THE CHAIRMAN, MUNICIPAL COUNCIL OF RAJAHMUNDRY v. SUSURLA VENKATESWARLU.

favour of one Durba Venkamma who was at the time of its execution the trustee of a charitable endowment known as the Durbhavari choultry in Rajahmundry. This lady was removed from the office of trustee on the ground of mismanagement and Government, on the motion of the Board of Revenue, transferred the management and superintendence of the choultry to the Rajahmundry Municipality by which the present suit is brought.

It was contended *inter alia* that, there having been no assignment to plaintiff in writing of the mortgage, the plaintiff was not entitled to maintain this suit.

The management and superintendence of the trust was made over to the plaintiff under section 26 of the District Municipalities Act (IV of 1884).

The District Munsif held that the plaintiff was entitled to maintain the suit without an assignment and decreed in his favour.

The District Judge held that he was not so entitled and reversed the decree.

The plaintiff appealed to the High Court.

T. V. Seshagiri Ayyar and *T. V. Muthukrishna Ayyar* for appellant.

The Hon. The Acting Advocate-General for first respondent.

P. Nagabhushanam for second respondent.

JUDGMENT.—One Venkamma was trustee of a choultry at Rajahmundry. As she was guilty of mismanagement, action was taken under section 26 of the District Municipalities Act IV of 1884, and the management and superintendence of the choultry were made over to the Municipal Council of Rajahmundry. Venkamma did not contest the matter. She gave up to the Municipal Council all the property belonging to the choultry including sundry documents. One of these documents is the mortgage bond on which the present suit by the Chairman of the Municipal Council of Rajahmundry is brought. The only question for determination is whether the plaintiff can maintain the suit without an assignment in writing of the bond. The District Judge has held that the plaintiff cannot maintain the suit because his powers are no greater than those of the Board of Revenue whose powers are only powers of superintendence, and the judgment is supported by the learned Advocate-General on this sole ground. It is true that the powers which the Board of

THE CHAIRMAN, MUNICIPAL COUNCIL OF RAJAHMUNDRY v. SUSURLA NENKATESWARLU.

Revenue has under Regulation VII of 1817 are primarily powers of supervision and control designed to ensure due appropriation by existing trustees of endowments to the purpose for which they were destined—*vide Ponduranga* v. *Nagappa*(1). In the present case, prior to the transfer to the Municipality, the Board of Revenue had only the powers just mentioned and could not have maintained a suit on the bond. But the contention that the Municipality has merely stepped into the shoes of the Board of Revenue and has no greater powers does not seem to be correct. What was made over to the Municipality under section 26 of the District Municipalities Act was not only the superintendence of the choultry, but also the actual management. This is clear from the Government Order which follows the wording of the section. The section no doubt says that, after the management and superintendence of the endowment have been made over, all powers and duties which attached to the Board of Revenue in respect of the endowment shall attach to the Municipal Council. It does not follow that these are the only powers and duties that attach. The powers and duties of management which did not attach to the Board of Revenue in the present instance were also given by Government to the Municipality. This being found, it is not contended that any formal assignment in writing of the suit bond would be necessary in order to enable the plaintiff to maintain the suit. The lower Court's decree is therefore set aside, and the suit remanded for disposal on the merits. Costs will abide the event.

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(1) I.L.R., 12 Mad., 366 at p. 368.

APPELLATE CIVIL.

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

1908. January 7.

KRISHNAMA CHARIAR (PLAINTIFF), APPELLANT,

v.

NARASIMHA CHARIAR (DEFENDANT), RESPONDENT.*

Civil Procedure Code, Act XIV of 1882, *s.* 568—*Fresh evidence admissible when inherent defect apparent on examining the evidence—Document purporting to be executed by two persons but signed by only one not invalid.*

The legitimate occasion for the admission of additional evidence by the Appellate Court under section 568 of the Code of Civil Procedure arises only when, on examining the evidence as it stands, some defect becomes apparent. Where fresh evidence is discovered outside the Court, such evidence can be imported into the case on an application under section 623 of the Code. *Kessowji Issur* v. *Great Indian Peninsula Railway Company*, (I.L.R., 31 Bom., 381), followed.

A deed is not invalid because one only of several parties who purported to execute it actually signed it.

THE facts are thus stated in the judgment of the lower Appellate Court.

"Suit for redemption. The suit land admittedly was plaintiff's ancestral' property, and the plaintiff's case was that he and his uncle had mortgaged it to the father of defendants Nos. 1 to 4 for Rs. 50. Defendants, except No. 3, pleaded that it was not a mortgage, but an outright sale. The alleged mortgage and sale were both unregistered documents, and both are alleged to have been executed in *Dhatu*. Neither documents were produced at the first trial. The District Munsif considered plaintiff's evidence more reliable and gave a decree. The first defendant appealed.

After the appeal was filed, the appellant discovered the document, exhibit III, and produced it. Fresh evidence was taken by the Munsif, and the appeal has again come up for hearing, and the question for decision now in appeal is whether, in

* Second Appeal No. 299 of 1905, presented against the decree of K. C. Manavedan Raja, Esq., District Judge of North Arcot, in Appeal Suit No. 277 of 1903, presented against the decree of M.R.Ry. A. Sambamurti Ayyar, District Munsif of Ranipet, in Original Suit No. 73 of 1903.

the face of the evidence now on record, the alleged mortgage of plaintiff is true. I feel no hesitation in finding that it is not.

* * * *

I am convinced that exhibit III, the sale deed now produced, is genuine.

The body of exhibit III shows that it was intended to have been executed by plaintff and one Varadachari, but, actually, it bears the signature of only the plaintiff. The case of *Sivasamy Chetti* v. *Sevugan Chetti* (I.L.R., 25 Mad., 389) was cited by the respondent's vakil to show that, even if exhibit III be genuine, it must be considered as an incomplete instrument having no effect. That decision does not enunciate any such general proposition, and apparently relates only to the facts of the particular case. Moreover, in this case, exhibit IV has also a similar recital, and bears the signature of plaintiff alone. This shows that that was a recognised practice among them. Granting, however, for argument's sake, that exhibit III has not been completed, I think it is more than enough to show that plaintiff's alleged mortgage is untrue.

* * * *

I therefore find the first issue for the defendants and dismiss the plaintiff's suit."

The plaintiff appealed to the High Court.

The first and fourth grounds of appeal were as follows:—

"That the lower Appellate Court erred in admitting exhibit III at the late stage of the case without any grounds for the same.

That the lower Appellate Court had not recorded any reasons for admitting new evidence on appeal."

T. Rangachariar for appellant.

T. V. Seshagiri Ayyar and *T. Narsimha Ayyangar* for respondent.

JUDGMENT.—The main question for consideration in this appeal is with reference to the jurisdiction of an Appellate Court, under section 568 of the Code of Civil Procedure, to admit additional evidence. This question was recently considered by the Privy Council in *Kessowji Issur* v. *Great Indian Peninsula Railway Company*(1), and the law is laid down in the following terms:—

. . . "the legitimate occasion for section 568 is when, on examining the evidence as it stands, some inherent lacuna or defect

(1) I.L.R., 31 Bom., 381.

KRISHNAMA CHARIAR v. NARASIMHA CHARIAR.

becomes apparent, not where a discovery is made, outside the Court, of fresh evidence, and the application is made to import it. That is the subject of the separate enactment in section 623."

No doubt in the case before us the defence was that a sale deed had, in fact, been executed, and also the statement of the law referred to was made with reference to the special circumstances of that case, viz., that the Appellate Court in dealing with the appeal was, in fact, reviewing and reversing an order by the Court of First Instance, refusing to grant a review on the ground of the discovery of new evidence; but, having regard to the general terms in which the law is laid down in the passage of the judgment of the Privy Council which has been cited, we do not think we should be warranted in holding that, as regards the question before us, the present case can be distinguished from the case before the Privy Council, and we think that the statement of the law of the Privy Council is applicable to the present case.

As regards the contention that the sale deed was ineffective on the ground that it was only signed by one of the parties who purported to execute it, we see no reason to differ from the view of the District Judge.

As we are of opinion that, having regard to the statement of the law by the Privy Council, we are bound to hold that the order by the District Judge admitting the sale deed in evidence was made without jurisdiction, we must set aside the decree of the lower Appellate Court and remand the case to that Court for disposal upon the evidence which was before the Court of First Instance at the first hearing. Costs will abide the event.

APPELLATE CIVIL.

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

AIYASAMI AIYAR (THIRD PLAINTIFF), APPELLANT,

v.

THE DISTRICT BOARD, TANJORE, AND OTHERS (DEFENDANT AND FIRST AND SECOND PLAINTIFFS), RESPONDENTS.*

1907. March 12. December 4, 5, 6. 1908. January 8.

Local Boards Act (Madras)—Act V of 1884, s. 95—Act throws on Local Boards the duty of making necessary improvements in roads by necessary implication—Board not liable for damage caused by such works, when not negligently carried out.

The duty imposed on District Boards by section 95 of Madras Act V of 1884 to construct and maintain roads casts on them by necessary implication the duty of constructing and maintaining the necessary culverts and tunnels under them. This implied power to construct and maintain such culverts and tunnels is not merely permissive, to be exercised only when no injury will be caused to others thereby, but an imperative duty cast on the Board by the Act.

No suit for injunction or damages will lie against the District Board for any injury caused by the construction or improvement of such works, when such works or improvements are necessary in the interests of the public for the maintenance of the road, and there is no negligence in the carrying out of the work. *Sankara Vadivelu Pillai* v. *Secretary of State for India in Council*, (I.L.R., 28 Mad., 72), distinguished.

THE facts are fully set out in the judgment of the lower Appellate Court which was as follows:—

"The appellant, that is, the District Board Tanjore, enlarged the ventways of two tunnels bearing Nos. 140 and 141 in road which is situated west of Pattamangalam village. Respondents No. 35, who are the inhabitants of this village brought the suit for a permanent injunction to restrain the District Board from altering the original dimensions of the ventways, and for a mandatory injunction to cause the restoration of the ventways to their original dimensions.

A channel flowing west of the road crosses the road by four tunnels and irrigates the plaintiff's village. Plaintiffs complain that on account of the enlargement of two of the tunnels, a larger

* Second Appeal No. 584 of 1904, presented against the decree of M.R.Ry. T. T. Ranga Chariar, Subordinate Judge of Kumbakonam, in Appeal Suit No. 764 of 1903, presented against the decree of M.R.Ry. S. Ramaswami Ayyar, District Munsif of Mayavaram, in Original Suit No. 185 of 1902.

AIYASAMI AIYAR v. THE DISTRICT BOARD, TANJORE.

quantity of water than necessary is thrown upon their lands; that the drainage channel passing east of the road has not the capacity to drain away the said water; that their lands are therefore rendered unfit for cultivation, and that they suffer great loss. They also state that the injury they have thus to suffer every year cannot be adequately compensated for in money.

Defendant contends that plaintiffs have no right to insist on the ventways being maintained at particular dimensions; that the Board is under a statutory obligation to maintain the road and the tunnels underneath it in good order; that, owing to the incapacity of the old tunnels to drain away the water of the channel, the road was often damaged and the persons who had to use it were put to inconvenience; that the enlargement complained of was therefore legitimate; and that plaintiffs cannot maintain this suit.

The District Munsif found that the enlargement of the tunnels was calculated to cause injury to plaintiffs' lands, that the defendant was not justified in having carried out the enlargement without adequately protecting plaintiffs' lands from inundations, and that plaintiffs are entitled to the injunctions asked for."

The Subordinate Judge held that the Board being enjoined to maintain the roads in proper order was not responsible unless it was shown that it had exceeded or abused its powers, or exercised them negligently so as to cause injury to others. He reversed the judgment of the lower Court and dismissed the suit.

The third plaintiff appealed to the High Court.

T. V. Seshagiri Ayyar and *B. Govindan Nambiar* for appellant.

The Hon. Mr. *V. Krishnaswami Ayyar* for first respondent.

JUDGMENT.—The plaintiffs on behalf of themselves and other landholders seek for a permanent injunction restraining the District Board of Tanjore from increasing the size of two tunnels or culverts passing under a public road. The road runs from north to south, and, for a part of its length, on the west side of it, and running parallel with it, there is an irrigation channel called the Pallavan channel; it is in this part of the road that the two tunnels in question are situated, and water from the Pallavan channel passes through them under the road, and is used for the irrigation of the seed beds of the plaintiffs and other landholders, lying on the east side of the road. These two tunnels having fallen into disrepair the District Board, the authority responsible for the maintenance of the road,

AIYASAMI AIYAR v. THE DISTRICT BOARD, TANJORE.

decided, in repairing them, to increase their size, the object being to allow a greater volume of water to pass through them and thus to prevent the waters on the west side of the road from rising in the rainy season to such a height as to damage the road surface. The complaint of the plaintiffs is that the increased volume of water discharged by the tunnels is, or is likely to be, too great to be carried off by the channels on the east side of the road, and that consequently their fields will be submerged and their crops injured.

Both the lower Courts find that they will be injured in the way they allege, and the question is therefore whether they are in these circumstances entitled to the injunction for which they pray.

We endeavoured, by calling for a finding of fact, to ascertain whether the tunnels were constructed at or after the time of the construction of the road for the purposes of the road, or whether they existed before the construction of the road as irrigation conduits or pipes. The Subordinate Judge has however been unable to find any evidence sufficient to establish either position, and is able only to find that for fifty years or so the tunnels and the road have existed together without alteration in the dimensions of the former.

We must take it, then that the road was vested in the Local Fund Board by section 8 of Madras Act IV of 1871 and transferred to the District Board by section 4 (iii) of Act V of 1884 and that when it first vested in the Local Fund Board the two tunnels now in question were in existence.

It seems to be accepted by both sides that the injury to which the plaintiffs' lands are liable will be caused if caused at all, by the waters of the Pallavan channel, but there is no finding whether it will be caused when the water in the channel is at its normal level in the irrigation season, or when it is at its ordinary seasonal flood level, or only at a time of extraordinary flood.

There is some evidence and a finding by the Subordinate Judge that injury is done annually to the road in the rainy season, but on the question of the injury done to the plaintiffs' lands the only evidence referred to by the District Munsif showed that even in a time of 'unprecedented' rain, a protective bank on the east side of the road was sufficient to prevent any damage. The findings of fact being in many respects wanting in precision, the case has been argued upon both sides upon the footing that the

AIYASAMI AIYAR v. THE DISTRICT BOARD, TANJORE.

District Board to make a successful defence must rely on the powers conferred upon it by the Local Boards Act V of 1884, and we deal with the matter on this footing.

Mr. Seshagiri Aiyar contends that the power given to the Board to construct culverts under their roads, if it exists at all, is merely permissive, and can be exercised only in such a way that no injury is done to others. But this contention will not bear examination. By section 95 of Act V of 1884 (Madras) the District Board is directed to provide so far as its funds allow, for the construction, repair, and maintenance of roads, bridges, and other means of communication. The road in question is, it is not denied, one of the roads to which the provisions of this section are applicable, and, even assuming that, a culvert or tunnel is neither a 'bridge' nor a 'means of communication,' it is vested by section 50 of the Act in the District Board, and it is clearly impossible, or so it seems to us, for the Board to maintain the road passing over a culvert or tunnel unless it at the same time maintains the culvert or tunnel which by the Act, is vested in it. The duty cast upon the Board of maintaining the road necessarily involves then the duty of maintaining the necessary culverts and tunnels under it. It can hardly be denied that an authority to construct a 'road' carries with it the authority to construct the water-ways necessary to enable the road to be carried safely across the drainage of the country, and we did not hear from Mr. Seshagiri Aiyar any argument which should lead to the application of a different rule in the case of a road which was vested, ready made, in the District Board in 1884. If in order to 'maintain' such a road it is necessary to improve the water-ways it seems to us that there is imposed upon the District Board the duty of making the necessary improvements. Mr. Seshagiri Aiyar relied upon the judgment of Sir Subrahmanya Ayyar, J., in *Sankaravadivelu Pillai* v. *Secretary of State for India in Council*(1) and likened the culverts or tunnels in the present case to the 'bye-wash' dealt with in that case. He argued that they are to be treated as 'new works' constructed under an authority which is "in the strict sense of law permissive."

We think the two cases are distinguishable. In the case before us the statute enjoins the maintenance of the road and does

(1) I.L.R., 28 Mad., 72.

AIYASAMI AIYAR v. THE DISTRICT BOARD, TANJORE.

not confine the Board to its maintenance as originally designed and executed; and in the absence of any such express restriction, we are of opinion that the injunction to maintain imposes the duty to provide such new works as it may be found necessary from time to time to provide in order that the road may be properly maintained.

There is no resemblance between the present case and the case of *Canadian Pacific Railway* v. *Parke*(1) in which Lord Watson makes use of the phrase "in the strict sense of law permissive." In that case the authority was given to the defendant for his own benefit; here it is given solely for the benefit of the public: the District Board makes no profit out of the roads. There having got the water to his land the defendant was entitled to use it or not as he pleased in irrigating that land or any part of it: here it is the duty of the Board to provide so far as its funds admit, for the proper maintenance of the road. The cases are far apart. The case before us is nearer to the case of *London, Brighton and South Coast Ry. Co.* v. *Truman*(2) where for the purposes of the cattle traffic on the railway the Company was authorised to acquire land for, and to construct cattle docks and yards—which when constructed formed as Lord Watson says in *Canadian Pacific Railway* v. *Parke*(1), "just a part of the railway" which it was the business of the Company under its statute to make.

The case of *Cracknell* v. *Mayor, etc., of Thetford*(3) may also be referred to in this connection.

It may no doubt be suggested that in these cases the work done was expressly authorised by the statute, but we do not think that that makes any real difference: in the present case as we have endeavoured to show the power is given by necessary implication. Mr. Seshagiri Aiyar suggested that we cannot imply more than a mere permissive authority in the present case because it was not incumbent on the District Board to put a culvert in the place which was selected for it; but the case *London, Brighton and South Coast Ry. Co.* v. *Truman*(2) is sufficient authority for the contrary view. We may also refer to the opinion expressed by Sir George Jessel in *Hawley* v. *Steele*(4), a case where land acquired

(1) 1899, A.C., 535.
(2) 11 A.C., p. 45.
(3) L.R., 4 C.P., 629.
(4) 6 Ch.D., 521.

AIYASAMI AIYAR v. THE DISTRICT BOARD, TANJORE.

for purposes of the defence of the realm was utilized for rifle shooting in such a way as to be a nuisance to a resident in the vicinity. The Master of the Rolls was of opinion that "the power conferred upon the military authorities was a legal right to the use of the land for that purpose, although such a use would, without the authority of parliament, have been illegal. If that is so, it is impossible to maintain an action for nuisance," and he pointed out that it was not for the Court to decide for what purpose any particular part of the land was to be used.

It is found that action was necessary to prevent the annually recurring injury to the road, and it is found that to accomplish this object three courses were open, (1) to raise the road way, (2) to construct a bank along the west side of the road, and (3) to enlarge the water-ways. The first two courses are practically identical in effect and is not clearly found that either of them by itself will be effective to prevent the mischief: the Subordinate Judge who accepts the District Munsif's finding seems to take it that it was necessary both to raise the road and widen the tunnels, and this is, we think, the effect of the District Munsif's finding and of the evidence to which he points in support of it. It is obvious that in the case of an embanked road the raising of the surface to any great extent, or the raising of one side of the road, may involve the narrowing of the road to an extent which impairs its utility, and that, in the present case, to erect a bank separate from the road along its western side may be impracticable from want of room, or so expensive that the funds of the District Board will not admit of its being done. There is therefore nothing apparently unreasonable in the finding that the extension of the water-ways was necessary in the interests of the public for the maintenance of the road. There was no negligence in the carrying out of the work, and the plaintiffs have not shown that the Board could have constructed a culvert at any other part of the road which, while effective to protect the road, would have done no injury to the lands on the east side of it.

We dismiss the Second Appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Miller.

1907. October 29, 30.

CHIDAMBARAM CHETTIAR (PETITIONER), APPELLANT,

v.

THE TINNEVELLY SARANGAPANI SUGAR MILLS COMPANY, LIMITED, REPRESENTED BY ITS OFFICIAL LIQUIDATOR MR. F. S. CLARK (RESPONDENT), RESPONDENT.*

Indian Companies Act VI of 1882, *s.* 149—*Contract Act, Act IX of* 1872, *s.* 221—*Lien of agent under s.* 221 *of the Contract Act not affected by winding up order under s.* 149 *of the Companies Act.*

An agent who is in possession of properties belonging to a Company under an agreement by which he was to advance monies for working expenses has, in the absence of a contract to the contrary, a lein on such properties under section 221 of the Contract Act for the amounts disbursed by him, and section 149 of the Companies Act does not authorise the Court to deprive the agent of his possession of the security.

The making of a winding up order will not affect his right to continue in possession and make the necessary disbursements as long as his possession continues; and as regards such disbursements also he will have the same lien and stand in the position of a secured creditor against the properties of which he was in possession as agent when dispossessed by order of Court.

THE petitioner and his father entered into an agreement on 23rd June 1891 with the President of the Sarangapani Sugar Mills Company by which they undertook to advance monies for the working expenses of the Company on condition that they were to be placed in possession of the factory and be paid a commission on the proceeds of the sugar sold and that they were to continue in possession until the monies advanced by them with interest were paid off.

Subsequently, an order of Court was passed for the winding up of the company and the official liquidator was appointed; and sometime after, on 5th December 1905 the properties of which petitioner was in possession were handed over to the official liquidator by order of Court without prejudice to any rights of the petitioner.

* Civil Miscellaneous Appeal, No. 6 of 1907, presented against the order of C. G. Spencer, Esq., District Judge of Tinnevelly, dated 18th December 1906, in Interlocutory Application No. 342 of 1906 in Miscellaneous Petition No. 265 of 1903.

CHIDAMBARAM CHETTIAR v. THE TINNEVELLY SARANGAPANY SUGAR MILLS COMPANY, LIMITED.

Petitioner applied in the present proceedings to have the monies advanced by him for working expenses, with interest and commission, paid as a first charge out of the sale proceeds of the sugar in the hands of the liquidator and to stand as a secured creditor in respect of any balance due against the assets of the Company.

The Court recognised his right to the payment of working expenses, commission, etc., only up to the date of the winding up, but as regards such amount it held that the petitioner had no charge against the sale proceeds of sugar or other assets of the company

The petitioner appealed to High Court.

K. Srinivasa Ayyangar for appellant.

Mr. *K. Ramanath Shenai* for respondent.

JUDGMENT.—We do not think that there is anything in the agreement between the petitioner and the Company to exclude the operation of section 221 of the Indian Contract Act. In so far as the expenditure incurred before the winding up order comes within that section the appellant is entitled to a lien. The District Judge was therefore wrong in refusing to recognise this lien which operated on the properties and goods in his possession at the date of the winding up order. Section 149 of the Indian Companies Act does not authorise the Court to deprive a secured creditor of possession of his security; but we understand that in this case possession was given up under the order of the Court, dated the 5th December 1905, without prejudice to the petitioner's right. If the petitioner was entitled to remain in possession by virtue of a lien under section 221 of the Indian Contract Act, the making the winding up order would not affect his right to remain in possession and continue to make the necessary disbursements. The subsequent disbursements are stated to have been made between the date of the winding up order and the handing over of possession. These disbursements in our opinion stand on the same footing as the disbursements made prior to the winding up order.

We must therefore set aside the order of the District Judge, and remand the case to him for the purpose of deciding what sum should be allowed in respect of disbursements subsequent to the winding up order and also for the purpose of deciding of what property the appellant was in possession as agent when dispossessed

by the Court, and for what amount he is entitled to a lien on such property under section 221 of Indian Contract Act. Fresh evidence may be taken. The appeal is allowed with costs here and in the lower Court. Costs will be paid out of the estate.

CHIDAMBARAM CHETTIAR v. THE TINNEVELLY SARANGAPANY SUGAR MILLS COMPANY, LIMITED.

APPELLATE CIVIL.

Before Mr. Justice Boddam and Mr. Justice Munro.

1908. January 17.

BUDRUDEEN SAHIB AND ANOTHER (FIRST AND SECOND PETITIONERS—THIRD AND FOURTH DEFENDANTS), APPELLANTS,

v.

ABDUL RAHIM SAHIB (RESPONDENT—PLAINTIFF), RESPONDENT.*

Civil Procedure Code, Act XIV of 1882, ss. 244, 278—When judgment-debtor objects as trustee, claim falls within s. 278 and the order on such claim is not appealable—Decree directing sale Waqf property valid.

Where the judgment-debtor or his representative objects to the attachment and sale of property in execution on the ground that he holds the property in trust for some third person or a charitable institution, the claim must be investigated under the provisions of sections 278—283 of the Code of Civil Procedure and not under section 244.

An order passed on such claim must be challenged by a regular suit and not by appeal.

A decree directing the sale of waqf property may, in certain circumstances, be valid. Such a decree is not against public policy and is not necessarily *ultra vires*.

THE facts of the case are sufficiently stated in the judgment.

G. S. Ramachandra Ayyar for appellant.

T. R. Venkatarama Sastri for The Hon. The Acting Advocate-General for respondent.

JUDGMENT.—The respondent obtained a decree for sale of certain property in a mortgage suit against the father of the appellants.

After decree, the defendant died and the respondent applied for leave to execute the decree against the appellants by sale of

* Civil Miscellaneous Second Appeal No. 14 of 1907, presented against the decree of F. D. P. Oldfield, Esq., District Judge of Tanjore, in Appeal Suit No. 383 of 1906, presented against the order of M.R.Ry. P. Aiyasami Mudaliar, District Munsif of Tiruvadi (Execution Application No. 71 of 1906 in Execution Petition No 1313 of 1905) (Original Suit No. 203 of 1901).

BUDRUDEEN SAHIB v. ABDUL RAHIM SAHIB.

the lands under section 234, Civil Procedure Code. The appellants opposed the application on the ground that the land ordered to be sold was 'Waqf' property of which they were in possession not as representatives of their deceased father but as hereditary trustees of the property.

The District Munsif held that he could not go into the question under section 244, Civil Procedure Code. On appeal the District Judge also held that section 244 did not apply, and if it did he dismissed the appellant's appeal.

The second appeal is brought from this decision. It is contended before us that no appeal or second appeal lies, as the appellant's only remedy is by proceeding under sections 278 to 283, Civil Procedure Code, and section 244 does not apply.

We think this contention is right. The appellant's objection is taken as trustees and in a different capacity to their position as representatives of their father, and in that capacity they are not within section 244.

This is the result of the decision in *Murigeya* v. *Hayat Saheb*(1) where it is stated that Ranade, J., laid down the proper procedure as follows:—"Where he asserts that he holds the property in trust for . . . . . some third person or body of persons, or a religious charity or institution, the claim must be investigated under the provisions of sections 278 to 283, and the order passed therein cannot be challenged by an appeal, but must form the subject of a separate suit."

See also *Ramanathan Chettiar* v. *Levvai Marakayar*(2) and *Kumaretta Servaigaran* v. *Sabapathy Chettiar*(3).

In this case there is no ground for holding that the decree is *ultra vires*. No question of public policy arises, for a decree for the sale of 'Waqf' property may, in certain circumstances, be perfectly valid. The cases cited from *Lakshmanaswami Naidu* v. *Rangamma*(4) and *Raja of Vizianagram* v. *Dantivada Chelliah*(5) therefore do not apply.

We dismiss the appeal with costs.

(1) I.L.R., 23 Bom., 237.
(2) I.L.R., 23 Mad., 195.
(3) I.L.R., 30 Mad., 26.
(4) I.L.R., 26 Mad., 31.
(5) I.L.R., 28 Mad., 84.

APPELLATE CRIMINAL.

Before Mr. Justice Benson and Mr. Justice Miller.

SANKAPPA RAI (SIXTH PRISONER), APPELLANT,

1908. February 5.

v.

EMPEROR, RESPONDENT.*

Misdirection to jury—Confession—Evidence Act, ss. 27 and 30—Confession of an accused person, which is not the immediate cause of the discovery of stolen property in the house of another accused cannot, under s. 30 of the Evidence Act, be considered as against such other accused—Statement made by a witness to a Police Inspector or to an investigating Magistrate who is not the Committing Magistrate, though in the presence of the accused, not admissible as evidence.

Under sections 27 and 30 of the Evidence Act, a confession made by one accused can be taken into consideration against another accused when such confession is the immediate cause of the discovery of some fact relevant as against such other accused; and a direction to the jury to take such confession into consideration, when it is not the immediate cause of any such discovery, is a misdirection.

It is also a misdirection to ask the jury to take into consideration against the accused a statement made by a witness before a Police Inspector or before a Magistrate, who, though an investigating Magistrate, is not the Committing Magistrate, when such statement is withdrawn before the Committing Magistrate and before the Court of Session.

THE facts of the case are sufficiently set out in the judgment.

K. Narayana Row for appellant.

The Public Prosecutor for respondent.

JUDGMENT.—The sixth accused is the appellant before us: he was charged with abetting a dacoity or receiving stolen property and has been found guilty of the former offence and acquitted of the latter, the verdict of the jury being that "it is doubtful whether he received the stolen property knowing it to be stolen."

The principal contentions in the appeal are that the Sessions Judge has misdirected the jury (1) in regard to a confession said to have been made by the first accused, and (2) in regard to the statements made by the second accused's wife Akku, prosecution witness No. 11.

* Criminal Appeal No. 780 of 1907, presented against the conviction and sentence of H. O. D. Harding, Esq., Sessions Judge of South Canara Division, in cases Nos. 40 and 41 of the Calendar for 1907.

SANKAPPA RAI v. EMPEROR.

The confession of the first accused was made to the Police Inspector, and was therefore inadmissible in evidence, but, under section 27 of the Evidence Act, if the first accused was in the custody of the police, so much of the information given by him might be proved as related distinctly to the discovery of the stolen property. The confession was to the following effect: The first accused had obtained a share of the property stolen in the present dacoity and in the other three and he would produce it . . . he had one mura of rice and one kalsige of horse gram, one umbreila, one piece of white cloth and one rupee. On the night of the dacoities the stolen rice muras were carried to the potel's (sixth accused's) house, and then potel gave three muras, to him, one to Patta (second accused) and one to Malinga. He had left the umbrella in the potel's house. The Sessions Judge directed the jury in the following terms: "The law recording confessions is that a confessional statement made by an accused to a public officer is not admissible against him, and it is perfectly just and reasonable because you can hardly believe that a person will voluntarily confess his guilt to a police officer; and if you take such a confession to be evidence against him, no doubt any body may be convicted on such evidence. But the law says, supposing that, in consequence of such information, property is discovered, then so much of the information is relevant and can be proved against that person. If a person merely says 'yes, I stole the property,' and if he afterwards says he did not say so, you may have reason to believe that his confession was not voluntary and true. But if it is said that he confessed and produced the property as being his share, then you have good reason to believe that the confession is a truthful thing unless the production of the property can be otherwise accounted for; and therefore the law wisely says that unless such corroboration is afforded a confession to the police is not relevant. But if you find corroboration and property is discovered in consequence of such statement, then to that extent it is a relevant matter, and therefore, in my opinion, the statement of the first accused that he had certain stolen property, that the potel gave one mura to him and one each to the second accused and to Maliga, and that the rest of the muras were with the potel is relevant as against first accused himself, and, as the section 30 of the Evidence Act says, such confession may be taken into consideration against such other person, that is against

SANKAPPA RAI v. EMPEROR.

second and sixth accused." It is first objected to this direction that the first accused was not at the time he gave the information in the custody of the police. The Police Inspector's evidence, however, implies that he was brought to him by a constable to Venkatakrishna Bhatta's house and the Sessions Judge, though he does not say so, might well have accepted this evidence as proving the custody. It was the duty of the Judge, not of the jury, to decide the point as being a matter of fact which it was necessary to prove in order to enable the confession to be admitted in evidence (Criminal Procedure Code, section 298, clause (d)), and his omission to state to the jury his finding on the point is not a misdirection and could not prejudice the accused. We think the Sessions Judge was wrong in leaving to the jury the consideration of the first accused's confession as against the sixth accused. He allowed the jury to take into consideration against the sixth accused the statement by the first accused that he had certain stolen property with him and that the sixth accused gave him one mura of rice and gave one mura of rice to the second accused and one to Malinga. These facts were not the immediate cause of the discovery of stolen property in the Potel's house (vide *Queen-Empress* v. *Commer Sahib*(1)), and it cannot be that a statement which would not have been admissible against the sixth accused if made by himself when in custody is admissible against him when made by a co-accused when in custody. The most that could be taken into consideration as affecting the sixth accused, would be so much of the information (if it amounted to a confession) as was the immediate cause of the discovery of some fact relevant against him. In the present case the fact that he was in possession of stolen rice and as that, in this case, was only the statement that the first accused carried some rice to him, which could not amount to a confession, there is here no confession which could be taken into consideration against the sixth accused.

In paragraph 9 of his charge to the jury the Sessions Judge deals with the evidence of the witness Akku, and, after pointing out that she at the trial (and we may remark also in the Committing Magistrate's Court) withdrew the statement which the Inspector alleged that she had made to him, directed the jury that if they believed the story which the witness told the Inspector, and

(1) I.L.R., 12 Mad., 153.

SANKAPPA RAI v. EMPEROR.

which was also recorded in a statement made to an investigating Magistrate though not to the Committing Magistrate. "It is a strong case against the sixth accused as also against some other accused"—clearly there is here a serious misdirection.

The Sessions Judge has told the jury that they may use as evidence against the accused a statement made behind their back and not tested by cross-examination. Whether the Judge is referring to the statement made to the Inspector, or to the statement Exhibit G made to the Magistrate Saldanha, the result is the same: neither statement is evidence against the accused: for even if the latter statement was made in the presence of the accused, which does not appear, section 288 of the Criminal Procedure Code will not apply to it, as it was not made before the Committing Magistrate, *i.e.*, the Magistrate holding an enquiry under chapter XVIII of the Criminal Procedure Code.

The Sessions Judge has thus directed the jury that a statement which is not evidence against the sixth accused (though it might no doubt be used to contradict the witness) is, if believed, strong evidence against him. It is clear that the verdict cannot in these circumstances be sustained. The misdirection is repeated in paragraphs 14 and 15 of the charge and must have misled the jury.

Throughout his charge the Sessions Judge has placed too much stress upon statements made or alleged to have been made to the Inspector of Police and too little on the evidence given by the witnesses at the trial The statements made to the police cannot be treated as evidence on which the accused can be convicted when the facts stated in them are not proved by evidence given at the trial. The evidence of the prosecution witness No. 20 seems to be altogether irrelevant, and we think that the jury should not have been told that they were entitled to draw any inference against the sixth accused from that evidence or from the fact that there were three or four other dacoities on the same night in the same neighbourhood. We set aside the conviction of the sixth accused and direct his retrial.

The prisoners Nos. 1 to 5 convicted of dacoity have not appealed, and inasmuch as there is clearly evidence against them sufficient to warrant their conviction, and the misdirection on which we have had to set aside the conviction of the sixth accused affect only some of them and affect those to a much slighter extent

than they affect the sixth accused, and further considering the fact that the sentence passed on them is a light sentence for the offence of dacoity, and a sentence which might be increased on a retrial, we think that we are not called on to interfere on their behalf in revision.

SANKAPPA RAI v. EMPEROR.

APPELLATE CRIMINAL.

Before Mr. Justice Miller and Mr. Justice Munro.

NARAYANA MUDALY AND ANOTHER

v.

EMPEROR.*

1907. November 26.

Criminal Procedure Code, Act V of 1898, ss. 257, 537—Refusal of Magistrate to issue process to witnesses where none of the grounds mentioned in s. 257 exist is illegal.

The refusal of a Magistrate to issue process to witnesses named by the accused, when such refusal, in regard to any particular witness, is not based on any of the grounds mentioned in section 257 of the Code of Criminal Procedure, is an illegality which cannot be cured by section 537 of the Code.

A conviction under such circumstances is illegal and will be set aside. *Emperor* v. *Purushottam*, (I.L.R., 26 Bom., 418), followed.

THE accused were tried by the Second-class Magistrate of Gudiyáttam on charge of offences under sections 341, 323 and 327 of the Indian Penal Code.

Charges were framed against the accused, who cited 71 persons as witnesses for the defence. The Magistrate refused to issue process for more than 24 of the witnesses. Some of these were examined and the accused insisted on having all the witnesses named by them summoned and examined. This the Magistrate refused to do and convicted the accused. The material portion of his judgment on this point is as follows:—

"It was only after the accused entered on their defence that the accused headed by No. 3 began to display their true spirit of rowdysm as detailed below. They refused on two hearing dates, 6th

* Criminal Revision Case No. 393 of 1907 presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the decision of J. C. Stodart, Esq., Joint Magistrate of Vellore, in Criminal Appeal No. 57 of 1907 presented against the sentence passed by M.R.Ry. T. S. Venkatarama Ayyar, Second-class Magistrate of Gudiyáttam in C. C. No. 142 of 1907.

and 15th July 1907, to recross-examine the prosecution witnesses saying that they had not obtained copies of depositions and that intended to engage a pleader. The accused filed a list containing 71 names to be examined on their defence: the list was ordered to be minimised and reduced to a dozen at the utmost. The accused put in a revised list containing 27 names saying that they could not further reduce the number. The accused were asked to give the reasons for summoning each witness the number being too many, and this also they declined to do They applied for an adjournment to apply for a transfer elsewhere: and it was rejected on 24th July 1907 on the ground that it was put in to defeat the ends of justice and the 27 defence witnesses were summoned for the 3rd instant. On this date two witnesses were examined and the accused put in an application for time to move the Sub-Divisional Magistrate for transfer making certain out-of-the-way and clearly vexatious allegations therein. The request could not be complied with, the examination of the defence witnesses having begun and having been adjourned to the 13th instant. The accused in the meanwhile put in an application to the Sub-Divisional Magistrate for a transfer of the case and it was declined on the ground that the reasons alleged were clearly vexatious. Seven witnesses were examined on the 13th, 9 on the 14th August 1907, 2 on the 15th instant and two more this day, thus making up 25 in number. One witness was dispensed with by the accused and the other's name is not correctly stated. On the 14th instant the accused presented an application for adjournment to enable them to move the District Magistrate. It was rejected as too late, and the accused presented an application just when the last defence witness was being examined this day, that all the 71 persons including those already enquired into, should be enquired into and the seventh prosecution witness's presence secured. This was rejected as too late."

An appeal was presented by the accused to the Joint-Magistrate of Vellore, who dismissed it under section 421 of the Code of Criminal Procedure.

A revision petition was put in in the High Court under sections 435 and 439.

Mr. *John Adam* and *C. V. Ananthakrishna Ayyar* for petitioners.

Mr. *P. R. Grant* for the Public Prosecutor *contra*.

ORDER.—The Magistrate's order read to us by Mr. Adam but which is not among the papers sent up shows that the Magistrate

in refusing to issue process for the witnesses named by the accused did not base his refusal in regard to any particular witness, on any of the grounds which, under the provisions of section 257 of the Code, are sufficient to justify it.

The order was therefore illegal (vide *Emperor* v. *Purshottam* (1)) and we do not think the illegality can be cured by section 537, Criminal Procedure Code.

We set aside the conviction: as the accused have served their sentences we do not order any further proceedings.

APPELLATE CRIMINAL.

Before Mr. Justice Sankaran Nair.

LAKSHMINARASAPPA AND ANOTHER

v.

MEKALA VENKATAPPA.*

1907. December 6, 18.

Criminal Procedure Code, Act V of 1898, ss. 435, 437, 439—District Magistrate cannot under s. 437 set aside an order of discharge on the ground that the lower Court had not appreciated the evidence properly.

Where a District Magistrate taking action under section 437 of the Code of Criminal Procedure comes to the conclusion that the evidence for the prosecution is reliable, and that the lower Court has erred in disbelieving such evidence and discharging the accused, the proper course for him is to refer the matter for orders to the High Court, which can deal with it under section 439. It is not open to him to set aside the order of discharge himself on the ground that the lower Court had misappreciated the evidence.

Queen-Empress v. *Amir Khan*, (I.L.R., 8 Mad., 337), followed.

Haredass Sanyal v. *Saritulla*, (I.L.R., 15 Calc., 621), followed.

When a Court competent to decide whether the accused is guilty or not holds that he is not guilty on a consideration of the evidence adduced by the prosecution, that finding should, if at all, be set aside only by a Court competent to set aside such finding of fact, that is by the High Court under section 439 of the Code of Criminal Procedure read with section 423.

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(1) I.L.R., 26 Bom., 418.

* Criminal Revision Case No. 349 of 1907, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the order of J. J. Cotton, Esq., District Magistrate of Cuddapah, in Revision Petition No. 11 of 1907, setting aside the order of discharge passed by M.R.Ry. M. Bapu Row, Second-class Magistrate of Kadiri, in Calendar Case No. 112 of 1907, and directing further enquiry into the case by First-class Divisional Magistrate of Cuddapah.

LAKSHMI-NARASAPPA v. MEKALA VENKATAPPA.

THE accused were tried by the Stationary Second-class Magistrate of Kadiri for offences of thefts under section 380 and abetment of same under sections 380 and 109, Indian Penal Code, and discharged under section 253 of the Code of Criminal Procedure on the ground that the offences were not proved.

The District Magistrate, to whom a revision petition was presented, passed the following order under section 437 of the Code of Criminal Procedure:—

From the evidence on record, I have no doubt that the document existed. There are of course discrepancies in the depositions of the first four witnesses: but I do not consider any of them to be so serious as to come to the conclusion that these witnesses have been giving false evidence. The lower Court has attached undue importance to them. There appears to be no motive why the complainant should concoct a serious charge of this description. The subsequent denial of the petitioner's title by the karnam lends support to the prosecution story. The complaint was promptly lodged and there was no one else interested in making away with the document than the karnam: and the persons whom the complainant cited as his witnesses, were promptly examined by the Magistrate and they supported him in the main story.

Under section 431, Criminal Procedure Code, I set aside the order of discharge and restore the case to file. I direct that it be tried by the First-class Divisional Magistrate of Cuddapah.

Against this order revision petition was presented to the High Court under sections 435 and 439 of the Code of Criminal Procedure.

Dr. *S. Swaminadhan* for petitioner.

The Public Prosecutor, *contra* and *R. V. Seshagiri Rau* for complainant.

ORDER.—This is an application to reverse the order of the District Magistrate of Cuddapah setting aside an order of discharge passed by the Second-class Magistrate of Kadiri and directing a further inquiry by the First-class Divisional Magistrate of Cuddapah on the sole ground that the Sub-Magistrate has misappreciated the evidence and arrived at a wrong conclusion on the facts. The complaint was one of theft of a document punishable under section 380, Indian Penal Code. The Second-class Magistrate

LAKSHMI-NARASAPPA v. MEKALA VENKATAPPA.

examined eight witnesses, and filed six exhibits for the prosecution, and also filed nine exhibits on behalf of the defence, and discharged the accused as in his own words "the very existence of a document of the kind said to have been lost is doubtful and the case bears distinct marks of having been trumped up as the witnesses are all untrustworthy." The District Magistrate, on the other hand, has "no doubt that the document existed" and he also saw no reason to consider that the witnesses have been giving false evidence and accordingly directed further inquiry by another Magistrate. The petitioner's counsel refers to Criminal Revision Case No. 501 of 1900 where this Court reversed an order of the District Magistrate directing a further inquiry on the ground of misappreciation of evidence. He also relies upon *Joy Gopaul Banerjee* v. *The Emperor*(1) and *Queen-Empress* v. *Erram Reddi*(2) and *Rash Behari Lal Mandal and others* v. *The Emperor*(3). Under the Codes of 1861 and 1872 it has been held that this Court will not exercise its power of revision on the ground that the lower Court has not rightly appreciated the evidence the reason being that it is for the Court called upon to determine whether the person charged is guilty or not, to consider and weigh the evidence and any error as to the probative force and effect is not open to correction on revision but only on appeal (5 M.H.C., Appx. X and *In the matter of Aurokiam*(4)). The same view has been accepted under the Codes of 1882 and 1898 in the case of *Queen-Empress* v. *Lakshmi Nayakan*(5) and Criminal Revision Case No. 343 of 1900, Weir, p. 255. The practice, so far as I am aware, has been in accordance with this view. While it is quite clear to me that the High Court is entitled to deal with any case on facts, it has been held that only in cases of defective investigation, of failure to consider important evidence, of consideration of the evidence from a wrong point of view, of contravention of any provision of law, and of conviction upon facts which will not support the same, will the revisionary powers of this Court be exercised. It is clear, therefore, assuming the District Magistrate is right in his estimate of the evidence,

(1) 11 C.W.N., 173.
(2) I.L.R., 8 Mad., 299.
(3) 12 C.W.N., 117.
(4) I.L.R., 2 Mad., 38.
(5) I.L.R., 19 Mad., 238.

LAKSHMI-NARASAPPA v. MEKALA VENKATAPPA.

that this Court would not have interfered with the order of discharge on the grounds stated by him. If the Second-class Magistrate had proceeded to frame a charge against the accused and tried and acquitted him, the High Court alone could have interfered with the order of acquittal or convicted him on appeal by the Local Government. The District Magistrate's powers in this respect are defined by sections 435 and 437 of the Code of Criminal Procedure. Under section 435, he is entitled to call for the records to satisfy himself "as to the correctness" of any finding or order and may order "further enquiry" under section 437 into the case of any discharged person or refer the case to the High Court under section 438 for orders. Reading sections 439 and 423 together there is no doubt the High Court can set aside a finding of fact and direct a retrial or further inquiry. It was decided by the High Court in *Queen-Empress* v. *Amir Khan*(1) that the "further enquiry" referred to in section 437 is not the same as "fresh enquiry" in section 436 and does not include the power to direct a Subordinate Magistrate to reconsider the same evidence on the sole ground that he has misappreciated the evidence and it was pointed out that "The High Court itself which has a power that the Magistrate does not possess, namely, to order a retrial is not warranted in so doing merely because the Magistrate who has discharged an accused person in a case he was competent to try and finally determine, arrived at a conclusion different from that at which the High Court would have arrived as to the credit due to the witnesses" and that "If in cases not falling under section 436 a District Magistrate sees reason to think that the Subordinate Magistrate has improperly discharged an accused person by reason of his having misapprehended the law or committed a material error in procedure the District Magistrate should, under section 438, report the case for opinion and orders of the High Court." The majority of the Judges of the Calcutta High Court took a different view as to the effect of the words "further enquiry" and held that it was open to the District Magistrate for sufficient reasons acting under section 437 to direct a reconsideration of the case on the same evidence, and further Wilson, J., expressing the opinion of the majority of the Judges said: "In a case not triable

(1) I.L.R., 8 Mad., 337.

LAKSHMI-NARASAPPA v. MEKALA VENKATAPPA.

only by the Court of Sessions, if the Sessions Judge or the District Magistrate is satisfied that on the evidence taken there is a clear case for charging and trying the accused, and there is no reason for desiring further magisterial examination, I think it is ordinarily his duty to refer the case to this Court, which can make a suitable order, and not to direct a further enquiry by a Magistrate." This Court in *Queen-Empress* v. *Balasinnatambi* and others(1) agreed with the decision of the Calcutta High Court but did not indicate in their judgment the nature of the order to be passed under section 437 that would be appropriate to the grounds on which the revisional powers of the District Magistrate are to be exercised.

It is clear from *Queen-Empress* v. *Amir Khan*(2) and *Hare Dass Sanyal* v. *Saritulla*(3), therefore, that the balance of authority is in favour of the view that the District Magistrate, when he has come to the conclusion, as in this case that, *primâ facie*, the prosecution evidence is reliable, ought to have referred the case to this Court for orders instead of setting it aside himself on the grounds formulated by him in his order. It may be different when he exercises his powers for other reasons than mere misappreciation of evidence. I am inclined to take this view. My reasons are these. Where a Court competent to decide whether the accused is guilty or not, holds that he is not guilty on a consideration of the evidence adduced by the prosecution, that finding should, if at all, be set aside only by a Court competent to set aside such finding of fact, that is, by the High Court under section 439 of the Code of Criminal Procedure read with section 423. The District Magistrate, it is clear, is not entitled to come to a final conclusion on the evidence and hold that a *primâ facie* case has been made out because in that case the proper order would be one to direct a charge to be framed and try the accused on that charge. Prinsep, J., no doubt in the case of *Haridass Sanyal* v. *Saritulla*(3) was of opinion that he had such power but I agree with Wilson, J., who delivered the judgment of the majority of the Judges that that view is not correct for the reasons given by him in p. 620. In addition to those reasons I would add that section 436 which

(1) I.L.R., 14 Mad., 334. (2) I.L.R., 8 Mad., 337.
(3) I.L.R., 15 Calc., 621.

LAKSHMI-NARASAPPA v. MEKALA VENKATAPPA.

empowers the District Magistrate to direct a committal which involves the framing of a charge and for which a finding that a *primâ facie* case has been made out is a preliminary condition supports the same view. The case in *Queen-Empress* v. *Munisami* and others(1) apparently accepts that principle. The proper function of the District Magistrate is therefore criticism. He ought to point out to the Subordinate Magistrate the reasons which may have led to an incorrect conclusion, reasons which have been held to justify the High Court in interfering with the findings of fact, to enable that magistrate to come to a right conclusion and not dictate to him, the decision to be pronounced. In case of a difference of opinion upon the evidence he ought to refer the matter to the High Court which has also the powers of that Appellate Court to deal with that reference. The procedure above indicated keeps in view the ordinary distinction between the revisional and appellate jurisdiction of a Court. A power to order what is practically a retrial, to give a complainant another opportunity of re-examining his witnesses and adducing fresh evidence ought not to be presumed as it is unjust to the accused and opens a wide door to perjury and corruption. That the case is only one of discharge, which is not ordinarily at any rate a bar to a fresh prosecution, supports the same view as the injustice, if any, to the complainant may be thereby remedied. That it will be generally inquired into by the same Magistrate and good reasons will have to be adduced by the complainant for coming to a different conclusion is a sufficient guarantee that this privilege is not likely to be abused.

Assuming the District Magistrate has the power he ought to exercise it subject to the limitations placed by the High Court upon their own larger powers. It has been suggested that the High Court refuse to interfere for the reason that the evidence has already been considered by two Courts. I have already pointed out that this is not the ground of decision. This was not so in the case reported in Weir, p. 257, nor in the cases in 5 Madras High Court Appeal and II Madras series, p. 38. The right of appeal given to the Local Government against a judgment of acquittal by an Appellate Court does not support that argument.

(1) I.L.R., 15 Mad., 39.

LAKSHMI-NARASAPPA v. MEKALA VENKATAPPA.

For the above reasons I am of opinion that the order of the District Magistrate should be set aside and it is ordered accordingly. But as the records have been called up and the District Magistrate considers the view of the Second-class Magistrate unsustainable, I have heard counsel on the evidence to see whether this Court ought to interfere in revision.

The prosecution case is that an unregistered sale deed executed by the father of the first accused in favour of the complainant's uncle more than 35 years ago was taken by him to the first accused for preparing an application for transfer of patta; that the latter gave it to a petition writer Subban Singh to prepare the transfer application in one Somayya's house, and when after preparing the application, the petition writer went to the Sub-Registrar to show him this and a lease deed which he had prepared, leaving the sale deed in Somayya's house, the second accused took it and rushed into the house of the first accused with it. The prosecution second and fourth witnesses are admittedly interested in the complainant, no independent witnesses of Kadiri are produced. No explanation is given for the necessity of this application after a lapse of 30 years There is no explanation whatever why it was necessary to take the documents to the Sub-Registrar. No motive on the part of the second accused is alleged much less proved. He is a Muhammadan while the first accused is a Hindu. For these reasons I see no reason to interfere with the order of discharge.

APPELLATE CRIMINAL—FULL BENCH.

Before Sir Arnold White, Chief Justice, Mr. Justice Wallis, and Mr. Justice Miller.

1907.
August 29.
October 14.
November 4.
1908.
January 6.

RAHIMADULLA SAHIB

v.

EMPEROR.*

Criminal Procedure Code, Act V of 1898, s. 476—Order under section must be made during or immediately after the conclusion of the proceedings.

On a reference to the Full Bench whether a Magistrate has jurisdiction to take action *suo motu* under section 476 of the Code of Criminal Procedure more than two months after the termination of the proceedings before such Magistrate:

Held (Miller, J., dissenting), that it was the intention of the Legislature in enacting section 476 that an order under the section should be made either at the close of the proceedings or so shortly there after that it may reasonably be said that the order is part of the proceeding.

Begu Singh v. *Emperor*, (I.L.R., 34 Calc., 551), referred to and followed.

In re Subbaraya Vathyar, (15 M.L.J., 489), referred to and followed.

The earlier enactments and corresponding English Acts on the subject considered and discussed.

THE case came in the first instance before (Wallis and Miller, JJ.) who made the following

ORDER OF REFERENCE TO A FULL BENCH.—In this case the Magistrate has ordered the prosecution of the petitioner under section 211 of the Indian Penal Code for causing criminal proceedings to be instituted against one Kandan Chetty knowing that there were no just or lawful grounds for such proceedings. On information given to the police by the petitioner an investigation was made and an inquiry held with a view to a committal under section 307 of the Indian Penal Code, and at the conclusion of the inquiry, the accused was discharged. This was on the 11th July 1906. Subsequently, the Additional District Magistrate refused to set aside the order of discharge. His order is dated the 28th August 1906. On the 25th September 1906 the Magistrate

* Criminal Revision Case No. 213 of 1907, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the proceedings of M.R.Ry. A. R. Rajagopal, Second-class Magistrate of Periyakulam, dated the 3rd November 1906, in Revision Case No. 9 of 1906.

who had held the inquiry issued a notice calling on the petitioner to show cause why he should not be prosecuted under section 211, and on the 3rd November 1906 passed an order ordering his prosecution under that section.

The order states that the Magistrate was acting *suo motu* and he must be taken to have been acting under section 476 of the Criminal Procedure Code.

It is now contended that he had no jurisdiction to take action under section 476 after the close of the proceedings in the course of which the offence was brought to his notice, and the recent Full Bench ruling in *Begu Singh* v. *Emperor*(1) has been relied on in support of this view. This decision appears to conflict with a decision of a Bench of this Court in *Runga Ayyar* v. *Emperor*(2) in which action taken after the close of the proceedings and by a fresh Magistrate was held to be within the jurisdiction conferred by the section. There was however a decision which appears to be the other way in Criminal Revision Case No. 54 of 1901 reported in Weir's 'Criminal Rulings,' Vol. II, p. 597; and in *In re Subbaraya Vathyar*(3) another Bench expressed the opinion, if they did not actually decide, that under section 476 immediate action is contemplated and that to take action after the lapse of several months would be illegal. As it is desirable to have the point settled in this Court we have resolved to refer to the Full Bench the question whether the Magistrate's order was made without jurisdiction."

The reference came on for hearing in due course before a Full Bench constituted as above.

T. Rangachariar for *V. Krishnaswami Ayyar* and *K. V. Krishnaswami Ayyar* for petitioner.

Mr. *J. C. Adam* for the Public Prosecutor *contra*.

S. Venkatachariar for the complainant.

The Court expressed the following

OPINION (SIR ARNOLD WHITE, C.J.).—Having regard to the terms of the order of the 3rd November 1906, I am inclined to think that the Magistrate considered he was exercising the powers conferred by section 195 of the Code of Criminal Procedure and

(1) I.L.R., 34 Calc., 551. (2) I.L.R., 29 Mad., 331.
(3) 15 M.L.J., 489.

RAHIMA-DULLA SAHIB v. EMPEROR.

that the provisions of section 476 were not present to his mind at all. However, the order of reference states that the Magistrate was acting *suo motu* and that he must be taken to have been acting under section 476 of the Code of Criminal Procedure, so I propose to deal with the case on that footing.

It is no doubt true that section 476 may be construed, without doing violence to any of its provisions so as to warrant an order being made under the section after the close of the proceeding in which the offence was alleged to have been committed or brought under the notice of the Court. But it is equally true that there is nothing in the section which militates against the other view, whilst the provision in the section as to sending the accused in custody, without any provision being made for his arrest when he is not in custody, as he would not be when the order under the section is made in an independent proceeding, lends support to the view that the section contemplates the making of the order as a part of the proceeding in which the offence was alleged to have been committed or was brought under the notice of the Court. The conclusion at which I have arrived is that it was the intention of the Legislature that an order under the section should be made either at the close of the proceeding or so shortly thereafter that it may be reasonably said that the order is part of the proceeding.

The history of the section appears to be this:—So far as the object of the section is to secure the conviction of a party who has been guilty of an offence against public justice its origin may be traced to the provisions of section 20 of the Criminal Procedure Act, 1851, 14 & 15 Vict., cap., 100, which empowers a Court to commit any person who, in the opinion of the Court, has been guilty of perjury in a proceeding before that Court. I do not think it has ever been suggested that an order of commitment could properly be made under the English enactment as an independent proceeding after the close of the case in which the offence was alleged to have been committed, and, for the purposes of the question now under consideration, I do not think any distinction can be drawn between the language of the English statute and the language of section 476 of the Code of Criminal Procedure.

Turning to the Criminal Procedure Code of 1861 we there find the enactments which appear as sections 195 and 476 in the Code of 1898 appearing as sections 169, and 170 and 171 respectively,

RAHIMA-DULLA SAHIB v. EMPEROR.

under a chapter headed "Prosecutions in certain cases." As regards sections 169 and 170 there was an express provision that the sanction required by these sections might be given at any time. There was no express provision in section 171 as to when the Court might take action.

The sections of the Code of 1861 to which reference has been made were reproduced in the Code of 1872 (see sections 468 to 471) under a chapter bearing the same title as in the Code of 1861.

In the Code of 1898 the sanction provisions were reproduced in section 195 under a sub-heading "Conditions requisite for Initiation of Proceedings," whilst the express provision that sanction might be given at any time disappeared. In the Code of 1898 the enactment empowering the Court to act on its own initiative in regard to offences referred to in section 195, was reproduced as section 476 under the heading "Proceedings in the case of certain offences affecting the Administration of Justice" in close juxtaposition to a section empowering the Court to take action in certain cases of contempt (section 480)—a section which expressly provides for a procedure of an immediate and summary nature.

We find in sections 16, 17 and 19 of the Civil Procedure Code of 1861 certain provisions which are reproduced in section 643 of the Code of 1882. The usefulness of these provisions is not apparent since they would seem to cover the same ground as is covered by section 476 of the Criminal Procedure Code of 1898, and it may be observed that in the new Civil Procedure Bill, and in the Bill of 1901 which has been recently withdrawn section 643 of the Code of 1882 has been dropped. Section 643 of the Civil Procedure Code in the clearest terms provides for a procedure of an immediate and a summary character, and the reasons which render such a course of procedure desirable when action is taken under the Civil Procedure Code seem equally applicable when action, directed towards the same end, is taken under the Criminal Procedure Code.

The point raised in the order of reference has recently been considered by a Full Bench of the Calcutta High Court in *Begu Singh* v. *Emperor*(1). The actual point there referred was whether an order purporting to be under section 476 and made by a

(1) I.L.R., 34 Calc., 551.

RAHIMA-DULLA SAHIB v. EMPEROR.

Magistrate, who was not the Magistrate who tried the case, was bad for want of jurisdiction.

It does not of course follow that, if an order under this section made by a Magistrate, other than the Magistrate who tried the case is bad, an order made by the same Magistrate after the close of the case is also bad. As to the actual point referred in the Calcutta case Geidt, J., took a somewhat different view from that of the other Judges, but all the Judges were agreed with regard to the question now before us, viz., that the power conferred by section 476 was properly exercisable only at or immediately after the conclusion of the trial.

I think there is considerable force in the observation of the Chief Justice that if months after the trial the Court may act under section 476 it is difficult to appreciate the necessity of section 195. As regards the general policy of the law, I agree with the view expressed by Geidt, J., "I do not think"—the learned Judge observes—"that it was ever intended that when the proceedings had terminated and passed beyond the ken of the Court, the attention of the Court should be subsequently redrawn by some private person to the fact that in those proceedings there had been committed some offence in contempt of the Court's authority or against public justice which deserved punishment. The commission of the offence and the desirability of a prosecution should be so patent as to move the Court at the time to take action without the stimulus of an application by some interested person."

As regards *Runga Ayyar* v. *Emperor*(1), the learned Judges no doubt say that, a Magistrate who is not the Magistrate who tried the case has jurisdiction to make the order, and this of course involves the view that the order may be made after the close of the case. But, as a matter of fact, in the case then before the Court the Magistrate who tried the case had himself granted a sanction to prosecute, which fell through because the party who obtained the sanction presented an unstamped complaint. It was clear from the fact that the Magistrate who tried the case had granted sanction that he was of opinion that the case was one in which there was ground for enquiry.

In a case (Criminal Revision Case No. 54 of 1901) reported in Weir, Vol. II, p. 597, there is a ruling by Davies and Boddam, JJ.,

(1) I.L.R., 29 Mad., 331.

RAHIMA-DULLA SAHIB v. EMPEROR.

that a Magistrate has no power to act *suo motu* under section 476 after the case before his predecessor has been closed without any action being taken under that section, and a similar view is indicated in *In re Subbaraya Vathyar*(1).

I think the answer to the question which has been referred to us should be in the affirmative.

WALLIS, J.—In this case, as pointed out in the order of reference, the Magistrate himself states that he acted *suo motu* and he must, I think, be deemed to have acted under section 476, Criminal Procedure Code. There can, I think, be no doubt that the provisions of section 476, Criminal Procedure Code, when first enacted as section 171 of the Code of 1861 were suggested by the provisions of section 19 of the Criminal Procedure Act, 1851 (14 & 15 Vict., cap. 100) and it is therefore material to examine the history and language of the English enactment. As recited in the section itself it re-enacts in an amended form two acts of Geo. II and Geo. III for rendering prosecutions for perjury and subornation of perjury more easy and effectual. Now before the passing of the Vexatious Indictments Act, 1859, there were no restrictions at all on prosecutions for perjury and any one could institute one by presenting a Bill to the Grand Jury behind the back of the accused, and such Bill, if found by the Grand Jury, became an indictment upon which the accused had to stand his trial. (Stephen's 'History of the Criminal Law of England,' Vol. I, p. 293.) There was nothing in law to prevent a Judge from preferring an indictment before the Grand Jury against a witness for perjury committed before him, but of course this was not a task that a Judge could be expected to undertake himself, and it was for this reason that the enactment now in question was passed to enable him in a proper case to impose the task of prosecution on another. He is therefore empowered (1) to direct a prosecution, (2) to commit the person to be prosecuted to prison until the next Sessions in default of his giving security, (3) to bind over some one to prosecute, that is, to prefer a Bill before the Grand Jury and prosecute at the trial, (4) to give the person so bound over a certificate entitling him to be paid the costs of the prosecution, and (5) to bind over the witnesses to attend. The section does not expressly say that the direction to prosecute must be

(1) 15 M.L.J., 489.

RAHIMA-DULLA SAHIB v. EMPEROR.

made within any particular time, but merely provides that it shall and may be lawful for the Judge or Judges therein mentioned "in case it shall appear to him or them that any person has been guilty of wilful or corrupt perjury in any evidence given or in any affidavit, deposition, examination, answer or other proceeding made or taken before him or them to direct such person to be prosecuted for such perjury" and to proceed as already stated. As incidental to the powers of committing and binding over, the Court would have authority to bring the parties before it, and I cannot see anything in the language of the section to show that the exercise of these powers is made conditional on the proceedings in which the perjury is alleged to have been committed being still pending. Ordinarily no doubt the direction to prosecute would be given during or in continuation of such proceedings, but in case the evidence adduced before a county Court Judge in a case before him should be such as to convince him that a witness in a case disposed of by him some days previously must have committed perjury, I am not aware that it has ever been held that the Judge could not direct a prosecution for perjury because the case in which it was committed was over; and, in the absence of authority, I should not be prepared to put any such construction upon the section, especially having regard to its declared object and the state of the law when it was passed. I am therefore of opinion that there is nothing in the provisions of section 19 of the Criminal Procedure Act, 1851, to suggest that a restrictive construction should be put on the Indian enactment.

The circumstances of the two countries, and the status of the officers on whom the powers are conferred by the English and Indian enactments are however very different, and the absence of any such restriction in England is not a strong argument in favour of the absence of such restriction here. There is nothing in the language of section 171 of the Criminal Procedure Code, Act XXV of 1861, to show that any such restriction was intended, but Mr. Rangachariar relies on the fact that in sections 169 and 170, which correspond to section 195 of the present Code, it is expressly provided that sanction may be given at any time, while there is no such express provision in section 171 as regards proceedings initiated by the Court itself. He also relies on the language of the contemporaneous sections 16, 17 and 19 of the Code of Civil Procedure (Act XXIII of 1861) which are

RAHIMA-DULLA SAHIB v. EMPEROR.

reproduced not very intelligibly in section 643 of the present Code (Act XIV of 1882) and argues that the language "when in a case pending before any Court there appears sufficient ground" shows that action must be taken while the case is pending. And as showing the meaning of section 476 he relies even more strongly on the language of section 478 which enables the Court before which the offence is committed itself to commit the case for trial at Sessions or before the High Court. The language of this section is "When any such offence *is* committed before any Civil or Revenue Court . . . and the case is triable, etc." The operation of the two sections must apparently be co-extensive and it is argued that the use of the present tense "when any such offence is committed" shows that both under this section and under section 476, where the language is not quite so clear, it was the intention of the Legislature that the sending for enquiry or trial in the one case and the commitment for trial in the other must be made while the proceedings in which the offence was committed or brought to notice are pending or in immediate continuation of them. These arguments are, in my opinion, entitled to weight though I cannot say that they appear to me to be conclusive. They are however supported by the authority of the cases in Weir, Vol. II, p. 597, and in *In re Subbaraya Vathyar*(1) as well as by the *obiter dicta* of the Calcutta Judges in *Begu Singh* v. *Emperor*(2) and by the judgment of the learned Chief Justice in the present case. Moreover having regard to the fact that power to take action under section 476 is conferred upon all ranks of the judiciary I think the suggested restriction may be supported on grounds of policy. Under these circumstances I am not prepared to differ from the conclusion arrived at by the learned Chief Justice and would answer the question referred to us in the affirmative.

MILLER, J.—As I have the misfortune to differ from the other members of the Court in the conclusion at which I have arrived, it is my duty to explain somewhat fully the reasons which have led me to my conclusion. I am however to some extent relieved of the task of expressing my views at great length, by the judgment just delivered by my learned brother, which I have had the advantage of reading before it was delivered

(1) 15 M.L.J., 489. (2) I.L.R., 34 Calc., 551.

and with which I may say I agree in almost everything except, unhappily, in its final conclusion.

I agree with my learned brother's opinion that the English Act of 1851 does not impliedly enact the restriction which we are now asked to import into section 476 of the Code of Criminal Procedure, and that there is nothing in it to suggest that a restrictive construction should be placed on the Indian enactment. I agree also that the arguments derived from the provisions of former Codes and from section 643 of the present Civil Procedure Code though entitled to some weight (as to the amount of weight to be attached to them I am not perhaps quite in accord with my brother) are very far from conclusive. In 1882 when section 476 was re-enacted, the Legislature had before it the provisions of section 643 of the Code of Civil Procedure of 1877 and it is not improper to set against the arguments of Mr. Rangachariar the inference that had it been intended that the two sections should be identical in scope care would have been taken to make them identical or indistinguishable in language.

Nor is the argument drawn from section 478 of much greater force. If the language of section 478 is such as to necessitate the inference that under its provisions action must be taken by the Court to commence the enquiry during, or immediately after the close of, the proceedings in the course of which the offence to be enquired into was committed, it by no means follows that section 476 was not intended to provide an alternative procedure which might be adopted after the proceedings were closed. But in *Queen-Empress* v. *Shankar*(1), two learned Judges of the Bombay High Court upheld a commitment under section 478, which appears to have been made nearly two years after the close of the proceedings in the course of which the offence was committed. It is true that the present question was not then argued before or indeed presented to the Court, but the case at least shows that the intention and scope of section 478 is in spite of its language, not so clear upon the face of the section as Mr. Rangachariar seemed to suggest.

That case I may perhaps remark before leaving it, incidentally shows that the fears of Rampini and Gupta, JJ., who referred to the Full Bench of the Calcutta High Court the question

(1) I.L.R., 13 Bom., 384.

decided in *Begu Singh* v. *Emperor*(1) are not altogether so unfounded as is suggested in the judgments of some of the learned Judges composing the Full Bench.

In the Bombay case sanction had actually been given some time after the case closed to a private party to prosecute for a very serious forgery, the substitution of a false agreement of compromise in a suit for the true one, but the sanction was not acted upon by the party to whom it was given. As Jardine, J., points out the person to whom sanction is accorded may compound the offence and allow the sanction to lapse: he is not bound over to prosecute: he can do as he pleases; and if the view of section 476 now pressed upon us by Mr. Rangachariar is to prevail, if he does not choose to prosecute, the offender must go unpunished. Mr. Rangachariar relied also to some extent on sections 480 and 481 as indicating the scope of section 476 but those sections deal with a restricted class of offences in regard to which it is always possible to take action as soon as the offence has been committed. It is pressing the argument from juxta-position very far to suggest that the procedure applicable to such cases is necessarily to be applied to all cases within the provisions of section 476.

Now, agreeing with my learned brother that there is nothing in the history of the enactment to necessitate the placing on section 476 of the Code, of a restrictive construction, and that no conclusive argument can be drawn from other provisions of the same Code or other Codes, I turn to the language of section 476 itself. I, of course, agree with the learned Judges of this Court who held in *In re Subbaraya Vathyar*(2) that the section contemplates immediate action, that is to say, that the language of the section warrants and provides for immediate action, but I am unable to go further, and to hold that, it either expressly or impliedly excludes what I may call action subsequent—action taken after the close of the proceedings in the course of which the offence was committed or brought to notice. The words 'when the Court is of opinion' are wide enough to embrace any point of time at which the opinion is formed, whether during, or after the close of, the proceedings, and there is nothing in the rest of the section to indicate that the opinion must, in all cases, be formed as soon as the offence is committed. There is nothing that I can see

(1) I.L.R., 34 Calc., 551. (2) 15 M.L.J., 489.

inconsistent with the view that in a proper case 'subsequent' action may be taken; there is nothing in the procedure provided by the section which is incompatible with such action. The preliminary enquiry can be made at any time: if the accused person is present at its close he can be sent to the Magistrate with the case; if he is absent the Magistrate to whom the case is sent can be left to secure his attendance at the trial.

It seems to me that some light is thrown upon the intention of the Legislature in this matter by a consideration of the provisions of sections 195 and 200 along with section 476 of the Code.

In 1885 three Judges of a Full Bench of the Allahabad High Court expressed the opinion that section 476 enacts the procedure to be adopted by a Court desirous of making a 'complaint' under section 195 (*Ishri Prasad* v. *Sham Lal*(1)). Straight, J., there observes "it is easy to imagine the inconvenience which might be caused if a Munsif or a Subordinate Judge or a Judge were obliged to appear before a Magistrate and make a complaint on oath in order to lay the foundation for a prosecution, and for this reason the Legislature thought it desirable that the procedure to be followed in case of complaint by a Court, should be different from that which has to be observed by an ordinary complainant." That this is a correct view of the section, that one of the functions of section 476 is to provide the machinery by which a Court is enabled without inconvenience to make a complaint, is made very clear by the amendments introduced into the present Code, in sub-section 2 of section 476, and in the opening words of section 200. Both those amendments might perhaps have been expressed in happier language, but I have no doubt—and I am confirmed by the decision in *Eranholi Athan* v. *King-Emperor*(2) that they were intended to have the effect of affirming the view taken by Allahabad High Court in *Ishri Prasad* v. *Sham Lal*(1).

That being so the question arises whether a Court which deems it necessary to make a complaint, and so to proceed under section 476 of the Code, ought to be subjected to restrictions which do not apply to the persons styled by Straight, J., in the Allahabad case 'ordinary complainants.'

(1) I.L.R., 7 All., 871. (2) I.L.R., 26 Mad., 98.

In *Begu Singh* v. *Emperor*(1), Harrington, J., suggests one reason why this should be so. The party aggrieved by the unjustifiable institution of criminal proceedings against him by a Court has not the same facility for obtaining redress as he would have if the prosecution were left to a private person.

Now the danger that a Court when moved to take action by a private person, may, from malicious or corrupt motives, prefer, instead of granting a sanction to that person, to take the prosecution into its own hands is, I venture respectfully to think, not very imminent, but I fully recognise the possibility that both in this and in other ways the powers which section 476 can be construed to confer, are like other powers open to abuse by the Courts to which they are entrusted. I fully recognise also that every Court like every other complainant ought to take action at the earliest possible moment, but I find some difficulty in holding that, while the ordinary complainant is permitted if he can to explain any delay which appears to be attributable to him, any delay in taking the first steps whether reasonably explicable or not is to be fatal to a prosecution instituted by a Court.

In considering the probable intention of the Legislature it is necessary to remember that against the danger of abuse of powers there can be set the danger of unpunished offences. As I have already pointed out the power of sanction given by section 195 is not enough to ensure the prosecution of offenders against justice in all proper cases, and if the power of complaint is to be restricted to cases in which, to use the words of Geidt, J., in *Begu Singh* v. *Emperor*(1), "the commission of the offence" is so "patent as to move the Court at the time to take action," there is at once apparent the danger that offenders may for want of the means of instituting proceedings against them, be able to escape the penalty of their offences.

To take the illustration given by my learned brother, it may well happen that a Court some days, or weeks, after trying and deciding a suit before it, may discover, perhaps in the course of the trial of another suit, that the plaintiff or a witness in the former suit, has in the former suit been guilty of gross perjury or of using as genuine a forged document. Is the Court to be helpless in such a case? Must the offender go unpunished unless the

(1) I.L.R., 34 Calc., 551.

RAHIMA-DULLA SAHIB v. EMPEROR.

opposite party (who it may be has obtained a decree in his favour on a point of law and is satisfied therewith) chooses to apply for a sanction to institute proceedings, or unless the Judge himself goes down to the Magistrate's Court and makes and swears to a complaint? To my mind section 476 may be construed to provide the necessary power in such a case and the machinery necessary to give effect to that power and I do not think that the fact that the power is, like other powers expressly conferred by the Code, capable of being abused, would justify me in attributing to the framers of the Code an intention to withhold it from the Courts in India where there may be cases in which its exercise is very important and very necessary.

As regards authority there seem to be two cases in this Court in one of which it was held that the successor of the Magistrate before whom an offence was committed can, and in the other that he cannot, take action in respect of that offence under section 476. That question presents somewhat different considerations from the one before us and I do not discuss it. I have already referred to the case in *In re Subbaraya Vathyar*(1), in which the learned Judges do not give reasons for the view taken by them, and to *Begu Singh* v. *Emperor*(2), in which the question before us was not the one referred for decision but was discussed by the Court.

There are cases in which, without discussion, action taken under section 476 after the close of proceedings has been upheld or directed (and as to section 478, compare the case in *Queen-Empress* v. *Shankar*(3) to which I have referred). But they are only of value as showing that the impropriety of conferring the jurisdiction on the Courts is not obvious, and that the language of section 476 does not obviously preclude the view I have taken. I am of opinion that Magistrate had jurisdiction, and I answer the question referred to us in the negative.

The case came on for final hearing before (Wallis and Miller, JJ.) when the court delivered the following

ORDER.—In accordance with the opinion of the Full Bench we set aside the order made by the Magistrate.

(1) 15 M.L.J., 489. (2) I.L.R., 34 Calc., 551.
(3) I.L.R., 13 Bom., 384.

APPELLATE CIVIL.

Before Mr. Justice Boddam and Mr. Justice Sankaran Nair.

SINGAM SETTI SANJIVI KONDAYA AND OTHERS (DEFENDANTS NOS. 2, 3 to 5), APPELLANTS,

v.

DRAUPADI BAYAMMA *alias* VENKAMMA (SECOND PLAINTIFF), RESPONDENT *

1907. October 10, 30.

Hindu Law, Reversioner—When sale by limited owner for purposes binding on the reversion, sale not to be set aside unless purchase money refunded—Right of presumptive reversioner to set aside such sale—Widow not trustee for reversioners.

Where a Hindu widow with a limited interest in property, sells the property under circumstances which render the purchase money binding on the reversion, the actual reversioner after her death, or the presumptive reversioner during her lifetime, cannot have the sale set aside without refunding the purchase money.

Obiter, a suit to set aside such sale will be liable to be dismissed if the plaint does not contain an offer to refund.

Where a presumptive reversioner sues to set aside such a sale during the lifetime of the widow without offering to refund the purchase money, it is not competent to the Court to pass a decree that upon the widow's death, the sale should be set aside on the person then entitled to the reversion refunding the purchase money.

Phool Chund Lall v. *Raghubuns Suhayee*, (9 W.R., 109), followed.

A widow is not a trustee for the reversioner, and, in the absence of other ways of paying off debts binding on the property, is not bound to raise money on her personal security to discharge such debts, neither is she bound to mortgage the property for that purpose if such a course would be more prejudicial to her than a sale.

SUIT to establish plaintiffs' reversionary right to the plaint properties and to declare the alienations made by first defendant invalid beyond her lifetime.

The plaintiffs were the daughters and the first defendant was the widow of the last male owner.

The facts are sufficiently stated in the judgment.

The Munsif passed a decree declaring that the alienations made by the first defendant to the other defendants were invalid

* Second Appeal No. 575 of 1905, presented against the decree of A. C. Dutt, Esq., District Judge of Cuddapah, in Appeal Suit No. 38 of 1904, presented against the decree of M.R.Ry. A. Narayana Pantulu, District Munsif of Cuddapah, in Original Suit No. 602 of 1903.

beyond her lifetime, and that at her death the then existing reversioners would be entitled to recover the lands from the defendants on payment of the sum of Rs. 540 which was found to be a binding debt.

An appeal to the District Court was dismissed with costs.

The second and other defendants appealed to the High Court.

Dr. *S. Swaminadhan* for appellants.

C. Ramachandra Rau Sahib for respondent.

JUDGMENT.—The plaintiffs as the reversionary heirs of their father brought this suit against the first defendant, his widow, and the other defendants who are alienees claiming under her, to set aside the sale in their favour by the first defendant on the grounds that there was no necessity for such sale, and that these lands of the value of Rs. 1,500 were sold for Rs. 540.

Out of this sum of Rs. 540, the second defendant who had attached the properties in execution of his decree for Rs. 340 which he had obtained against the first defendant, as representative of her husband, was paid his decree debt; the first defendant also discharged a debt of Rs. 180 incurred for the funeral ceremonies of her husband, and the remaining portion of the purchase money was paid in discharge of another debt also found to be binding on the reversioners. It is thus proved that the sale was effected for the purpose of discharging debts binding on the reversion and the purchase money has been applied in payment of those debts. It is also found that the property sold for Rs. 540 was worth about Rs. 1,000.

On these findings the Court of First Instance passed a decree declaring "that the alienations made by the first defendant in favour of the other defendants are not valid after her lifetime and that the plaintiffs or the then existing reversioner will be entitled to recover the lands from the defendants on payment to them of Rs. 540 which is found to be a binding debt." This decree has been confirmed by the District Judge. This is an appeal from that decree. We are of opinion that this decree cannot be sustained. The attaching creditor could have forced a sale. There is no finding by the lower Courts, and there is no evidence to show that these debts could have been paid off by the widow—otherwise than by a sale of this property; she is not bound to mortgage any portion of her husband's estate if that would be more prejudicial to her than a sale, by reducing her

income to a greater extent, as she does not hold the property for the benefit of the reversioner, nor is she bound to raise money on her personal security. The lower Courts have also decided that the reversioner after the widow's death is entitled to recover possession only on payment of the amount found to be binding. A suit brought by the heir after the widow's death where the plaint contained no offer to pay the money, when it should have contained such offer was dismissed on that ground. (See *Mutteeram Kowar* v. *Gopaul Sahoo*(1).) This view appears to have been accepted by their Lordships of the Privy Council. In a case where the suit was brought to set aside an alienation by a widow of property which was claimed by the plaintiff to be debuttor property devoted to an idol, their Lordships after declaring that the widow as the manager of the estate had the same right as or a right analogous to, that of the manager of an infant heir say: "Their Lordships are still of opinion that the plaintiff could not succeed on this plaint in setting aside the deed; because if part of the money only was required for the repairs of the idol or was represented to have been so required and this was *bonâ fide* believed in by the grantees, the deeds would not be wholly void by reason that some money was raised for another purpose. It would then come to this, that too much of the idol's property may have been granted, that a less quantity of land than that included in the grants would have sufficed to raise the money required for the temples. But that should not be a sufficient ground for setting aside the deeds altogether. The plaintiff in that case should have offered to reimburse the *bonâ fide* purchasers so much of the money as had been legitimately advanced" and they add that the "suit in the present form could not have been sustained."

Even assuming this to be a mere question of pleading, there can, therefore, be no doubt that the right of the heir to set aside the deed and recover possession of the property from the appellants depends upon his refund of at least the purchase money. Whether he is not also bound to pay interest, etc., as decided in *Phool Chund Lall* v. *Rughoobuns Suhaye*(2) has not been argued before us. If the sale then can be set aside only on condition of the plaintiffs refunding the purchase money that is held to be binding on the reversion, how can a declaratory decree setting

(1) 11 B.L.R., p. 416. (2) 9 W.R., 108 at p. 109.

SINGAM SETTI SANJIVI KONDAYA v. DRAUPADI RAYAMMA.

aside the sale be passed in favour of the plaintiffs, without also a direction to refund such money? Ordinarily an expectant reversioner would not pay the money out of his own pocket as he might never be benefited thereby, since the purchaser would, notwithstanding such payment, continue in possession till the widow's death as the reversioner would not till then be entitled to possession, and he might not be entitled to it at all in the event of his not surviving the widow. In the case before us there was no offer by the plaintiffs to refund the purchase money nor is such a reversioner entitled to a decree as is passed in this case for the reasons stated by Sir Barnes Peacock in *Phool Chund Lall* v. *Rughoobuns Suhaye*(1). The learned Chief Justice held that the Court could not properly decree "in the lifetime of the widow that upon her death, the deeds should be set aside upon payment by the persons who should succeed to the estate, of the amount which the widow was entitled to raise inasmuch as it would be contingent upon the will of the persons who might succeed to the inheritance whether they would pay the amount or not; and the purchaser could not properly have been placed by a decree of the Court in a position in which for many years he might remain in a state of uncertainty as to whether or not he could safely expend capital in the improvement of the estate. Such a decree would have been unjust to the purchaser, and it would be contrary to public policy to place an estate in that position in which it could not be known whether the estate could be safely improved or not." This decision was followed in *Sugeeram Begum* v. *Juddoobuns Suhaye* and others(2). The learned Judges of the Allahabad High Court profess to follow the decision above cited in *Gobind Singh* v. *Baldeo Singh*(3). If that judgment is inconsistent with the decision in *Phool Chund Lall* v. *Rughoobuns Suhaye*(1) we are unable to follow it. There is no decision of this Court brought to our notice. Though the question was apparently raised in Appeal Suit No. 119 of 1901 the learned Judges have not expressed any opinion on this point.

For the above reasons we reverse the decrees of the Courts below and dismiss the suit with costs throughout.

(1) 9 W.R., 108 at p. 109. (2) 9 W.R., 284.
(3) I.L.R., 25 All., 330.

APPELLATE CIVIL.

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

DAKSHINAMOORTHY PILLAI (PLAINTIFF), APPELLANT,

v.

THE MUNICIPAL COUNCIL OF TRICHINOPOLY (DEFENDANT), RESPONDENT.*

1907. October 28, 29. November 8.

Civil Procedure Code, Act XIV of 1882, ss. 2, 103, 556, 558, 584, 588 (27)—Order dismissing suit or appeal for default under section 102 or 556 respectively not a 'decree' and not appealable under section 584.

A decision dismissing a suit or appeal for default of plaintiff's or appellant's appearance under sections 102 and 556 of the Code of Civil Procedure respectively is not a 'decree' within the meaning of the definition in section 2 of the Code; and such decision in a suit or appeal is not appealable under the general provisions of section 540 or 584 of the Code.

Radha Nath Singh v. *Chandi Charan Singh*, (I.L.R., 30 Calc., 660), dissented from.

Ablakh v. *Bhagirathi*, (1 L.R., 9 All., 427), dissented from.

The plaintiff or appellant has ample remedies provided in such cases by sections 103 and 588, and the Legislature could not have intended that appellants should, in addition, have the power of appealing under section 584 of the Code.

THE facts are fully set forth in the judgment.

T. Natesa Ayyar for appellant.

The Hon. Sir *V. C. Desikachariar* for respondent.

JUDGMENT.—The appellant's appeal was dismissed by the District Judge for default of appearance under section 556 of the Code of Civil Procedure. He applied to the District Judge for readmission of the appeal under section 558 and his application was dismissed. He now appeals to this Court under section 588 (clause 27), against the order dismissing his application to restore, and he also appeals against the same order under the general provisions of section 584 on the ground that the order amounts to a "decree" as defined by section 2 of the Code. First, as regards the appeal against the order under section 588 (clause 27).

* Second Appeal No. 1339 of 1904, presented against the decree of J. Hewetson, Esq., District Judge of Trichinopoly, in A.S. No. 4 of 1904, presented against the decree of M.R.Ry. S. Doraiswami Ayyar, District Munsif of Trichinopoly, in O.S. No. 215 of 1902.

Civil Miscellaneous appeal No. 212 of 1904, presented against the order of the District Court of Trichinopoly in Interlocutory application No. 414 of 1904.

DAKSHINA-MOORTHY PILLAI v. THE MUNICIPAL COUNCIL OF TRICHINOPOLY.

Accepting the statements in the affidavits filed in support of the application to readmit the appeal as true, it would appear from the affidavits, and the order of the learned Judge, that the facts were as follows :—

The grounds of appeal were drawn by a vakil, Mr. Sanjiva Row, and the appeal was filed before the recess. An order was made before the recess adjourning the case to June 22nd to fix the date of hearing. The Court reopened on June 20th. Before the recess, in consequence of Mr. Sanjiva Row's absence, the appellant gave vakalats to two other vakils. On the reopening of the Court, the appellant took back the records in the suit from the vakil with whom he had left them (apparently with the intention of withdrawing his vakalats from both the vakils), and saw Mr. Sanjiva Row's clerk who told him that, as many appeals of 1903 were pending, the appeals of 1904 would not be taken up for hearing, and that Mr. Sanjiva Row would take a vakalat as soon as the date of hearing was fixed. The appellant went to Court on June 21st and inspected the notice board. The appeal was not posted on that day, but in pursuance of the order made before the recess, it was posted on June 22nd. It would appear from the observation of the learned Judge in his order, "it is impossible always to take up appeals in the exact order they are filed, and that appellants must be prepared for their cases being taken up out of their turn," that the appellant's appeal was taken up before appeals which had been filed later. The appellant did not see the notice which was posted on June 22nd. On the 22nd the case was adjourned to the 28th, and on the 28th it was adjourned to July 1st. On July 1st the appeal was called on. The appellant was not in attendance either in person or by pleader, and the appeal was dismissed for default. The application to restore the appeal was made on July 4th.

It is clear that the appellant was not misled by anything that was done by the Court. Assuming the appeal was taken up at an earlier date than it would have been in the ordinary course, there was ample notice given. The order fixing June 22nd as the day on which the date of hearing would be fixed was made before the recess. He would appear to have been aware that some such order was made since he inspected the notice board on June 21st, and, finding his case was not posted, he took no further steps to ascertain when his case would come on, but was content to rely

DAKSHINA-MOORTHY PILLAI v. THE MUNICIPAL COUNCIL OF TRICHINOPOLY.

on the assurance of Mr. Sanjiva Row's clerk that it would not come on for some time. In these circumstances we are not prepared to say that the District Judge exercised his discretion wrongly in declining to hold that the appellant was prevented by any sufficient cause from attending, when his appeal was called on. We accordingly dismiss this appeal with costs.

Secondly, as to the appeal from the appellate "decree" under section 584.

The first question for consideration is—is a decision dismissing a suit under section 102 for default of appearance of the plaintiff or dismissing an appeal under section 556 for default of appearance by the appellant a decree within the meaning of the definition in section 2 of the Code? We are of opinion that it is not. In such a case we do not think there is any "formal expression of an adjudication upon any right claimed or defence set up." When there is an *ex parte* "decree" in favour of the plaintiff or an *ex parte* decree in favour of the appellant, in our opinion, it is otherwise. In both these cases there is an adjudication on a right claimed or a defence set up, since the plaintiff has to prove his case (if it is not admitted), and the appellant has to show that the decree he appeals against is wrong. Any doubts which there may at one time have been with regard to *ex parte* decrees have been set at rest by the Legislature, since section 540 provides that, an appeal may lie from an original decree passed *ex parte*, and section 584 provides that an appeal may lie from an appellate decree passed *ex parte*.

The question whether a decision under section 102 dismissing a suit in default of appearance of the plaintiff was an "order" or a "decree" was considered in *Gilkinson and another* v. *Subramania Ayyar*(1). And it was held to be an "order", and that no appeal lay. We think this decision was right, and we do not think any distinction can be drawn between a decision dismissing a suit under section 102 and a decision dismissing an appeal under section 556. With great respect we are unable to agree with the decision of the Full Bench of the Calcutta High Court in *Radha Nath Singh* v. *Chandi Charan Singh*(2), or with the dictum of Birdwood, J. in *Ramachandra Pandurang Naick* v. *Madhav Purushottam Naick*(3) or with the decision of the Allahabad High Court

(1) I.L.R., 22 Mad., 221. (2) I.L.R., 30 Calc., 660.
(3) I.L.R., 16 Bom., 23.

in *Ablakh and another* v. *Bhagirathi*(1). In *ex parte Modalatha*(2) the decree was given in default of appearance by the respondent, and this was also the case in the Full Bench decision of the Allahabad High Court in *Ajudhia Prasad* v. *Balmukand*(3). Such a decision would, in our opinion, be a "decree", but, as we have stated, this question has now been settled by Legislature.

It is material to observe that, when the law was amended for the purpose of removing the doubts which had arisen by reason of conflicting decision in cases where a decree was given in the absence of the other side, express provision was made in the cases of *ex parte decrees* in original suits and on appeal. No provision was made giving a right of appeal in cases of "decrees" in default of appearance by the plaintiff or the appellant. The fact that no right of appeal was given in these cases seems to indicate the intention of the Legislature that there should only be a right of appeal in the cases specifically mentioned. It was suggested in the course of the argument that a "decree passed *ex parte*" included a decree passed on default of appearance by the plaintiff or the appellant, but this contention seems to us to be altogether untenable.

The plaintiff or the appellant, who is prevented from appearing by a sufficient cause when his case is called on, is fully protected by section 103 and section 588, and the right of appeal given by section 588 (8) and (27) against an order refusing to restore, and we do not think the Legislature intended that in addition to the right of appeal given him by the special provisions of section 588, he should have a further right of appeal under the general provisions of section 584.

We accordingly dismiss the appeal against the appellate "decree" on the ground that no appeal lies. The appeal is dismissed with costs.

(1) I.L.R., 9 All., 427. (2) I.L.R., 2 Mad., 75.
(3) I.L.R., 8 All., 354.

APPELLATE CIVIL.

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

KANEMAR VENKAPPAYYA (SECOND DEFENDANT), APPELLANT,

v.

KRISHNA CHARIYA (PLAINTIFF), RESPONDENT.*

1907. August 20. November 8.

Hindu Law—Son's liability for father's debts—Son liable for father's misappropriation when such misappropriation amounts only to a breach of civil duty.

Where an undivided Hindu father misappropriates money received by him for the purpose of being paid to others in the course of a transaction entered into by him for the benefit of the family, and under circumstances which constitute such misappropriation a mere breach of civil duty and not a criminal act, the undivided son's interest in the joint family property is liable for the repayment of the monies so misappropriated to the person entitled to be paid.

McDowell & Co. v. *Ragava Chetty*, (I.L.R., 27 Mad., 71), distinguished.

THE first defendant was the father of the second. The first defendant started a *Kuri* fund consisting of 20 persons for Rs. 1,000 and as manager thereof, the first defendant took the first year's subscription of Rs. 1,000 without any interest. Every subsequent year during the term of the Kuri, the first defendant was bound to pay his own subscription, to collect the subscription of the other members and to pay the total amount so collected to the successful subscriber each year.

The first defendant having failed to pay to the plaintiff, who was the successful subscriber in a subsequent year, the amount payable to him, the plaintiff obtained a decree against the first defendant in Original Suit No. 243 of 1899 for the amount due to him. In execution he attached the family properties of first defendant. The second defendant put in a claim petition and his one-half share was released from attachment. This suit was brought by plaintiff to declare his right to attach and bring to sale the interest of the second defendant in execution of the decree in Original Suit No. 243.

* Second Appeal No. 1226 of 1904, presented against the decree of H. O. D. Harding, Esq., District Judge of South Canara, in Appeal Suit No. 279 of 1904, presented against the decree of Mr. C. D. J. Pinto, District Munsif of Mangalore, in Original Suit No. 409 of 1902.

KANEMAR VENKAP-PAYYA v. KRISHNA CHARIYA.

The District Munsif dismissed the suit.

His decision was reversed on appeal by the District Judge who decreed in favour of plaintiff.

The second defendant appealed.

K. Narayana Rau for appellant.

K. P. Madhava Rau for respondent.

JUDGMENT.—We think that the decree of the District Judge is right. His finding is that the first defendant as manager of the undivided Hindu family, consisting of himself and the second defendant, entered into the Kuri transaction in 1889, received Rs. 1,000 without any deduction in that year in consideration of his undertaking to manage the fund, to make collections from the other members, and to dispose of the collections in accordance with the contract entered into by him with the other members. He has found that this Kuri transaction was entered into for the benefit of the family and that the sum of Rs. 1,000 was received for the family benefit. In accordance with the terms of the contract then made by the first defendant he was bound to dispose of the collections subsequently made by him in a certain way. He was bound to pay the plaintiff certain sums which he collected in 1898 and 1899, but he failed to do so, and the plaintiff obtained a decree against him, and now sues for a declaration that the family property, including the second defendant's share of it, is liable to satisfy the decree. For the second defendant it is contended that the father in not paying the sums collected was guilty of criminal misappropriation of those sums and that the son is not liable for the criminal acts of his father. Reliance is placed on the case of *McDowell & Co.* v. *Ragava Chetty*(1). That case, however, is not on all fours with the present case. There the Court expressly based their decision on the ground that the money was taken by the father and misappropriated under circumstances which constituted the taking itself a criminal offence, and they pointed out that this distinguished the case from that of *Natasayyan* v. *Ponnusami*(2) where the father's act though characterized by the Judges as dishonest, amounted to nothing more than a breach of a civil duty. In the present case it is not shown that the father's act amounted to more than a breach of a civil duty. The obligation of the father and the liability of the family property, to pay

(1) I.L.R., 27 Mad., 71.

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

KANEMAR VENKAP-PAYYA v. KRISHNA CHARIYA.

the plaintiff arose by virtue of the contract entered into by him as manager of the family and for its benefit, coupled with the subsequent receipt of the collections. The fact that the father failed to fulfil his obligation cannot free the family property from its liability for the debt. We dismiss the second appeal with costs. This judgment is in review of our judgment, dated the 20th August 1907.

APPELLATE CIVIL.

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

VADAPALLI NARASIMHAM (PLAINTIFF), APPELLANT,

v.

DRONAMRAJU SEETHARAMAMURTHY AND OTHERS (DEFENDANTS NOS. 1 TO 9), RESPONDENTS.*

1907. November 14, 15. December 3.

Limitation Act—Act XV of 1877, sched. II, arts. 139, 144—Landlord and tenant—Transfer of Property Act, s. 116—Representative of a tenant by sufferance a trespasser and cannot, without his consent, be converted by the lessor into a yearly or monthly tenant—Suit for possession against such representative governed by art. 144 and not art. 139 of sch. II of the Limitation Act—Civil Procedure Code, ss. 281, 283—Order passed under s. 281 is not binding on judgment-debtor under s. 283 unless he is a party to the proceedings in which the order was passed.

A tenant holding over after the expiry of his term becomes a tenant on sufferance and the landlord's assent alone will suffice to convert such a tenancy into a tenancy from year to year or from month to month according to the nature of the original case.

The provisions of section 116 of the Transfer of Property Act indicate the rule which is *primâ facie* applicable in cases not coming under the Act.

Sayaji Bin Habaji Bhadvalkar v. *Umaji Bin Sadoji Ravut*, (3 B.H.C.R., App. C.J., 27), referred to.

The representatives of a tenant on sufferance, are however mere trespassers, and the lessor cannot, by his assent alone, convert such representatives into tenants without their concurrence.

English and American cases on the point referred to and considered.

* Second Appeal No. 1628 of 1904, presented against the decree of J. H. Munro, Esq., District Judge of Vizagapatam, in Appeal Suit No. 41 of 1904, presented against the decree of M.R.Ry. A. S. Krishnaswami Ayyar, District Munsif of Yellamanchili, in Original Suit No. 212 of 1903.

VADAPALLI NARASIMHAM v. DRONAMRAJU SEETHARAMAMURTHY.

In a suit by a lessor to recover possession from a tenant for a term of years, time begins to run under article 139 of the Limitation Act from the expiry of the term, when the tenancy is determined within the meaning of the article.

Adimulam v. *Pir Ravuthan*, (I.L.R., 8 Mad., 424), not followed.

Seshamma Shettati v. *Chickaya Hegade*, (I.L.R., 25 Mad., 507), approved.

Article 139 deals only with the case of persons who have been tenants and whose tenancy has determined. The representatives of a tenant on sufferance who enter on possession at his death are not tenants within the meaning of article 139 and a suit for possession against them will fall under article 144.

An order made on a claim under section 281 of the Code of Civil Procedure is not conclusive against or in favour of the judgment-debtor under section 283 of the Code unless the judgment-debtor was a party to the proceedings in which the order was passed.

Jagan Nath v. *Ganesh*, (I.L.R., 18 All., 413), approved and followed.

SUIT for land.

The plaintiff alleged that the plaint lands belonged to defendants Nos. 8 and 9 from whom he purchased under a registered deed, dated 24th March 1903, and that the defendants Nos. 1 to 7 who were wrongfully in possession of the said lands refused to surrender the same. Hence this suit.

The facts found by the lower Court were as follows :—

In 1884 Sanyasi, the father of defendants Nos. 2 to 6 obtained possession of the lands under a kadapa or case agreement executed in favour of the predecessors in title of defendants Nos. 8 and 9 for a period of three years. Sanyasi paid rent till 1887, but, after that date he, and after his death defendants Nos. 2 to 6, and from 1899 the first defendant after sale from defendants Nos. 2 to 6 successively remained in possession for more than 12 years without paying any rent. In 1896 the plaint lands were attached in execution of a decree against defendants Nos. 8 and 9. The defendants Nos. 2 to 6 put in a claim petition claiming the lands as their own, but the claim was disallowed on 31st July 1898. Defendants Nos. 8 and 9 were not parties to the proceedings. Defendants Nos. 2 to 6 did not bring a suit under section 283 of the Code of Civil Procedure, but they continued in possession.

The District Munsif held that the effect of the order of 31st July 1898 which was not set aside, was to establish conclusively the title of defendants Nos. 8 and 9, and he accordingly decreed for plaintiff. On appeal, the District Court held that the defendants Nos. 8 and 9 not being parties to the claim proceedings, the order did not enure for their benefit. He therefore reversed the decision of the Munsif. The plaintiff appealed to the High Court.

VADAPALLI NARASIMHAM v. DRONAMRAJU SEETHARAMAMURTHY.

V. Krishnswami Ayyar and *V. Ramesam* for appellant.

T. V. Seshagiri Ayyar and *K. Subrahmania Sastri* for first respondent.

JUDGMENT.—This is a suit to recover certain lands which were held by one Sanyasi the predecessor of defendants Nos. 2 to 6 under certain inamdars. The inamdars granted them to the defendants Nos. 8 and 9, the predecessors of the plaintiff, and subsequently to the grant Sanyasi attorned to the grantees, and on the 7th January 1884 executed a kadappa, exhibit M, in their favour, by which he undertook to hold the lands under them at a yearly rental for three years until the close of the year Vijaya (April 1887).

The kadappa further provided that, although he should conduct himself properly for these years according to the terms of the cowle, he should obtain a fresh cowle at the end of the three years.

In 1887 Government resumed the inam, and Sanyasi then attempted to get Government to grant him a patta for the lands at the full assessment, but the 8th and 9th defendants put in a petition alleging that he was only a ryot cultivating under them, and ultimately, Government ordered the patta to be issued to defendants Nos. 8 and 9 (exhibit J), dated the 20th July 1888. Sanyasi, however, did not pay any rent subsequent to the end of the year Vijaya (April 1887), and died in 1889 when defendants Nos. 2 to 6 are found to have entered as his representatives; nor was any rent paid subsequently down to the institution of the suit in 1903.

In these circumstances both the lower Courts have held that the suit was barred, as at the expiry of the term limited by exhibit M. Sanyasi became a tenant by sufferance, and defendants Nos. 2 to 6 who are found to have entered on his death cannot be regarded as deriving any interest from him, but must be regarded as mere trespassers holding adversely to the plaintiff and to his predecessors. In this Court it has been urged, that exhibit M not having been executed by the lessor, was not a valid lease for three years under the provisions of the Transfer of Property Act, and that Sanyasi did not in law hold under it, but must be regarded as having become a tenant from year to year. This point was not raised in the lower Courts, and we cannot now assume that there was not a registered counterpart executed in his favour by the defendants Nos. 8 and 9. Assuming that

Sanyasi held for three years, and on the expiry of the term became a tenant at sufferance, we think the view taken in the lower Courts is right. There is no evidence of any assent on the part of the landlord during Sanyasi's life which could have converted him from a tenant at sufferance into a tenant in the true sense of the term, either at will, or from year to year. At common law the landlord's assent converted a tenant at sufferance into a tenant at will, but the inconveniences of this tenure to both sides disposed the Courts readily to construe tenancies at will as tenancies from year to year. In *Right* v. *Darby*(1), Lord Mansfield laid it down that 'if there be a lease for a year, and by consent of both parties the tenant continue in possession, the law 'implies a tacit renovation of the contract.' In England this is apparently only a presumption, vide *Dougal* v. *McCarthy*(2), but in most of the American States, it is now held that a tenant who holds even after his term has expired may be treated by the lessor as a tenant from year to year or a trespasser at his option, but that the tenant cannot elect in which capacity he should be regarded, (*vide* American notes in XV Ruling Cases at pages 541 and 594), and the rule appears to have been laid down as broadly in *Sayaji Bin Habaji Bhadvalkar* v. *Umaji Bin Sadaji Ravut*(3) before the passing of the Transfer of Property Act. Under section 116 which, in our opinion, points out the rule which is *primâ facie* applicable even in cases not coming under the Act, where a lessee holds over and the lessor or his representative accepts rent or otherwise assents to the tenant containing in possession, the lease is, in the absence of a contract to the contrary, renewed from year to year or month to month as the case may be. But while at common law the lessor could, by his assent, convert a tenant by sufferance into a tenant in the true sense of the term, he could not, by his mere assent, convert the representatives of a tenant by sufferance, who are mere trespassers into tenants and without their own consent; and section 116 of the Transfer of Property Act which enables the lessor or his representative by his assent to convert a tenant by sufferance into a yearly or monthly tenant, does not enable him by his mere assent to convert the representatives of a tenant

(1) (1) Term Rep., 159. (2) (1893) I.Q.B.D., 736.
(3) 8 B.H.C.R., App. C.J., 27.

by sufferance into such a tenant. It is therefore unnecessary for us to consider the evidence of assent by the lessor after the death of Sanyasi, the alleged tenant by sufferance, which has been relied on by the plaintiff. The statement made *obiter* in *Adimulam* v. *Pir Ravuthan*(1) that "if a tenant by sufferance dies and his representative enters and holds 'on' he holds as a trespasser" is, in our opinion, in accordance with all the authorities on the subject, and in the present case, the facts negative any implication that a tenancy was subsequently created by consent of both sides. The decision in *Krishnaji Ramchandra* v. *Antaji Pandurang*(2) which has been relied on by the appellant, is, in our opinion, distinguishable, and we may further observe that this decision has been dissented from in *Kantheppa* v. *Sheshappa*(3) and in *Chandri* v. *Daji Bhau*(4). Although the possession of a tenant by sufferance is not at common law adverse to the landlord (see notes to *Taylor* v. *Horde*(5)), still, as held in the two cases last mentioned, and according to the view expressed in *Seshamma Shettati* v. *Chickaya Hegade*(6), in a suit by a landlord to recover possession from a tenant for a term of years, time begins to run under article 139 of the Limitation Act from the expiry of the term which must be held to be the time when the tenancy is determined within the meaning of the article, and the decision in *Adimulam* v. *Pir Ravuthan*(1), can, in our opinion, be no longer treated as good law. Article 139 of the Limitation Act, however, deals with suits to recover possession from a tenant, that is to say, a person who was a tenant until his tenancy determined. The representatives of a tenant by sufferance who enter after his death cannot, in our opinion, be said to have ever been tenants within the meaning of article 139, and a suit against them would appear to fall within article 144. Even so, the present suit is barred as the defendants Nos. 2 to 6 entered in 1889, and the present suit was not instituted until 1903.

One more point remains to be considered. In 1896 the suit lands were attached in execution of a decree against defendants Nos. 8 and 9, and defendants Nos. 2 to 6 put in a claim petition which appears from exhibit D, an extract from the Miscellaneous

(1) I.L.R., 8 Mad., 424 at p. 427. (2) I.L.R., 18 Bom., 256.
(3) I.L.R., 22 Bom., 893. (4) I.L.R., 24 Bom., 504.
(5) 2 Sm.L.C., at p. 732, 8th Ed. (6) I.L.R., 25 Mad., 507 at p. 511.

VADAPALLI NARASIMHAM v. DRONAMRAJU SEETHARAMAMURTHY.

Petition Register, to have been dismissed. Defendants Nos. 2 to 6 did not sue within the year and, on this ground, the District Munsif held that they were debarred from asserting their right to the property in the present suit; but the District Judge overruled this contention, we think rightly, on the ground that it is not shown that the judgment-debtors, defendants Nos. 8 and 9, were parties to the proceedings in which the order exhibit D was passed.

It has been held in *Guruva* v. *Subbarayudu*(1) and *Moidin Kutti* v. *Kunhi Kutti Ali*(2) which was approved by the Full Bench in *Krishnasami Naidu* v. *Somasundaram Chettiar*(3) that an order passed under section 281 is not conclusive as against the judgment-debtor unless he is a party to the proceedings in which the order was passed. If, therefore, the order in exhibit D had been in favour of defendants Nos. 2 to 6, they could not have pleaded it successfully in the present suit against the plaintiff, as his predecessors, the judgment-debtors (defendants Nos. 8 and 9) were not parties to the proceedings in which the order was passed. It is contended, however, that though the defendants Nos. 2 to 6 could not under these circumstances have taken advantage against the judgment-debtors of an order passed on their claim, still under the words of section 283, an order made against them must be held to be conclusive as between them and the judgment-debtors, even though the latter were not parties. No authority has been cited in support of this contention which is opposed to the decision of *Jagan Nath* v. *Ganesh*(4), and was, in our opinion, rightly rejected. In the result the second appeal must be dismissed with costs.

(1) I.L.R., 13 Mad., 366.
(2) I.L.R., 25 Mad., 721.
(3) I.L.R., 30 Mad., 335.
(4) I.L.R., 18 All., 413.

(2) (1893) I.Q.B.D., 786.
(3) 3 B.H.C.R., App. C.J., 27.

APPELLATE CIVIL.

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

1907. December 17, 18.

PAMANUJA CHARIAR (FOURTH DEFENDANT), APPELLANT,

v.

KRISHNASAWMI MUDALI AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Water, damage caused by retention of—Liability of owner of land for damage caused by storage of water.

An owner of land is not liable for damage caused to other lands by the retention of water on his land in the natural and usual course of enjoying his property.

The retention of water by a person on a portion of his land to prevent its passing on to other portions of his land is not an act done in the natural and usual course of enjoyment and the person so doing is liable for damage caused thereby, *Moholal* v. *Baijivkore*, (I.L.R., 28 Bom., 472), doubted and distinguished.

THE facts are sufficiently stated in the judgment of the lower Appellate Court which was as follows:—

"The facts are defendant owns fields B, C, C1 in the plan. South of field B lies field G which belongs to plaintiffs. B and G are separated by a bund, E, three feet high. Fields C and C1 are nominally irrigated from the channel D. Field B is irrigated from the channel that runs through culvert A. Formerly this channel continued towards the east, but that part is silted up and the water now flows westward on to field C. Defendant does not wish it to flow west, so he increased the size of the ridge dividing B from C, from one foot high to 4½ feet high. The effect of this is to cause water to stagnate in the south part of field B and this percolates into the north part of field G andwater logs it and renders it unfit for cultivation. Besides the actual waterlogging of four cents in field B, plaintiff states that he fears that in time of flood much water will collect in B and this may cause the bund E to breach. The apprehension is not unreasonable. The District Munsiff found that defendant had done no wrong by building a bund on his own

* Second Appeal No. 302 of 1905 presented against the decree of R. D. (1) I.L.R., Mad., [illegible] of Chingleput in A.S. No. 151 of 1904, presented
(3) I.L.R., 22 Bom., 893. (4) I.L.R., 28 Bom., 504.
(5) 2 Sm.L.C., at p. 732, 8th Ed. (6) I.L.R., 25 Mad., 507 at p. 511.

RAMANUJA CHARIAR v. KRISHNASAWMI MUDALI.

land and dismissed the suit holding the matter to be a case of *damnum absque injuria.*"

"Plaintiffs appeal.

I think the District Munsif is wrong and that the maxim applicable is *sic utere tuo ut alienum non laedas.* Plaintiff is not protecting himself against an extraordinary flood; he is for his own convenience interrupting the flow of surplus water and storing it on part of his land. In so doing he is bound to see that it does not damage his neighbour.

I decide in favour of plaintiff and allow him damages of one rupee. So much of the bund F shall be removed as is necessary to prevent damage to plaintiffs' land; 12 Calcutta, 323, and defendants will be restrained from increasing the size which shall be settled in execution."

V. V. Srinivasa Aiyangar for appellant.

The Hon. Mr. *V. Krishnaswami Aiyar* for respondent.

The fourth defendant appealed to the High Court.

JUDGMENT.—It is true that the water was not brought on to the 4th defendant's land by any act of his, but we read the finding as a finding that the fourth defendant retained water which flowed on to one portion of his land for the purpose of protecting another portion of his land, and the result of the water being so retained was that damage was caused to land of the plaintiffs which adjoined the portion of the fourth defendant's land where the water had been retained. We think the principle of the decision in *Whalley* v. *Lancashire and Yorkshire Ry. Co.*(1) and *Baird* v. *Williamson*(2) applies to this case. It seems to us that the soundness of the decision in the case of *Mohola*l v. *Bai Jivkore*(3) may be open to doubt. But the case may be distinguished on the ground that in that case, although it may perhaps be said the defendant did not bring the water on to his land, the act done by him, viz., the digging of a trench for the purpose of building operations was an act done in the natural and usual course of enjoyment of the defendant's property. The retaining of water on one part of a mans's land in order that it might not flow on to another part does not appear to us to be an act done in the natural and usual course of the enjoyment of property which would protect the man

(1) 13 Q.B.D., 131. (2) 15 C., B. (NS.), 376.
(3) I.L.R., 28 Bom., 472.

RAMANUJA CHARIAR v. KRISHNASAWMI MUDALI.

who does it from being liable in damages if he injures his neighbour's land.

We think the plaintiff was entitled to the relief which the lower Appellate Court gave him and we dismiss this second appeal with costs.

APPELLATE CIVIL.

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

RAMA ODAYAN AND OTHERS (DEFENDANTS), APPELLANTS,

v.

SUBRAMANIA AIYAR (PLAINTIFF), RESPONDENT.*

1907. December 12, 13, 16. 1908. January 23.

Water, right to—Infringement of water right, whether contractual or proprietary, when likely to cause damage, may be restrained by injunction though no evidence of actual damage is given.

Ryotwari lands belonging to the plaintiff had been irrigated for a period of more than 60 years by a channel without any interference on the part of Government. The defendant without any justifying cause blocked up the mouth of the channel cutting off the entire supply of water. The plaintiff without claiming any damages but stating in a general way that he had been damnified by the act of the defendants sued to restrain the defendants by injunction from interfering with the channel:

Held, that the plaintiff was entitled to the injunction sued for whether his right to the water was based on a contract with Government or whether his right was a proprietary right appurtenant to his ownership of land.

In either view of the case, the plaintiff is entitled to succeed without an express finding as to damage. It is enough if the act is such as to be likely to cause damage to the plaintiff, and the stoppage of the entire supply of water is such an act.

The interference with contractual relations without sufficient justification is a violation of legal right which gives a right of action to the party whose rights are infringed. The observation of Lord Macnaghten in *Quinn* v. *Leathem*, ([1901] A.C., 495 at p. 510), referred to.

THE facts are sufficiently stated in the judgment.

T. V. Seshagiri Ayyar and *R. Kuppuswami Ayyar* for appellants.

* Second Appeal No. 319 of 1905, presented against the decree of F. D. P. Oldfield, Esq., District Judge of Tanjore, in Appeal Suit No. 448 of 1904, presented against the decree of M.R.Ry. S. Ramaswami Ayyar, District Munsif of Mayavaram, in Original Suit No. 355 of 1902.

RAMA ODAYAN v. SUBRAMANIA AIYAR.

The Hon. The Acting Advocate-General, The Hon. Mr. V. *Krishnaswami Ayyar* and *T. S. Rajagopala Ayyar* for respondent.

JUDGMENT (Sir ARNOLD WHITE, C.J.).—The facts of this case, as admitted or found are stated in the judgment of my learned brother, which I have had the advantage of reading.

It seems to me that whether we regard the relations between the plaintiff and Government, with reference to the supply of water, as contractual, the view taken in *Chinnappa Mudaliar* v. *Sikka Naikan*(1), or whether we regard the plaintiff's right to the water of the channel as a proprietary right appurtenant to the ownership of the land—in either view, I think the injunction which has been granted can be sustained without any express finding that actual damage has been suffered by the plaintiff.

Assume the rights of the plaintiff as against the Government to be contractual. I do not think it is necessary in order to uphold the injunction which has been granted to pray in aid the principle of the decisions in *Temperton* v. *Russell*(2) and *Quinn* v. *Leathem*(3). In fact I doubt whether the principle of these decisions has any application to the present case. This is not a case of inducing a man to break his contract with a third party. No question of combination—the fact there are more defendants than one does not show combination—or of conspiracy to injure arises. If an act has been done by the defendants, which deprives the plaintiff of the enjoyment of a contractual right—assuming the right to be contractual—I think, subject to the question of damage to the plaintiff, which I will deal with later, the plaintiff has a right of action against the defendants.

In his judgment in *Quinn* v. *Leathem*(3), Lord Macnaghten, in discussing *Lumley* v. *Gye*(4) said (p. 510). "Speaking for myself, I have no hesitation in saying that I think the decision was right, not on the ground of malicious intention—that was not, I think, the gist of the action—but on the ground that a violation of legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference." I take it, Lord Macnaghten assumed that the

(1) I.L.R., 24 Mad., 36.
(2) [1893] 1 Q.B., 715.
(3) [1901] A.C., 495.
(4) 2 E. & B., 216.

RAMA ODAYAN v. SUBRAMANIA AIYAR.

violation of the legal right caused damage to the party whose right had been violated.

The question of course remains, assuming the plaintiff's rights as against Government to be contractual, what is the contract? The contract, if any, is a contract on the part of Government to continue such supply as is sufficient for the accustomed requirements of the ryotwari land-holder (see *Sankaravadivelu Pillai* v. *Secretary of State for India in Council*(1)). It may well be that if Government had blocked up the channel in question the plaintiff would have no cause of action against them if they could show that they had made other provision to supply him with water sufficient to meet his accustomed requirements. But I do not think this defence is open to the defendants. Even if it were they have not attempted to set it up. They have not sought to justify their act on any ground of law in the view that the channel which they blocked up was the channel which had been irrigating the plaintiff's lands. The case was fought in the lower Courts solely on the question whether the plaintiff's lands had in fact been irrigated by the channel which the defendants blocked up.

I think the defendants' act was in violation of the plaintiff's right, and applying the law as enunciated by Lord Macnaghten in the passage I have cited, I think the plaintiff has a right of action against the defendants, if, as the result of their act, he has sustained damage. It is true there is no express finding as to damage and though there is a general allegation of injury, no damages are claimed in the suit. But I think the plaintiff is entitled to the injunction without any express finding as to damage. It might have been otherwise if the result of the defendants' act had merely been to diminish the supply of water which the plaintiff had been accustomed to receive. But here the channel has been blocked at its source, and as the result of the defendants' act the plaintiff has been deprived of the supply of all the water which he has been accustomed to receive by means of this channel. Even if, in such a case, damage is not to be presumed, seeing that the defendants have violated what is, against them, at any rate a *primâ facie* right in the plaintiff, I think it was for them to show that no damage was sustained by the plaintiff, and they have not attempted to do this.

(1) I.L.R., 28 Mad., 72 at p. 74.

RAMA ODAYAN v. SUBRAMANIA AIYAR.

In the view that the plaintiff had a proprietary right in the water of the channel in question as appurtenant to the ownership of the land it could not be contended that the act of the defendants did not amount to an infringement of that right. In this view also, I think, the plaintiff, for the reasons I have stated, is entitled to an injunction without an express finding as to damage.

I think the injunction was rightly granted and I would dismiss this second appeal with costs.

MILLER, J.—The material facts of the case as presented to us and as found by the District Judge are the following:—The defendants, Mirasidars of Perambur Village, irrigate the lands of that village which are classed as 'wet,' from the Perambur channel, an irrigation channel constructed before the paimash by the Government of the day for the purpose of conducting water to the village of Perambur. The plaintiff is a ryot of Edakudi, holding land near the Perambur channel at a point above the Perambur village. The District Judge finds as a fact, and we accept the finding, that this land is watered from a small channel, the Kandiamadai Kanni which was in existence at the paimash, and is led from the southern bank of the Perambur channel. We must on these facts take it that the plaintiff's irrigation of his land for at least 60 years from the Perambur channel without interference by the Government is proved. The defendants blocked up the entrance of the Kandiamadai Kanni by an obstruction placed in the bank of the Perambur channel and so deprived the plaintiff of the use of the water of that channel. The District Judge has restrained them by injunction from repeating the obstruction.

It does not seem that any question was argued in the lower Court as to the right of the plaintiff to obtain a decree if the facts are found as they have been found. The controversy was as to the existence or non-existence of the Kandiamadai channel as a paimash channel, and it seems to have been assumed, in spite of the second issue, that the plaintiff would be entitled to a decree if the existence of the channel were established.

Here it is contended for the appellants that even on the facts found the plaintiff is not entitled to a decree; the argument is that the supply of water for irrigation is made by the Government to the ryot on the footing of contract, and if the defendants

RAMA ODAYAN v. SUBRAMANIA AIYAR.

obstruct the plaintiff's supply they can be made liable, if at all, only on proof of actual damage (of which it is contended, there is here no proof) as for procuring a breach of contract. For the plaintiff, on the other hand, it is argued that his right to the water of the channel is a right of property appurtenant to his occupation of his land, and that any interference with it by the defendants renders them liable to be restrained by injunction. Mr. Seshagiri Ayyar did not suggest that we ought not to apply to India the principles of law (apart from any question of conspiracy) enunciated by the House of Lords in *Quinn* v. *Leathem*(1) and by the decisions in other cases in England; and if we do so, and I know no reason why we should not do so, there is no doubt that in the present case the plaintiff has a cause of action if he has been injured by the act of the defendants. If their act has injured him, the defendants have injured him without just cause or excuse; for they have not suggested any justification; they contended themselves with denying the existence of the channel and consequently any obstruction by themselves; and the act by which the injury has been inflicted is, without doubt, a wrongful act, the blocking up of a channel which the defendants had no right to block up and which the plaintiff had by his contract with the Government—that is the assumption—a right to have kept open. This was practically conceded by Mr. Seshagiri Ayyar; and the question is therefore simply whether the plaintiff has shown that he has suffered any injury. The Advocate-General pointed to evidence which, if believed, might prove damage, but what is found by the lower Appellate Court is that the whole Kandiamadai Kanni was blocked up, and that, if while the channel was so blocked the plaintiff was able to obtain water from the Edakudi channel that was by leave and license of the Edakudi Mirasidars, who might at any time revoke the license and leave the plaintiff without water. This finding is arrived at in the course of a discussion of the District Munsif's finding that the plaintiff customarily watered his crops from Edakudi channel, and not on a consideration of any question of damage, for no issue was framed upon that question, nor does it seem to have been presented to the Court in argument. Damage generally was alleged in the plaint (paragraph 9) though not estimated in money, and was

(1) [1901] A.C., 495.

denied in the defendants' written statement, but no decision has been given on the question.

If damage is proved the injunction granted by the District Judge may be sustained as the appropriate remedy to prevent the repetition of the injury. It was the remedy adopted in *Ramachandra* v. *Narayanasawmi*(1). I have had some doubt whether we can decide this question of damage or no damage without obtaining a further finding from the District Judge, but having had an opportunity of reading the judgment just delivered by the learned Chief Justice, I am able to agree with him that it will not be necessary to send back the case. The whole of the plaintiff's water-supply being cut off by the defendants, it seems to follow, as a matter of necessary inference, that the plaintiff must have been damaged: if he had to be at the trouble of providing himself with a new source of supply, that is damage, or at any rate ought to be so considered unless the defendants can show that it was not. Such damage may not be easily estimated in money, but it is actual damage none the less. I may refer to the case of *Exchange Telegraph Company* v. *Gregory & Co.*(2), in which three injunctions were granted, of which one restrained the defendant from "continuing to induce any subscriber of the plaintiffs to supply the defendant with the said information (the information was information supplied by the Stock Exchange Committee to the plaintiffs and by them to their subscribers) in breach of his contract with the plaintiffs." In considering the propriety of this injunction Lord Esher, M.R., made the following observation:— "It is said that plaintiffs have not been injured; but what the defendant has done must have injured them . . . . Though I think there must be some damage to support an action for the infringement of the plaintiff's common law right, it is enough to show that the act complained of was done in such a way as to be likely to damage the plaintiffs, though proof of specific damage be not given;" and Kay, L.J., says "I agree that the gist of the action would be damage; but if a Judge or jury could properly infer from the acts complained of that those acts must result in damage to the plaintiffs, that is enough."

In the present case on the finding that the effect of the defendants' act was to drive the plaintiff to seek a precarious

(1) I.L.R., 16 Mad., 383. (2) [1896] 1 Q.B., 147.

water-supply, dependent on the good will of the Edakudi Mirasidars, we ought to hold that that act must have damaged the plaintiffs.

I concur therefore in dismissing the second appeal with costs.

APPELLATE CIVIL.

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

KRISHNA SATAPASTI (FIRST DEFENDANT), APPELLANT,

v.

SARASVATULA SAMBASIVA ROW (PLAINTIFF), RESPONDENT.*

1908. January 23, 24.

Civil Procedure Code, Act XIV of 1882, *s.* 244—*Auction purchaser not a representative of decree-holder when the question is the right of such purchaser to possession against judgment-debtor.*

The purchaser at an auction sale, held in execution of a decree, is not the representative of the decree-holder, when the question to be decided is the right of such auction purchaser to possession as against the judgment-debtor.

Section 244 of the Code of Civil Procedure is no bar to a separate suit by the auction purchaser for possession of the purchased property from the judgment-debtor.

Kishori Mohun Roy Chowdry v. *Chunder Nath Pal*, (I.L.R., 14 Calc., 644), followed.

Manickka Odayan v. *Rajagopala Pillai*, (I.L.R., 30 Mad., 507), doubted.

Sandhu Taraganar v. *Hussain Sahib*, (I.L.R., 28 Mad., 87), considered.

Obiter:—The purchaser from a decree-holder is, but the purchaser at a Court sale is not, a representative of the decree-holder for the purposes of section 244.

SUIT for redemption.

The suit-land, which belonged to the first defendant, was purchased by the plaintiff's late father, Sarasvatula Venkata Kondayya Pantulu, for Rs. 21, subject to the second defendant's mortgage, at the Court-sale held in execution of the decree against the first defendant in Original Suit No. 560 of 1885 on the file of this Court. The plaintiff now sued for its redemption.

The first defendant contends that, subsequent to the Court-sale, the plaintiff's father orally conveyed the land to him for

* Second Appeal No. 478 of 1905, presented against the decree of W. B. Ayling, Esq., District Judge of Ganjám at Berhampur, in Appeal Suit No. 287 of 1904, presented against the decree of M.R.Ry. P. Lakshminarasu Pantulu, District Munsif of Berhampur, in Original Suit No. 353 of 1903.

Rs. 31, in 1893, on the understanding that he should discharge the second defendant's mortgage-debt, and that he, accordingly, paid the mortgage-money to the second defendant and took possession of the land from him. The first defendant was supported by the second defendant, who disclaimed all interest in the land.

The following issues were framed:—

1. Whether or not the suit is sustainable?

2. Whether the oral sale stated by the first defendant is true and valid?

On the first issue the Munsif found the suit was sustainable; on the second he held the oral sale not proved. He passed a decree in favour of the plaintiff, which decree was affirmed on appeal.

The first defendant appealed to the High Court.

K. Narayana Rao for appellant.

T. V. Seshagiri Ayyar for respondent.

JUDGMENT.—We agree with the decision in *Kishori Mohun Roy Chowdry* v. *Chunder Nath Pal*(1), which was followed by the District Judge.

Mr. Narayana Rao has raised a point which was not taken in either of the Courts below, viz., that the suit was not maintainable by reason of the provisions of section 244 of the Code of Civil Procedure. He relied on the decisions in *Sandhu Taraganar* v. *Hussain Sahib*(2) and *Manickka Odayan* v. *Rajagopala Pillai*(3).

It seems to us that *Sandhu Taraganar* v. *Hussain Sahib*(2) is distinguishable on the ground that in that case the party who sued for possession was a purchaser from the decree-holder who had purchased at Court auction. He derived his title from the decree-holder. In the present case the purchaser did not purchase from the decree-holder and did not derive title from him.

We do not think that, in the present case, the purchaser who obtained his title by purchase at Court auction and did not derive it by purchase from the decree-holder, is the representative of the decree-holder within the meaning of the section. No doubt in *Manickka Odayan* v. *Rajagopala Pillai*(3), this Court in considering the question of the right of a purchaser at Court auction to set aside a sale under section 310A, held that he was the representative of the decree-holder for the purposes of section 244.

(1) I.L.R., 14 Calc., 644.

(2) I.L.R., 28 Mad., 87.

(3) I.L.R., 30 Mad., 507.

But the learned Judges in so holding would seem to have regarded *Sandhu Taraganar* v. *Hussain Sahib*(1) as deciding that an auction-purchaser is the representative of a decree-holder for the purposes of section 244 and to have followed that case. What was actually decided in *Sandhu Taraganar* v. *Hussain Sahib*(1) was that a purchaser from a decree-holder who had purchased in Court auction was a "representative."

But however this may be, where the question is the right of a purchaser at Court auction to possession as against the judgment-debtor, we are of opinion that the purchaser is not the representative of the judgment-creditor within the meaning of the section.

This being our view it is not necessary for us to decide whether the question of the right of a purchaser at Court auction to recover possession from the judgment-debtor is a question relating to the execution of the decree within the meaning of section 244.

The second appeal is dismissed with costs.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, Mr. Justice Wallis and Mr. Justice Miller.

SAMBASIVA AYYAR AND OTHERS (DEFENDANTS), APPELLANTS,

v.

VENKATASWARA AYYAR (LEGAL REPRESENTATIVE OF THE PLAINTIFF), RESPONDENT.*

1907. October 14, 21. November 4.

Hindu Law—Gift to widow, construction of—

When a suit brought by a Hindu widow against her deceased husband's co-parceners for possession of her divided husband's share was compromised and certain lands were given to her and another donee in equal shares as full owners and the instrument recited that the gift was made out of motives of generosity:

(1) I.L.R., 28 Mad. 87.

* Appeal No. 19 of 1907, presented under section 15 of the Letters Patent against the judgment of (Miller and Wallis, JJ.) in Second Appeal No. 638 of 1904, confirming under sections 575 and 587 of the Code of Civil Procedure the decree of the District Court of Trichinopoly in Appeal Suit No. 8 of 1903 presented against the decree of the District Munsif's Court of Kulittalai in Original Suit No. 293 of 1902.

SAMBASIVA AYYAR v. VENKATASWARA AYYAR.

Held, per Sir ARNOLD WHITE, C.J., and MILLER, J., (WALLIS, J., dissenting), that the widow took an absolute and alienable interest in her share of the lands given.

The gift being made in the same terms to the two donees, there was no reason to suppose that the gift to the widow alone was restricted. Although the suit was brought to recover only a widow's estate, it was competent to the defendant by way of compromise to convey an estate in full ownership; and where the instrument in clear words conveys such an interest, no presumption in favour of a restricted gift ought to be made from the nature of the suit.

Sreemutty Rabutty Dossee v. *Sibchunder Mullick*, (6 M.I.A., 1), distinguished.

THE facts of the case are stated in the report of the judgment appealed against in I.L.R., 30 Mad., 356.

R. S. Sankara Ayyar for appellant.

T. V. Seshagiri Ayyar for respondent.

Sir ARNOLD WHITE, C.J.—There can be no doubt that the agreement of 1865 purports to give the properties mentioned in full ownership to the two donees. The question is—do the words which operate so as to convey an estate in full ownership to Viswam Ayyar convey a similar estate to the widow Venkammal; or, having regard to the circumstances in which the agreement was made, does Venkammal take merely a widow's estate? In the present case, as in *Jogeswar Narain Deo* v. *Ram Chandra Dutt*(1) the gift is made to the two donees—not in similar language, but under the very same words. So far as the intention of Minakshi Ayyar, the donor, is concerned, it seems to me that this goes some way to show that he intended the two donees to take the same estate in the property. It is no doubt true that Venkammal's rights in the suit, if any, were the rights of a Hindu widow and that if she could have got anything in the suit, which seems doubtful, her estate in any property she might have obtained would have been that of a Hindu widow. But this consideration, of course, did not prevent Minakshi Ayyar—if he were so minded—either from motives of generosity or from some other motive which is not apparent, from conveying an estate in full ownership to Venkammal. I think this is what he intended to do.

In *Sreemutty Rabutty Dossee* v. *Sibchunder Mullick*(2), the deed of assignment itself declared that the widow was entitled to the money in question *as the share of her deceased husband* "for her sole absolute use and benefit." The deed itself therefore indicated the

(1) I.L.R., 23 Calc., 670.

(2) 6 M.I.A., 1.

SAMBASIVA AYYAR v. VENKATASWARA AYYAR.

capacity in which the widow took. This is not so in the present case. Although it is clear from the recitals to the deed that the only interest which Venkammal had in the suit was a widow's interest, I think the deed, read as a whole, indicates the intention of the donor that she should take a larger estate than she claimed in the suit. It may be observed that, though there can be little doubt that the agreement was in the nature of a compromise, it does not expressly purport to have been entered into by way of compromise of the suit. The words are "I gave you as a matter of favour," etc.

I think the Court of First Instance was right and that the decree of that Court should be restored, and the decree of the lower Appellate Court and that of the High Court in Second Appeal No. 638 of 1904 set aside.

The defendants are entitled to their costs throughout.

WALLIS, J.—I adhere to my former judgment.

MILLER, J.—I adhere to the conclusion at which I had arrived before and which I have stated in my previous judgment.

APPELLATE CRIMINAL.

Before Mr. Justice Wallis.

NARASIMMA CHARI

v.

CHAIRMAN, MUNICIPAL COUNCIL, CONJEEVERAM.*

1907. September 4, 5. 1908. February 7.

District Municipalities Act (Madras Act), IV of 1884, ss. 3 (27), 169, 263—License not required under s. 169 when verandah or other covering erected within the limits of adjacent property.

A public street as defined in section 3 (27) of the Madras District Municipalities Act, extends only up to the boundaries of the adjacent property.

The special license under section 169 of the Act which is required in the case of projections 'over pyals and pavements in front of any building or land *in a*

* Criminal Revision Case No. 171 of 1907, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the judgment of S. M. V. Oosman Sahib, Deputy Magistrate of Saidapet, in Criminal Appeal No. 3 of 1907, confirming the conviction and sentence passed upon the petitioner by M.R.Ry. Seshagiri Rao, Stationary Sub-Magistrate of Conjeeveram, in Calendar Case No. 809 of 1906.

NARASIMMA CHARI v. CHAIRMAN, MUNICIPAL COUNCIL, CONJEEVERAM.

public street ' is not required in the case of verandahs and other coverings *within* the limits of adjacent property.

THE facts of this case were stated in the judgment of the Stationary Sub-Magistrate, the material portions of which were as follows:—

"The Chairman of the Conjeeveram Municipality, charges the accused with having begun the construction for a top covering over the *koradu* in front of his house No. 31, Chetty street, Conjeeveram, without a license, on the 29th October last, punishable under sections 169 and 263 of Act III of 1897.

The facts of the case are briefly as follows. The accused, in December 1905, applied for a license to the Chairman for repair and reconstruction of his house No. 31, Chetty street, First Division, Little Conjeeveram. The petition was returned on the 16th January last for resubmission with a sketch showing the details of reconstruction and repairs to be made. A sketch was submitted. Subsequently a license was issued for general repairs and reconstruction of the building, and the accused was asked to make a separate application for the top construction over the *koradu* of the house No. 31 above referred to. This application was made by the accused on the 7th May last. Permission was refused for the top construction over the *koradu* and the accused was given notice to stop any top construction over the *koradu*. Notwithstanding the refusal to grant permission for the top construction over the *koradu*, and the notice issued to stop the same, the accused hurried on with the construction of the same.

The Vakil for the accused contends that it is a private property and that he could go on with the construction over his private property and relies on XV, Madras, page 292. The point now to be determined is not whether the property is public or private; that only whether the accused complied with the terms and conditions of section 169.

I, therefore, find the accused guilty of having constructed top-covering over *koradu* without license."

The conviction and sentence were upheld on appeal by the Deputy Magistrate.

The accused moved the High Court under section 439 of the Code of Criminal Procedure.

K. Srinivasa Ayyangar for the Hon. Mr. *V. Krishnaswami Ayyar* and *V. V. Srinivasa Ayyangar* for petitioner.

NARASIMMA CHARI v. CHAIRMAN, MUNICIPAL COUNCIL, CONJEEVERAM.

Mr. *P. R. Grant* for the Public Prosecutor and *T. V. Seshagiri Ayyar* for respondent.

ORDER.—The petitioner has been convicted under section 263 of the District Municipalities Act for erecting a covering over the *koradu* or pavement in front of his house without having obtained a license for such construction under section 169 of the Act. It is found by two Courts that no license was obtained, and I cannot interfere with that finding, but it is further contended in revision that the conviction is bad, because there is no finding that the *koradu* in question is not private property, and if it is private property no license is necessary. In support of this contention, *Krishnayya* v. *The Bellary Municipal Council*(1) is cited. Section 169 is one of several sections designed to restrain and regulate the erection of projections and obstructions in public streets. Section 167 provides that no wall, fence or other obstruction or encroachment shall be erected in any public street, or, bounding or abutting on any such street without permission. Section 168 empowers the Municipality to remove any projection, encroachment or obstruction made against or in front of any building or land in any public street. The power of removal, etc., conferred by this section clearly relates only to projections, encroachments or obstructions made in any public street. Section 169 provides that every person intending to put up any verandah, etc., "to project over the pyals and pavements in front of any building or land in a public street or over such street" shall apply for a license. This section which is not very happily worded, draws a distinction between projections over the pyals or pavements in front of any building or land in public street and projections over the street itself. Reading the section in connection with the previous sections the projections first mentioned are, it appears to me, projections over pyals or pavements in any public street in front of any building or land, and do not cover all projections over pyals or pavements in front of houses or lands abutting on the street. To come within the sections the projections must be over pyals or pavements in a public street or over the street itself, and to see whether the pavements or pyals are in a public street, reference must be had to the amended definition of street in section 3 (XXVII) of the Act. According to this definition,

(1) I.L.R., 15 Mad., 292.

NARASIMMA CHARI v. CHAIRMAN, MUNICIPAL COUNCIL, CONJEEVERAM.

street includes any road, street, etc., "together with the drains on either side and with the land, whether covered or not by any pavement, verandah or other erection, which lies on either side of the roadway up to the boundaries of the adjacent property." There may thus be pyals or pavements in a public street due to unauthorized encroachment of adjoining house-owners or erected with permission under section 167; and it is with projections over these pavements and pyals that section 169 deals. To bring them within the section they must be in a public street, and under the definition a public street extends only up to the boundaries of the adjacent property. Verandahs and other coverings erected within the limits of the adjacent property require no special license under (section 169). The lower Courts were therefore mistaken in thinking it immaterial whether the *koradu* in question was private property or not.

Before disposing of the case in revision, I have decided to call upon the Sub-Magistrate to submit a finding within a month as to whether the *koradu* in question was in a public street. Fresh evidence may be taken. Seven days will be allowed for filing objections after the notice of the return of the finding shall have been posted up in this Court.

In compliance with the above order the Stationary Second-class Magistrate of Conjeeveram took fresh evidence and found the koradu was an encroachment. On the case coming on before the learned Judge after the return of this finding, his Lordship went into the evidence and upholding the finding dismissed the petition.

APPELLATE CRIMINAL.

Before Mr. Justice Benson and Mr. Justice Miller.

PONNAYEE

v.

PERIYA MOOPPAN.*

1908. February 5.

Criminal Procedure, Act V of 1898, s. 488—Magistrate has a discretionary power in granting maintenance—Refusal to grant when woman guilty of adultery with one of lower caste not a wrong exercise of such discretion.

Under section 488 of the Code of Criminal Procedure, the Magistrate has a discretionary power to award maintenance, and such discretion is not wrongly exercised when a Magistrate refuses maintenance to a woman who, for adultery with one of a lower caste, is expelled from caste and has thus made it impossible for her husband to live with her.

THE facts are fully stated in the Letter of Reference which is as follows :—

"I have the honour to submit herewith for the orders of the High Court the records in Miscellaneous Case No. 41 of 1907, on the file of my Head-quarters Deputy Magistrate.

The petitioner in the case applied for maintenance from her husband, the counter-petitioner. The relationship between the parties is not disputed, but the Magistrate found that the petitioner had been guilty of adultery on one occasion and he refused to award maintenance. Objection was taken that the petitioner's act did not amount to 'living in adultery' and that she was therefore entitled to maintenance. The Deputy Magistrate overruled this objection, remarking that the chances were that the immoral relations between the petitioner and her paramour had existed for some time and that even if only one act of adultery had been committed, the petitioner under the circumstances of the case had rendered it impossible for her husband to live with her. His reasoning is, I submit, faulty, and the refusal to award maintenance is, in my opinion, opposed to the ruling of the High Court in I.L.R., XXXV Mad., 332.

* Case referred No. 83 of 1907 (Criminal Revision Case No. 444 of 1907) for the orders of the High Court under section 438 of the Code of Criminal Procedure by J. H. Robertson, Esq., District Magistrate of Salem, in his letter No. Mis. C-41 of 1907, dated 1st November 1907.

PONNAYEE v. PERIYA MOOPPAN.

As the Deputy Magistrate's decision gives the grounds for his orders, I have not thought it necessary to call for further explanation."

T. Subrahmania Ayyar for petitioner.

T. Narasimha Ayyangar for counter-petitioner.

ORDER.—We are not prepared to say that the view taken by the Deputy Magistrate as to the construction of section 488, Criminal Procedure Code, is wrong. We think that the use of the word " may " in that section, as distinguished from " shall," shows that the Magistrate has a discretion to decide in what cases the award of maintenance may properly be made. No doubt the discretion must be exercised judicially and reasonably, not capriciously. This was the view taken by Benson, J., in the case of *Gantapalli Appalamma* v. *Gantapalli Yellayya*(1). In the present case the Deputy Magistrate did not refuse to award maintenance, because the petitioner was " living in adultery," but because she had been guilty of adultery with a low caste man, which led to her expulsion from caste, and thus, as we take it, rendered it, in effect, impossible for her husband to keep her with him without himself losing the society of his fellow caste men. We are not prepared to say that in these circumstances the Deputy Magistrate was wrong in refusing to award her maintenance.

(1) I.L.R., 20 Mad., 470.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Sankaran-Nair.

MANUEL LOUIS KUNHA (PLAINTIFF), APPELLANT,

v.

JNANA COELHO AND OTHERS (DEFENDANTS NOS. 2 TO 7), RESPONDENTS.*

1908. January 7, 8, 28.

Will—Trusts Act, Act VI of 1882, *ss.* 5, 81—*Bequest to legatee with oral directions in testator's lifetime for the disposal of the property—Rule of English Law that such legatee is bound by the trusts so declared by testator applies in India under s.* 5 *of the Trusts Act—Section* 81 *of the Trusts Act does not apply to such cases—Maintainability under s.* 187 *of Succession Act of a suit by the beneficiary for the benefit conferred in the absence of Probate or Letters of Administration.*

Under English Law, where a testator disposes of property in favour of a legatee, and, at the time of such disposition or at any subsequent period during his lifetime, the testator informs the legatee that the disposition in his favour, although apparently for his benefit, was so made in order that he may carry into effect certain wishes of the testator which are communicated to him, and the legatee expressly, or impliedly, undertakes to carry out the wishes so expressed to him by the testator, the legatee will be treated as a trustee, and will be compelled to carry out the instructions so confided to him. The reason for this rule is that it would be a fraud on the part of the legatee not to give effect to the testator's intentions, and the law will not permit him to benefit by his own fraud.

The Legislature in enacting section 5 of the Indian Trusts Act and the proviso thereto intended to make this rule of Equity applicable in India.

Section 50 of the Indian Succession Act does not apply to such cases. The instructions of the testator are given effect to under the English Law, and under section 5 of the Trusts Act, not, as a part of the will, but by fastening on the conscience of the legatee a personal obligation to carry into effect the wishes of the testator, in order to prevent the perpetration of fraud. The title of the beneficiaries is one *dehors* the will and not under the will.

Per WALLIS, J.—The provisions of section 81 of the Indian Trusts Act do not apply to such cases.

Per SANKARAN-NAIR, J.—Section 81 applies where the testator intending to dispose of the beneficial interest to others leaves the estate to the devisees. This section has reference to the disposal of the beneficial interest by transfer or will.

Where such a legatee, to whom the testator has confided his intention suppresses such secret instructions with the intention of retaining the estate himself

* Appeal No. 72 of 1906, presented against the decree of H. O. D. Harding, Esq., District Judge of South Canara, in Original Suit No. 2 of 1905 (Original Petition No. 124 of 1904).

Second Appeal No. 229 of 1906, presented against the decree of the District Court of South Canara, in Appeal Suit No. 238 of 1905, presented against the decree of District Munsif of Mangalore in Original Suit No. 100 of 1904.

MANUEL LOUIS KUNHA v. JNANA COELHO.

and applies for Letters of Administration as universal legatee, the Court will refuse the grant. (*McCormick* v. *Grogan*, (L.R., 4 E. & I., 82 at p. 97), referred to.

In re *Maddock*. *Llewelyn* v. *Washington*, [(1902) 2 Ch., 220], referred to.

Per WALLIS, J.—The beneficiary entitled under the secret trust communicated to and accepted by the legatee claims through the legatee named in the will; and as no right as legatee can be established without a grant of probate or letters of administration under section 187 of the Indian Succession Act, the beneficiary cannot maintain a suit to recover the benefit intended for him when there is no grant of Probate or Letters of Administration.

Per SANKARAN-NAIR, J. (*contra*).—Section 187 of the Succession Act is no bar to such a suit, as the beneficiary does not sue to establish any claim as *legatee* but to enforce the trust imposed on the legatee, as far as he is concerned. The suit is to enforce an *obligation* against the legatee and not to establish *any right* of the legatee as such.

If the legatee is in possession of a substantial portion of the property he is an *executor de son tort* with all the liabilities of an executor and universal legatee and he cannot plead want of Probate or Letters of Administration.

In Appeal Suit No. 72 *of* 1906.

THE Revd. A. J. Coelho died in February 1901, having, by his last will and testament, dated 8th October 1894, bequeathed all his properties to the plaintiff Manuel Louis Kunha as sole legatee.

Manuel Louis Kunha applied for Letters of Administration with the will annexed as the universal legatee. J. M. Coelho, brother of the deceased, filed a caveat and the petition was registered as a suit. J. M. Coelho died, and his representatives were brought on record as defendants. The fourth defendant alleged that the testator's intention was to leave the bulk of his property for religious and charitable purposes, but apprehending that such legacies may not be given effect to be executed the will in question in favour of the plaintiff with private instructions as to its disposal; that the plaintiff had suppressed the private instructions left to him by the testator with a view to misappropriate the estate for himself and that accordingly the will was uncertain, incapable of execution, and was null and void.

The District Judge found that the plaintiff had received instructions from the testator as to the disposal of the property, which instructions had been suppressed. The suit was dismissed.

The plaintiff appealed to the High Court.

Second Appeal No. 229 *of* 1906.

In this case the defendant was M. L. Kunha, whose application for Letters of Administration as universal legatee under the will of the deceased A. J. Coelho was dealt with in Appeal Suit

MANUEL LOUIS KUNHA v. JNANA COELHO.

No. 72 of 1906. The plaintiff who claimed to be one of the persons beneficially entitled under the secret trust confided to the defendant by the deceased sued to recover Rs. 2,000 and odd as payable to him by defendant under the oral instructions of the deceased. The Munsif held that the trust was created in favour of plaintiff's children and not of plaintiff and dismissed the suit.

The District Judge held that the trust was for the plaintiff and passed a decree in his favour.

The defendant appealed to the High Court.

P. R. Sundara Ayyar and *B. Sitarama Rau* for appellant.

K. Narayana Rau for third respondent.

In Appeal No. 72 *of* 1906.

JUDGMENT (WALLIS, J.).—This is an appeal from the judgment of the District Judge of South Canara dismissing the appellant's petition for grant of Letters of Administration to the estate of Revd. A. J. Coelho, a Roman Catholic priest, with the will annexed by which the petitioner was made residuary legatee. A caveat was put in by one of the next-of-kin alleging in effect that, the testator had bequeathed the estate to the petitioner subject to certain instructions as to how the property should be disposed of, and that the petitioner had fraudulently suppressed the private instructions left by the testator in order to claim the estate for himself. The second issue raised was, whether the bequest was really intended for religious and charitable purposes? and, the fourth, whether the will had become uncertain and incapable of execution by reason of the plaintiff having suppressed the private instructions, if any, given him by the testator? The fifth issue was, whether the will had become null and void on the above grounds and the sixth to what relief is the plaintiff entitled? On these issues the District Judge has found that the will did not really express the intentions of the testator as the plaintiff undertook to dispose of the property in other ways explained to him by the testator. This finding is contested in appeal, but is in my opinion borne out by the evidence. The plaintiff was the only witness on his own side, and his evidence is unsatisfactory, and in some important matters is at variance with the evidence previously given by him in a suit relating to the same matter. On the other hand I see no reason for refusing to accept the evidence given by the two witnesses for the defence, the Revd.

MANUEL LOUIS KUNHA v. JNANA COELHO.

M. P. Collaco another priest, and S. B. Mascarenhas who is translator to the District Court and had been educated and started in life by the deceased. According to the last witness the decision of the testator to leave his money to some one with private instructions as to how it was to be disposed of was arrived at after the decision of the High Court against the legality of bequests for masses. This was *Colgan* v. *Administrator-General of Madras*(1) decided in March 1892. The will in the plaintiff's favour is dated the 8th October 1894 and the testator died on the 7th February 1901. The petition for Letters of Administration which has become the plaint in this suit was not filed until the 11th October 1904 after a suit had been filed against the plaintiff to compel him to give effect to the alleged secret trusts of the will. Although the defence evidence points to the plaintiff having been informed from the first of the intention of the testator in making this will in his favour, yet there is no direct evidence that he was so informed. But assuming that he was not so informed at the time when the will was executed, there is evidence that he was informed subsequently during the lifetime of the testator and that his conduct was such as to lead the testator to believe that he was prepared to carry out the instructions communicated to him by the testator. The Revd. M. P. Collaco who attested the will states that he was aware from the first of the testator's intention that the property should be disposed of according to his instructions, and that in August 1895 when the testator was ill the plaintiff told the witness that the instructions had not been completed—this shows that he was then aware of the testator's intentions—and that the witness in the plaintiff's presence took certain instructions and made a memorandum of them in his note-book (exhibit II), but did nothing further as Mascarenhas the defence second witness arrived and the matter was left in his hands. Mascarenhas says that he spoke to the plaintiff about these instructions, that subsequently at the testator's request he took down his instructions in Canarese and communicated them to the plaintiff who was put in possession of the written instructions.

In this state of the evidence the rule of English Law is clear To borrow the language of Lord Westbury in *McCormick* v. *Grogan*(2) "If an individual on his death bed, or at any other

(1) I.L.R., 15 Mad., 424. (2) L.R., 4 E. & I., App. 82 at p. 97.

MANUEL LOUIS KUNHA v. JNANA COELHO.

time, is persuaded by his heir-at-law, or his next-of-kin, to abstain from making a will, or if the same individual, having made a will, communicates the disposition to the person on the face of the will benefited by that disposition, but at the same time says to that individual that he has a purpose to answer which he has not expressed in the will, but which he relies on the disponee to carry into effect and the disponee assents to it either expressly or by any mode of action which the disponee knows must give the testator the impression and belief that he fully assents to the request, then undoubtedly the heir-at-law in the one case and the disponee in the other will be converted into trustees simply on the ground that an individual shall not be benefited by his own personal fraud." As explained in the same judgment, a Court of Equity, in order to prevent the Statute of Wills from being made an instrument of fraud, does not indeed set aside the statute but fastens on the individual who gets a title under it and imposes on him a personal obligation because he is seeking to apply the statute as an instrument for accomplishing a fraud. The important question we have to decide is whether this rule of Equity is applicable in India. There is no direct authority, and in the only case in which it was raised so far as I know (*Kali Charan Ghosal* v. *Ramachendra Mandal*(1)), it was unnecessary to decide it. It has been contended for the appellant that it is not applicable and the decisions in *Balkishen Das* v. *Legge*(2), and in *Kurri Veerareddi* v. *Kurri Bapireddi*(3), have been relied on. In the former of these cases it was held by the Privy Council that oral evidence was inadmissible to show that the parties to a deed of sale really intended to create a mortgage, as the case must be governed by section 92 of the Indian Evidence Act and not by the cases decided by the Courts of Equity in England which have no application to the law of India as laid down in Acts of the Indian Legislature. The law of trusts in India is regulated by the provisions of the Indian Trusts Act 1882 and the case now before us must no doubt be determined with reference to the provisions of that enactment. On behalf of the respondents who are the next-of-kin it has been argued that the provisions of section

(1) I.L.R., 30 Calc., 783. (2) I.L.R., 22 All., 149.
(3) I.L.R., 29 Mad., 337.

MANUEL LOUIS KUNHA v. JNANA COELHO.

81 apply. That section provides that when the owner of property transfers or bequeaths it and it cannot be inferred consistently with the attendant circumstances that he intended to dispose of the beneficial interest, the legatee must hold the property for the benefit of the legal representative of the testator. If this section applied, the Indian legislature would have departed from the English rules of equity and created a resulting trust in the circumstances of the present case instead of enforcing the trusts accepted by the legatee in so far as they are for lawful purposes, on the principles explained by Lord Westbury in the passage above cited and in numerous other cases. I am however of opinion that the present case does not come within the provisions of section 81, and on the other hand, I think that elsewhere in the Act we have statutory authority for applying the principles laid down in the English cases. Section 5 which provides that no trust is valid unless declared in the manner therein provided is subject to the proviso that the rules therein contained do not apply where they would operate so as to effectuate a fraud. This is exactly the principle upon which the English cases have been decided, and warrants the Courts in this country in imposing upon an heir or a beneficiary under a will, who has induced the deceased not to make a will or not to revoke a will, already made by assurances that he would carry out the instructions given him, a trust for the carrying out of such instructions. Otherwise the provisions of section 5 would operate so as to effectuate a fraud. That this was intended to be the effect of the proviso is further shown by the fact that in Chapter IX the Act provides for the case in which instructions accepted by the legatee are unlawful and therefore cannot be enforced, but it would be inequitable to allow the legatee to enjoy the beneficial interest by creating in such case a resulting trust in favour of the testator's legal representative. (See section 85 which provides that where during the testator's lifetime the legatee agrees with him to apply the property for an unlawful purpose the legatee must hold the property for the benefit of the testator's legal representative.) The section also provides that where property is bequeathed and the revocation of the bequest is prevented by coercion, the legatee must hold the property for the benefit of the testator's legal representative.

It is in my opinion obvious that the case of the legatee preventing revocation by undertaking to carry out the lawful

MANUEL LOUIS KUNHA v. JNANA COELHO.

instructions of the testator was considered by the framers of the Act to have been dealt with elsewhere in the Act, that is to say, under the proviso to section 5 which permits of such instructions being enforced as a trust, and, as a further application of the same principles, I should say that if the testator failed to give any instructions or such instructions could not be ascertained, the beneficiary would be compelled to hold for the benefit of his legal representatives. I may say further that, if cases such as the present come within the proviso to section 5 which embodies the English equitable rule, it follows that they cannot come within section 81, and even if there were no such proviso, I do not think the language of section 81 would cover them.

For the appellant it is argued that even on this view of the law he is entitled to administration because the testator's instructions as spoken to by the defence witnesses shew that the testator intended him to benefit to some extent. Even if this is so his conduct in denying the instructions and taking possession of the whole estate for his own benefit has been such as to make it improper to grant him administration, and on this ground I think his appeal must be dismissed.

We of course decide nothing as to the right of other persons claiming to be entitled to apply for a grant of Letters of Administration, or as to a suit for administration of the estate by the Court itself. In the result the appeal is dismissed with costs.

SANKARAN-NAIR, J.—This is an appeal from the decree of the District Judge of South Canara dismissing an application under the Indian Succession Act for Letters of Administration.

The Revd. A. J. Coelho, Vicar of the Church of Buntwal by his will (exhibit I), dated the 8th of October 1894, gave all his property moveable and immoveable to the petitioner-appellant Manuel Louis Kunha, Sexton of that church "to have them, possess and enjoy as his own things." After the testator's death on the 7th February 1901, Louis Kunha applied on the 11th October 1904 for Letters of Administration with the will annexed as the sole legatee under the will, the executors being dead.

This application was opposed by the brother and nephew of the testator.

They stated by their answer that the testator's desire was to leave the bulk of his property to the Church but as he feared a will leaving property to the Church for masses for his soul might

MANUEL LOUIS KUNHA v. JNANA COELHO.

be declared invalid, he left all to the plaintiff Louis Kunha with private instructions giving pecuniary legacies to certain parties and the bulk of the property to the Church.

The Judge has found that there is clear and definite evidence that, while the testator intended something for the legatee and certain other persons, he intended the bulk for the Church and that these private instructions left by the testator have been suppressed by the appellant. He held accordingly that the will is null and void and incapable of execution and therefore rejected the appellant's claim.

The appellant's pleader contends the evidence does not support the conclusions of the lower Court.

Father Collaco, now Vicar of Cordel Church, formerly assistant priest at Buntwal under the testator and an attesting witness deposes that, the testator was under the impression that a bequest to the Church for saying masses would be invalid and therefore was anxious to leave the property to some person who would carry out his instructions; that the testator even thought of making his will in favour of this witness but abandoned that idea on account of the contingency of his transfer and finally executed the will in favour of the appellant. The witness himself made notes of these instructions, which were given some time after in the presence of the appellant, in his diary, a copy of which was forwarded to the Bishop on the testator's death. The second witness Mascarenhas, translator of the District Court, also deposes that he wrote a will for the deceased in Canarese leaving to the Church all his property, and out of the interest thereof masses were to be said for his own soul, and doubting the legality of that will, after a decision of the Madras High Court, he executed this will in favour of the appellant leaving private instructions in the handwriting of this witness in Canarese as to how the property was to be disposed of. This paper was with the appellant. These instructions according to the witness were also communicated to the executor Father Patrao who was the brother-in-law of this witness. I see no reason to distrust the evidence of these witnesses whom the Judge has believed. It is pointed out that the notes of the first witness and the instructions given to the second witness, so far as he is able to remember them do not agree in many respects and that the witnesses are interested as valuable property is left to the Church and a darkhast land to the second

MANUEL LOUIS KUNHA v. JNANA COELHO.

witness. These reasons are not of sufficient weight for rejecting their evidence. The probability is as the Judge has pointed out in favour of its truth. According to this evidence the bulk of the property was left to the Church. What the appellant was to get is not clear. The first witness states it was to be Rs. 500. The second witness states that a thousand rupees and house and compound were left to him according to the written instructions. The house and compound were afterwards given to the Church and in lieu thereof the legacy to the appellant was increased to two thousand and another thousand was given to his son-in-law.

This is the extent of the appellant's interest in the property of the testator according to the secret instructions which he has suppressed.

By section 50 of the Indian Succession Act all wills must be signed by the testator or by some person in his presence and by his direction and attested by at least two witnesses in the presence of the testator. If any other document then actually written is referred to as expressing any part of the testator's intentions, it may be treated as a part of the will.

It is quite clear, therefore, that these instructions cannot be treated as a part of the will. There is no trust therefore by a will, nor is there a trust by a non-testamentary instrument as it is not and cannot be contended that these instructions declared any trust so as to place the subject-matter beyond the control of the testator and deprive him of his ownership. Nor can it be successfully contended that these instructions engrafted a trust upon the legal estate already well devised by exhibit I, as the will operated only after death, and the instructions in writing must have already passed—if they created a trust—the interest intended to be conveyed thereby though not necessarily an immediate interest in possession.

To defeat the appellant's claim under the will, the respondents however rely upon the rule of law that the Court will enforce a trust when the testator leaves the estate to the devisee on his undertaking to carry out the intentions of the testator, and also upon section 81 of the Trusts Act.

The rule of English law relied upon may be briefly stated thus. If the heir or legal representative of a person competent to make his will undertakes to carry into effect his wishes that may be communicated to him, and on the faith of that undertaking that

person did not dispose of his property by will, then the Court will compell the heir or legal representative to carry into effect all such instructions that may have been given to him. So again if a legatee promises the testator that upon the testator's leaving the property to him by a regular will, he will carry out all such wishes as are confided to him by the testator, and, relying upon that promise, the testator makes a will in his favour, or if having made a will a person at any time before his death communicates the disposition to the legatee and states to him that he has not expressed in the will all his intentions which he confides to the legatee and that he depends on the legatee to carry them into effect, and the legatee either expressly assents to it, or by his silence or conduct leads the testator to believe that he will abide by the instructions so communicated to him, then the legatee will be treated as a trustee and he will be compelled to carry out the instructions confided to him. The reason is that, but for such assent, express or implied, the testator would not probably have left the property to him, or the will, if made, might have been revoked. It would be fraud on his part not to give effect to the testator's intentions, and no man shall be benefited by his own personal fraud, and, if the Statute of Frauds or the Statute of Wills gives him the title the Court fastens upon his conscience a personal obligation to carry into effect the wishes of the testator confided to him. See *Wallgrave* v. *Tebbs*(1), *McCormick* v. *Grogan*(2), In re *Boyes*. *Boyes* v. *Carritt*(3), *Jones* v. *Badley*(4), In re *Pitt Rivers*. *Scott* v. *Pitt Rivers*(5), In re *Maddock*. *Llewelyn* v. *Washington*(6).

Thus the jurisdiction of the Court is founded upon fraud, and the Court interferes to prevent the perpetration of fraud. The property is not affected except by reason of the personal obligation binding on the devisee. If there is no personal obligation or fraud, then there is no trust. Therefore "if he renounces and disclaims, or dies in the lifetime of the testator, the persons claiming under the memorandum can take nothing against the heir-at-law or next-of-kin or residuary devisee or legatee." Cozens Hardy, L.J., in In re *Maddock*. *Llewelyn* v. *Washington*(6).

(1) (1855), 2 K. & J., 313.
(2) L.R., 4 E. & I., App. 82.
(3) 26 Ch.D., 531.
(4) 3 Ch., App. 362.
(5) (1902), 1 Ch., 403.
(6) (1902), 2 Ch., 220 at pp. 230, 231.

Thus the instructions are not treated or enforced as a part of the will. The instructions after acceptance create an obligation on the devisee and confer title on the beneficiaries *dehors* the will. Lord Westbury said in *Cullen* v. *Attorney-General for Ireland*(1), "where there is a secret trust or where there is a trust created by a personal confidence reposed by a testator in any individual, the breach of which confidence would amount to a fraud, the title of the party claiming under the secret trust or claiming by virtue of that personal confidence, is a title *dehors* the will, and which cannot be correctly termed testamentary." See also In re *Maddock*. *Llewelyn* v. *Washington* (2). For this reason a test is pointed out by Lord Cairns in *Jones* v. *Badley*(3), to consider the case as unaffected by the Statute of Wills. Thus the trust, if any, in the case before us, not being created by any instrument of a testamentary character is unaffected by the provisions of the Indian Succession Act.

In England, section 7 of the Statute of Frauds declares that a trust must be proved by a will or be manifested and proved by some writing signed by the author of the trust or else the trust shall be void. Resulting and constructive trusts are exempted from the operation of this section by section 8. The trust in question is not proved by a will or writing signed as required. But the English Judges got out of the difficulty by deciding that even an Act of Parliament shall not be used as an instrument of fraud. This is undoubtedly taking a bold step to compel justice to be done, and though it is a sound rule of law that when a statute is enacted to prevent fraud it shall not be used to cover the perpetration of fraud, unless by express words or necessary implication the Courts are restrained from interference, it can hardly be doubted that if this doctrine had not been already enforced in a long and uniform course of decisions it is not likely that it would now be accepted and enforced in Courts of Law.

Has the principle then been accepted in India, or are we now to apply it in the case before us?

The trust, if any, in such cases is treated as an exception to the rule that parol trusts cannot be declared upon an estate devised by a will, and is not a resulting or constructive trust in English

(1) L.R., I.H.L., 198.
(2) (1902), 2 Ch., 220 at pp. 230, 231.
(3) 3 Ch., App., 362.

law. So we may disregard for the present chapter IX of the Trusts Act which deals with such trusts. The definition of the word "trust" also excludes such trusts. But such definition in my opinion clearly includes this case. The obligation arises out of a confidence reposed in, and accepted by, the appellant, the owner of the property, for the benefit of himself partly and of the persons to whom he has undertaken to deliver certain properties or pay various sums of money.

Section 5 of the Trusts Act corresponding to section 7 of the Statute of Frauds similarly enacts that, no trust in relation to immoveable property is valid unless declared by a will or in writing signed by the author of the trust. The same rule applies to moveable property unless the ownership is transferred to the trustee. The exception (section 8 of the Statute of Frauds) in favour of resulting and constructive trusts is unnecessary in the Indian Act as the definition of the word "Trust" excludes them and they are fully dealt with separately in chapter IX. It will be noticed that trusts in cases of fraud as the one before us are not in terms exempted from the operation of the seventh section, though the English Courts, as I have already stated, treat them as an exception. But in the Indian Trusts Act there is a proviso to section 5 to the effect that, these rules as to the validity of a trust "do not apply where they would operate so as to effectuate a fraud." This is the ground on which English Courts have introduced the exception and converted by reason of the devisee's fraud what was a purely moral into a legal obligation. This proviso therefore to my mind places it beyond doubt that the Indian Legislature deliberately adopted the rule laid down by English decisions. Mr. Whitley Stokes who drew the Bill which became the Trust Act is of the same opinion. In his Anglo-Indian Codes he states "these rules do not apply where they would operate so as to effectuate a fraud, as, for example, where a father having power to bequeath certain land is induced not to make a will of that land by the promise of his heir presumptive that he will provide thereout for his relatives" and cites *Sellack* v. *Harris*(1) and other cases cited by Lewin 8th Edition, page 61, which declare the English law as above explained, or in other words the proviso was intended to preserve the rule of

(1) 5 Vin. Ab., 521.

English law. The provisions of the Statute of Frauds as to trusts were in force in the Presidency towns, and there can be little doubt that the decisions of the English Courts on those sections must have been followed by the Indian Courts, and when they were repealed by the Indian Trusts Act there would have been some indication in the Act to alter the law as then understood if that had been the intention, but, we find words which, to my mind, are clear the other way and certainly do not favour the inference of any departure from the law as then understood. A careful consideration of the various sections in Chapter IX of the Act, as will be shown when I consider the operation of section 81 of the Act also strongly confirms this view. Any change in that direction is unlikely as the Indian Courts are Courts of Equity and good conscience. Under the Indian Trusts Act the beneficiary has no estate or interest in the subject-matter of the Trust. He has only a right to proceed against the trustee and the parties are more easily brought therefore under the jurisdiction of an Equity Court.

I have discussed the question at some length on account of the hesitation expressed by the learned Judges of the Calcutta High Court in *Kali Charan Ghosal* v. *Ramachendra Mandal*(1), and I have no hesitation in coming to the conclusion that the law in India in this respect is the same as in England and that trusts as proved by the oral evidence are valid. The appellant is therefore only a trustee for the persons named by the testator as beneficiaries.

If I am right in this view, then section 81 of the Trusts Act which relates to resulting trusts and gives the property to the heir of the testator has obviously no application. But if such is not the law in India or if fraud is not proved so as to bring the case within that rule, the question arises, whether the appellant is entitled to keep the property or is he only a trustee for the testator's legal representatives? Where the will declares the trust, whether it is lawful or unlawful (section 85) the law is clear. Where the will itself shows that the devisee is only a trustee though there is no beneficial interest created by the will it is a case of resulting trust (section 83). Does it make any difference then that, it is by extrinsic evidence that it is proved that the

(1) I.L.R., 30 Calc., 783.

MANUEL LOUIS KUNHA v. JNANA COELHO.

devisee is only intended to be a trustee and no beneficial interest is created by the will when such extrinsic evidence is permitted by law? Section 81 of the Trusts Act runs thus:—"Where the owner of the property transfers or bequeaths it and it cannot be inferred consistently with the attendant circumstances that he intended to dispose of the beneficial interest therein, the transferee or legatee must hold such property for the benefit of the owner or legal representative." This clearly permits proof of the attendant circumstances to show that the testator did not intend to dispose of the beneficial interest—going further, I think, than the English law which allows only evidence of the *trust* to be given when the gift is made in absolute terms or when the will may even state that the gift is not by way of *trust*. But once the evidence is admitted and it is proved that the devisee is only a trustee, the law seems to be clear. The general rule is that when a transferee or devisee has only the legal estate and is made out only to be a trustee he takes no beneficial interest in the property. The Lord Chancellor after finding that the bequest in the case before him was one on trust said in *Briggs* v. *Penny*(1) "If so, that is sufficient to exclude Miss Penny from taking the beneficial interest. Such views and wishes may be left unexplained, such trust be left undeclared, but still, in such case, it is clear a trust was intended and that is sufficient to exclude the legatee from beneficial interest. Once establish that a trust was intended and the legatee cannot take beneficially. If a testator gives upon trust, though he never adds a syllable to denote the objects of that trust, or though he declares the trust in such a way as not to exhaust the property or though he declares it imperfectly or though the trusts are illegal, still in all these cases, as is well known, the legatee is excluded and the next-of-kin take." *Briggs* v. *Penny*(1).

Similarly under Act II of 1882 where there is a valid bequest to any person of the beneficial interest the trustee of course holds it for his benefit, or where any property is bequeathed upon trust, and no trust is declared, or the trust is incapable of execution, or executed without exhausting trust property (section 83), or where it is for an illegal purpose, or there is an agreement to apply it to an unlawful purpose (section 85), or where the revocation of the

(1) 3 Mac. & G., 557.

MANUEL LOUIS KUNHA v. JNANA COELHO.

bequest is prevented by coercion, the devisee must hold it in trust for the benefit of the testator's legal representatives. The omission of the case of the testator not revoking his will on account of fraud is only due to the fact that, it has been already provided for, as I have pointed out, by section 50. It would be in harmony with these provisions to hold that where the testator intends only the legal estate to be conveyed to the devisee though such intention is not expressed herein, then under section 81 he takes no beneficial interest therein. According to the illustrations to section 83, the will itself must show, that the devisee is only a trustee; section 81 applies where the attendant circumstances prove it.

But it is suggested that section 81 does not apply where it is the intention of the testator to pass the beneficial interest in the property to certain other persons though not by the transfer or devise in question. If the testator has in law disposed of the beneficial interest, if the transferee is only a benamidar, then no question arises, as the appellant would be a trustee for that beneficiary. Even if the testator intending to dispose of the beneficial interest to others leaves his estate to the devisee, I am of opinion that the section applies. As pointed out by Mr. Whitley Stokes in his notes to these sections they are generally intended to reproduce the English law except in one instance, see section 83 illustration (c). The illustrations even are taken from the decided cases given in Lewin on Trusts. The rule of English law is quite clear. The only question to be considered is "whether the grantee, devisee or legatee was intended to take the legal estate merely." See Lewin Chapter IX, Section I§ I, p. 150. The judgment of the Lord Chancellor already referred to also makes it clear. It seems also reasonable. When we have to consider the rights of a transferee or devisee the question is what are the rights conveyed to him, and the fact that certain rights are intended by the transferor to be conveyed to other persons is only useful to show his intention not to convey such rights under this transfer. The grantor's intention to convey the beneficial interest subseqently to somebody else cannot avail the appellant.

In one respect this is undoubtedly a departure from the English law. As I have already stated, where secret instructions are left by the testator *without* being communicated to the devisee

in circumstances that would raise a presumption of fraud then according to English law the devisee takes it absolutely. Whereas if my construction of the section is right, the legal representative would take it. But this argument loses much of its force when we consider that when such instructions simply show that the testator gave the devisee the legal estate only and not the beneficial interest without showing anything else, then this section clearly gives the estate to the legal representative though the English law in that case also would give it to the devisee. A deviation from that law was made when the section admitted proof of the attendant circumstances and placed a bequest on the same footing as a transfer, where it will be presumed in some cases, say in the absence of consideration, that the transferee held in trust for the transferor. It has also to be noticed that the appellant's case involves a wide departure from the English law when communication of the testator's wishes to the devisee and consequent fraud on his part is proved. Even, according to that law, where the devisee admits that he is only a trustee though the will is absolute in its terms, and it clearly appears that the testator's intention was to dispose of the beneficial interest in favour of certain persons which intention could not be carried into effect on account of the failure of the testator to communicate it in his lifetime to the devisee, it has been held that there is a resulting trust and the next-of-kin, not the devisee, takes the estate. Thus in In re *Boyes*. *Boyes* v. *Carritt*(1) the testator, as here, left the entire property by his will to Carritt, but it appeared clearly from the evidence that he was to have only the legal estate and the testator intended to dispose of the beneficial interest in favour of a certain lady and child. That trust failed, but as Carritt admitted that he was only a trustee he was held to be a trustee for the next-of-kin of the testator and not entitled to take the property himself. This appears to me to be precisely the effect of section 81. The only difference is as to the mode of proof. What in England can be proved only by the admission of the party is allowed to be proved by this section by other evidence. In England as already stated evidence appears to be admissible only to prove a trust, but not to prove that the legal estate alone passed though the law recognizes the principle

(1) 26 Ch. D., 531.

that where the legal estate alone passes the devisee, as already stated, must hold only as trustee.

In principle, it seems difficult to find any reason for giving the property absolutely to the devisee who was really intended only to be a trustee and not to the legal representative of the testator. The danger in allowing extrinsic evidence cannot be a reason as it is admitted that section 81 clearly permits it for certain purposes. Nor is this a revocation of the will any more than it is in the case of the other resulting or constructive trusts. The will is good and vests the legal estate in the devisee.

I am therefore of opinion that the words "intended to dispose of the beneficial interest therein" in section 81 have reference to the disposal of the beneficial interest by transfer or will. For these reasons, I hold that the appellant is only a trustee for the legal representatives if there are no trusts to be executed, or for the beneficiaries, if there are trusts.

Further I agree with Cozens Hardy, L.J., in In re *Maddock*. *Llewelyn* v. *Washington*(1) in holding that, the case is one of contract and estoppel. The appellant agreed for consideration with the deceased to dispose of the properties according to his wishes communicated to him, and the representatives of the deceased who are respondents before us are entitled to contend that the plaintiff should be given possession of the estate only on his undertaking to carry out its terms, and that he is estopped from claiming the estate unconditionally as the testator abstained from revoking his will by his representation.

The appellant has therefore not proved his right to administration as universal legatee. In appeal it is contended before us, that as trustee or as a legatee having a beneficial interest, though not to the extent claimed, letters of administration ought to be granted to him. If he had claimed in that capacity and disclosed the trusts he might have been entitled to it. But when he claims as universal legatee, suppresses the secret instructions given by the testator without stating what they are, with the evident intention of retaining the estate himself, it is clear that the letters of administration would enable him to commit fraud and ought not therefore to be granted. The case is entirely different where the will itself declares the trust, or where, on the face of the will, it is

(1) (1902), 2 Ch., 220.

MANUEL LOUIS KUNHA v. JNANA COELHO.

apparent that the appellant is only a trustee. For these reasons I would dismiss the appeal with costs.

In S.A. No. 229 *of* 1906.

WALLIS, J.—It follows from our decision in Appeal Suit No. 72 of 1906 that the plaintiff in this case can only be entitled to succeed by virtue of a trust imposed upon the defendant as legatee under the will by reason of his having undertaken to carry out the testator's instructions in the plaintiff's favour, and so induced him not to alter his will. The plaintiff therefore claims through the defendant the legatee named in the will, but under section 187 of the Indian Succession Act no right as legatee can be established without a grant of probate or letters of administration. So in England a legacy cannot be recovered without administration of the testator's estate, and there cannot be administration without a personal representative before the Court (*Rowsell* v. *Morris*(1)). There has been no grant of probate or letters of administration in this case, and, in my opinion, the plaintiff's suit therefore fails. The appeal in my opinion should be allowed, the decree reversed and the suit dismissed with costs throughout. As my learned brother differs the appeal must be dismissed with costs.

SANKARAN-NAIR, J.—For the reasons above given I would dismiss this second appeal also with costs.

The plaintiff is one of the persons to whom, Louis Cunha, who is the defendant, appellant in this appeal, has been directed by the instructions given to him by the deceased to pay a certain sum of money for which he has now been sued. It is found by the lower Courts that the appellant has been paying interest to the plaintiff for the amount that has to be paid to him.

I am unable to accept the contention urged on behalf of the appellant that section 187 of the Indian Succession Act is a bar to the claim. The suit is not brought to establish the plaintiff's claim as legatee. The legacy, *i.e.*, the entire property of the deceased vested in the defendant on the death of the testator (sections 91–106). The law, I have already held, makes him a trustee to carry out the instructions he has received. The suit is therefore by a beneficiary to enforce the trust so far as he is concerned. Nor does he seek to establish "any right" of the

(1) L.R., 17 Eq., 20.

MANUEL LOUIS KUNHA v. JNANA COELHO.

defendant under section 187. A suit to enforce the defendant's obligation or liability can scarcely be called an attempt to establish the defendant's "right." As universal legatee the defendant will get letters of administration when he discloses the trusts and undertakes to carry out the terms of the trust and he cannot be allowed to set up his own fraud in not taking out letters of administration to defeat the claims of the beneficiaries. It is true no right of action accrues to the defendant until he has obtained letters of administration (section 187). But though his title does not come into existence until the grant of administration, when granted, it relates back to the time of the death of the testator and it is only the intermediate acts "tending to the diminution or damage of the intestate" that are not binding. Where the act is done by a party, who afterwards becomes administrator, for the benefit of the estate or to fulfil the wishes of the testator, the relation back subsists and the act is valid.

Further the defendant is in possession of the substantial portion, if not the entire property of the testator. He is clearly an executor *de son tort* (section 265), and as he is both an executor *de son tort* and the universal legatee, he has all the liabilities that belong to the character of executor and universal legatee in this case and cannot therefore plead that he has not obtained letters of administration.

As neither the plaintiff nor any other beneficiary is entitled to obtain letters of administration and no other person is interested in administering the estate and carrying out the trusts it would seem if this suit is dismissed, that the beneficiaries have rights without any remedy.

In the case of this plaintiff, an additional ground is urged that there is a contract between the parties. But it is then necessary to consider, whether a request will be implied in fact, or in law, on the part of the defendant to make the bequest of the legal estate or the pecuniary legacy by the testator to him a consideration under the Indian Contract Act for the promise made by the defendant to the plaintiff. It is unnecessary to consider this in the view I take of the other questions.

I would dismiss the second appeal with costs.

This second appeal is dismissed, under section 575 of the Civil Procedure Code, with costs.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Sankaran-Nair.

1908. January 13, 18.

ASAN KANI RAVUTTAR AND OTHERS (DEFENDANTS NOS. 3 TO 6), APPELLANTS,

v.

SOMASUNDARAM CHETTIAR AND OTHERS (PLAINTIFFS NOS. 1 AND 2—DEFENDANTS NOS. 1 AND 2), RESPONDENTS.*

Partnership—Partner, power of single, to mortgage partnership property—Contract Act, s. 251—A single partner by objecting cannot vary articles of partnership—Transfer of Property Act, s. 53—Transfer cannot be impeached by any but the creditors.

Where one of several partners has, under arrangement with the other partners, the sole management of the business, he has the power of borrowing as incidental to the power to trade, and the power to pledge partnership assets as incidental to the power of borrowing :

Obiter.—The English doctrine that a single partner cannot mortgage the immoveable property of the firm does not apply in India.

It is not competent to a single partner to take objection to the exercise of any power conferred by the articles of partnership.

Where a partner has power to borrow or mortgage for the purpose of trade, he has power to give a mortgage for an antecedent debt.

An objection that a transfer of property was made with intent to defeat or delay creditors must be taken by the creditors, and it is not open to others to object to the transfer on that ground.

SUIT to recover from defendants personally, and by sale of the hypothecated properties described in the plaint, Rs. 66,996-13-8 for principal and interest due on a hypothecation bond executed by first defendant for himself, his brothers and partners, defendants Nos. 2 to 6, in favour of the plaintiff's firm, on 1st March 1902 for Rs. 60,000.

The defendants carried on their partnership trade as a firm under the style of Thina, Pina, Peer Mohomed Ravuttar in Tuticorin, Alleppy, Kayankulam, and other places, under an agreement, dated 17th December 1898.

* Appeal No. 193 of 1904, presented against the decree of M.R.Ry. M. Mundappa Bangera, Subordinate Judge of Tinnevelly, in Original Suit No. 33 of 1903.

By that agreement, it was arranged that their trade in Pettai should be conducted by first defendant, at Tuticorin by fourth defendant under the same style, at Kayankulam and Malayalam by sixth defendant, and at Alleppy by second defendant; and that defendants Nos. 3 and 5 should assist the others in their business.

The agreement also provided that funds required for the trade at Pettai and Tuticorin should be borrowed by first defendant; that required for the trade at Alleppy and Kayankulam by second defendant, while the remaining four partners were prevented by the agreement from borrowing.

On the 6th January 1899 defendants Nos. 2 to 6 executed exhibit D, a registered general power-of-attorney, in favour of first defendant authorising him to realize the outstandings belonging to them under the release deed C; to take all the necessary steps and conduct all proceedings on their behalf in that connection; to mortgage, sell or otherwise encumber the properties purchased in Court sales for debts due by the firm; to execute and register such documents as may be necessary in that behalf, and also to borrow on their behalf money required for their joint trade and to execute the necessary securities in that connection. This document ended with a provision that defendants Nos. 2 to 6 should abide by all transactions conducted by first defendant under it as if they had themselves joined in them.

The bond for Rs. 60,000 were executed in consideration of old debts, and Rs. 8,500 paid at the time of execution of the bond.

The further facts appear from the judgment.

A decree in the usual form on the mortgage was passed in favour of plaintiff.

Defendants Nos. 3 to 6 appealed.

Sir *V. Bhashyam Ayyangar* and *C. R. Thiruvenkatachariar* for appellants.

K. Srinivasa Ayyangar for The Hon. Mr. *V. Krishnaswami Ayyar* and *T. Natesa Ayyar* for respondents.

JUDGMENT (WALLIS, J.).—The only question argued in this appeal is whether the mortgage, exhibit A, of partnership property executed by one of the partners, the first defendant, is binding on the shares of four of the partners, defendants Nos. 3 to 6. The remaining partner, the second defendant, attested exhibit A, and has not appealed against the decree of the lower Court. On the

ASAN KANI RAVUTTAR v. SOMA-SUNDARAM CHETTIAR.

retirement of their father, the six partners, who are brothers, entered into articles of partnership, exhibit B, dated the 17th December 1898, under which the four branches of the business were each to be managed by one of the brothers. The capital estimated at Rs. 1,20,000, was made up in the main, as appears from the schedule, of house property which had been allotted to the brothers under the deed, exhibit C, executed in their favour by their father, and, as appears from the recitals in that deed, had been acquired out of the profits of the business previously carried on. The sums required for the Pettai and Tuticorin branches were to be borrowed by the first defendant, and the sums required by the other branches by the second defendant. None of the other partners were to borrow, and the first defendant was to decide on the payments to be made to each of the partners for his personal expenses, and debit them to the private account of such partner. The partnership was to last for fifteen years. For the appellants, it is contended that, under this instrument the first defendant had no power to sell or mortgage the immoveable property in which the capital of the business was largely invested. I am unable to agree with this contention. The English doctrine that a single partner cannot mortgage the immoveable property of the firm appears to be due to the technical rule of English law that an agent cannot execute a deed on behalf of his principal unless so authorised by deed. Lord Lindley in his work on 'Partnership', 5th edition, p. 139, has expressed the opinion that one partner can effect an equitable mortgage of immoveable property belonging to the partnership by deposit of title-deeds; and a Bench of the Calcutta High Court has expressly so held, on his authority, in *Bemola Dossee* v. *Mohun Dossee*(1). At the trial Mr. Justice (now Sir Arthur) Wilson raised the question whether the English rule as to the incapacity of a partner to give a legal mortgage of partnership property could be applied with the same strictness in this country, where the English distinctions between realty and personalty do not exist, but it was unnecessary to decide the point. In my opinion it cannot. If as held, I think rightly, in that case, a partner in India can mortgage partnership property by deposit of title-deeds, there is, I think, no good reason why he should not effect a legal mortgage as well. The observation of Straight, J.,

(1) I.L.R., 5 Calc., 792.

ASAN KANI RAVUTTAR v. SOMA-SUNDARAM CHETTIAR.

in *Harrison* v. *The Delhi and London Bank*(1), that in India the presumption is against the existence of such a power, was made in the case of a partnership between Englishmen; and I am unable to agree with it especially as applied to natives of India.

It is not, however, necessary to decide the case on this ground. Although this is not a joint family business carried on by Hindus or Muhammadans following Hindu usages, in which case the authority of the manager is beyond doubt, yet it is a family business regulated by articles of partnership in which the partners do not share equally in the management, and is in fact a sort of joint family business created by agreement of the parties. The two youngest are mere assistants and have no powers of management at all. The four elder brothers have each the sole management of one branch, and would, in my opinion, each have the power of dealing with the partnership property, as by realizing the partnership capital when necessary for the payment of debts owing by the branch and borrowing on the security of it for the purposes of the branch, on the principle that, power to borrow is incidental to power to trade and that power to pledge the business assets is incidental to power to borrow (*General Auction Estate and Monetary Company* v. *Smith*(2)), if it were not that, the power to borrow is especially reserved to the two elder brothers, each being empowered to borrow in respect of two branches. The debt now in question was contracted by the first defendant in respect of the business of the branch of which he was member, and there can, in my opinion, be no doubt as to his authority under the articles to borrow and mortgage the partnership property for the purposes of the branch.

It is, however, contended that this power must be considered to have been taken away by virtue of the general power of attorney executed by the other five partners in the first defendant's favour a few days after the signing of the articles. This document gives the first defendant four sets of powers each introduced in the translation by the words " so that, " first, power to execute decrees obtained by the father in respect of the Pettai branch; secondly, power to file fresh suits of a similar nature " Grant receipts, etc., for amounts that may be collected, and get such documents, if any, registered; sell or mortgage properties, purchased at auction sales

(1) I.L.R., 4 All., 437 at p. 459. (2) (1891), 3 Ch., 432.

ASAN KANI RAVUTTAR v. SOMA-SUNDARAM CHETTIAR.

on account of such debts or purchased at private sales, and execute documents required for those purposes and have them registered; and further, conduct the necessary proceedings from time to time in respect of the said matter, and (thirdly) so that you may borrow on our behalf from banks and other offices and from other customers amounts necessary for the trade carried on under the name and style of T. P. P. (the Pettai and Tuticorin branches) jointly by the six persons, and so that you may execute documents that may be necessary for the same." It is argued that the express power here given to sell or mortgage properties purchased at Court auctions or private sales in satisfaction of decrees obtained by the first defendant negatives any power on his part to sell or mortgage any other properties, and *Hare* v. *Horton*(1) has been cited. Exhibit D, however, in pursuance of exhibit B expressly empowers the first defendant to borrow and execute the necessary documents, and these latter words, in my opinion, are large enough to include the power of executing mortgages when exhibit D is read with exhibit B and the scheme of the latter document is borne in mind. There is nothing in exhibit D, which is executed by five only of the partners, to show that there was any intention to depart from the provisions of exhibit B, and the fact that sales and mortgages are expressly mentioned in the second set of powers, and are not expressly mentioned, though not excluded, in the third is not, in my opinion, sufficient to raise an inference that there was no power in the first defendant to sell or mortgage any properties but those mentioned in the second set of powers, especially having regard to the inartistic and clumsy language in which exhibit D is expressed. To hold that the bulk of the capital referred to in the articles of partnership (exhibit B), could not be realized or mortgaged without the consent of all the six partners, is, in my opinion, entirely opposed to the scheme of exhibit B, and is not a necessary result of the language in which exhibit D is expressed. In this view the objection taken under section 251, Indian Contract Act, does not arise as there was no agreement between the parties restricting the first defandant from executing this mortgage. Under these circumstances, the fact that one of the appellants took objection to the execution of the mortgage is immaterial as he had no power by his objection to vary

(1) 5 B & Ad., 715.

ASAN KANI RAVUTTAR v. SOMA-SUNDARAM CHETTIAR.

the articles of partnership; nor is it shown by satisfactory evidence that the plaintiffs had notice of his objection.

It is next contended that the mortgage is not binding on the shares of defendants Nos. 3 to 6, on the ground that, it was not entered into by the first defendant in the usual course of business on behalf of the partnership but was executed after the business had stopped, for the purpose of unduly preferring some of the creditors. In the first place it does not appear that the business had really stopped. In his cross-examination the fourth defendant, the only defendant who went into the box, says that, at the end of *Margali* corresponding to the middle of January 1902, the creditors of the firm were pressing for payment and that that was what he meant when he said that the business had then failed. It appears, however, that the business was still going on after that, as, on the 1st, and 26th January, and the 11th February, the first defendant borrowed some Rs. 50,000 from the plaintiffs for the purposes, as is now admitted, of the Pettai business. At the end of February the first defendant was anxious to obtain further advances for the same purpose, and the plaintiffs were anxious to obtain security for the advances they had already made. Under these circumstances negotiations took place and the plaintiffs eventually agreed to make these advances up to Rs. 60,000 if the first defendant would give a mortgage of the partnership property for that amount, and on the first March 1902 the plaint mortgage (exhibit, A), was executed. If the first defendant had power to borrow or mortgage he had also power to give a mortgage for an antecedent debt; and in the present case he obtained not only further time from these creditors but also a further advance. It was part of his duty to pay the debts of his branch, and for this purpose he was entitled to realize the partnership property and, if so, *a fortiori* to mortgage it (In re *Patent File Company*(1)). As to the objection that the mortgage was entered into for the purpose of defeating and delaying creditors, I do not think the evidence is sufficient to bring this home to the plaintiffs, and under section 53, Transfer of Property Act, such transfers are declared to be voidable at the suit of the creditors, who do not appear to have questioned the transfer, and are not parties to this suit. In my opinion this objection is not open to the appellants.

(1) L.R., 6 Ch., 83.

ASAN KANI RAVUTTAR v. SOMA-SUNDARAM CHETTIAR.

The appeal is dismissed with costs.

Sankaran-Nair, J. :—I agree.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Sankaran-Nair.

1908. January 10, 16, 20, 24.

MIYAJI *alias* MAHOMED GHOUSE SAHIB (DEFENDANT), APPELLANT,

v.

SHEIK AHMED SAHIB AND ANOTHER (PLAINTIFF AND SUPPLEMENTAL RESPONDENT), RESPONDENTS.*

Religious Endowments Act, Act XX of 1863, s. 14—Court may, by decree, direct appointment by competent person of new trustee in lieu of the one removed and order the trustee removed to surrender possession to the trustee so appointed—Trustee to be removed when he keeps no proper accounts and makes false claims.

It is competent to the Court when, in a suit brought under section 14 of the Religious Endowments Act, it directs the removal of a trustee, to order a person competent to appoint a new trustee to make such appointment and to direct the trustee removed to surrender possession of property and pay any damages decreed to the new trustee to be appointed.

A trustee ought not to be detained in the trusteeship when he does not keep proper accounts and misappropriates monies, and further makes false claims against the trust property.

SUIT by plaintiff to remove defendant from the trusteeship of a durga, and for damages for various acts of misfeasance and malfeasance committed by defendant. The decree removed the defendant from the trusteeship and directed him to pay to his successor in the trusteeship the sum of Rs. 3,000 and odd found to be misappropriated by him. The decree further directed the Mahomedan Religious Endowment Committee to appoint a proper trustee in the place of the defendant.

The defendant appealed to the High Court.

One of the grounds of appeal was, that the relief granted was one, which could not have been granted under Act XX of 1863.

T. R. Ramachandra Ayyar, *T. R. Krishnaswami Ayyar* and *G. S. Ramachandra Ayyar* for appellant.

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* Appeal No. 147 of 1904, presented against the decree of A. C. Dutt, Esq., District Judge of South Arcot, in Original Suit No. 20 of 1900.

MIYAJI *alias* MAHOMED GHOUSE SAHIB v. SHEIK AHMED SAHIB.

C. Ramachandra Rau Saheb and *K. R. Subrahmania Sastri* for respondents.

JUDGMENT.—

(After considering the evidence and the questions of fact raised in the case, their Lordships continued.)

It is then urged upon us that even on proof of these facts he (the appellant) ought not to be removed, but that he may be retained on conditions that may be imposed on him. We are of opinion that the defendant ought to be removed in the interests of the institution. We cannot find any reasonable excuse for the way in which the accounts are kept. It is impossible to ascertain from the accounts the income and expenditure of the durga: they are inextricably mixed up with his own accounts, so that the Commissioner had to report a large sum of money as "undistributable," *i.e.*, which cannot be ascertained to have been received and spent on durga or private account. He has misappropriated the sum of Rs. 1,370-0-5 and probably a larger sum which cannot now be traced. There is no explanation offered of his conduct in not appearing before the Commissioner to explain his accounts with reference to the sums received from the persons named in the plaint, which he is alleged to have misappropriated.

He claims a large sum of money from the durga to which he is found not to be entitled and it is evidently unsafe therefore to leave the durga properties in his possession. We have also to bear in mind that a married man is unfit to be a Jaynishin of the durga according to usage, and according to the inam title-deed the endowment is to be continued "so long as the rules regarding celibacy, etc., are conformed to."

As to the amount to be paid by him we reduce it to Rupees 1,370-0-5 for the reasons already referred to.

Under section 14 of Act XX of 1863 the Court may direct the removal of the trustee or manager. As the defendant is in possession of the durga properties as trustee and manager, on his removal, he has to be relieved of his possession of the properties. So long as he is in possession he will be treated as a trustee liable to render accounts. He is entitled to get a discharge and to be relieved of all obligations as a trustee by the Court. It is necessary therefore to direct surrender of possession. If there is any person already competent to represent the durga, possession may be delivered to him. If the power of appointment is shown

MIYAJI *alias* MAHOMED GHOUSE SAHIB *v.* SHEIK AHMED SAHIB.

to be vested in any person, the decision in *Giyana Sambandha Pandara Sannadhi* v. *Kandasami Tambiran*(1) shows that such person may be directed to make the appointment and possession may be delivered to him. If there is no person competent to represent the trust we see no reason why a receiver should not be appointed to take charge of the estate. Under section 14 of Act XX of 1863 damages may be decreed against the trustee. That provision implies that the damages decreed must be paid to some person representing the trust. The order that damages should be paid and possession delivered to some specified person is necessary to give effect to section 14. The question to whom the possession is to be transferred is an incident of the declaration that the defendant is removed from the trusteeship. On the question whether we are entitled to appoint a trustee there is a difference of opinion between Shephard, J. (see *Sivayya* v. *Rami Reddi*(2)), and the learned Judges who decided *Sheoratan Kunwari* v. *Ram Pargash*(3). It is unnecessary for us to decide that question. But whether we have jurisdiction to appoint a trustee or not, we are entitled to direct a competent person to appoint a trustee and to direct delivery of possession to the person properly appointed. In this case the second respondent has been appointed by the Religious Endowment Committee and possession may be properly delivered to him. The direction in the decree "that such appointment be made within two months from this date" is unnecessary. The decree therefore the Judge has passed is in accordance with the decision in *Giyana Sambandha Pandara Sannadhi* v. *Kandasami Tambiran*(1). With this and the other modification above pointed out as to the amount payable, we dismiss the appeal with costs.

(1) I.L.R., 10 Mad., 375, at p. 508. (2) I.L.R., 22 Mad., 223, at p. 227.
(3) I.L.R., 18 All. 227, at p. 232.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Sankaran-Nair.

1908. January 22, 23, 28.

SHAMU PATTER (PLAINTIFF), APPELLANT,

v.

ABDUL KADIR RAVUTHAN AND OTHERS (DEFENDANTS AND LEGAL REPRESENTATIVES OF FIFTH AND SIXTH DEFENDANTS), RESPONDENTS.*

Transfer of Property Act, Act IV of 1882, *s.* 59—*Provisions of section not sufficiently complied with when witnesses not present at execution, but attest on executant's acknowledgment of signature.*

A mortgage deed is 'attested' by witnesses within the meaning of section 59 of the Transfer of Property Act only when such attesting witnesses are actually present at the time of execution. The provisions of the section are not complied with when the witnesses are not present at the execution of the document but attest it, subsequently, on the acknowledgment by the mortgagor of his signature.

Abdul Karim v. *Saliman*, (I.L.R., 27 Calc., 193), followed.

Ramji v. *Bai Parvati*, (I.L.R., 27 Bom., 91), dissented from.

Ganga Dei v. *Shiam Sundar*, (I.L.R., 26 All., 69), dissented from.

Per WALLIS, J.—The provisions of section 50 (clause 3) of the Indian Succession Act prescribing the manner in which wills must be attested and allowing attestation by witnesses on the testator's acknowledgment of his signature, cannot be regarded as a statutory definition of an attestation applicable to other Indian Acts.

Per SANKARAN-NAIR, J.—The absence in section 59 of the Transfer of Property Act of the provision as to attestation on acknowledgment of signature contained in section 50 (3) of the Succession Act, shows that, under section 59 of the Transfer of Property Act, attestation of the actual signature is necessary.

SUIT to recover from first and second defendants personally, and by sale of the mortgaged properties the amount due on a mortgage bond executed by defendants Nos. 1 and 2 to plaintiff's elder brother in 1899.

The mortgage bond was attested by two witnesses both of whom when examined, admitted that they did not see the execution of the document, but attested subsequently on the admission of the execution by the mortgagor. The Subordinate Judge gave a decree personally against defendants Nos. 1 and 2, and dismissed

* Appeal No. 27 of 1904, presented against the decree of P. J. Itteyerah, Esq., Subordinate Judge of South Malabar at Palghat, in Original Suit No. 26 of 1902.

SHAMU PATTER v. ABDUL KADIR RAVUTHAN.

the suit as against the mortgaged properties. The plaintiff appealed to the High Court.

P. R. Sundara Ayyar and *C. V. Anantakrishna Ayyar* for appellant.

T. R. Ramachandra Ayyar and *T. R. Krishnaswami Ayyar* for third, seventh, tenth to twelfth and seventeenth respondents.

JUDGMENT (WALLIS, J.).—The main question raised in this appeal is whether the provisions of section 59 of the Transfer of Property Act which requires a mortgage to be effected by a registered instrument signed by the mortgagor and attested by at least two witnesses are sufficiently complied with when the witnesses are not present at the execution of the instrument by the mortgagor, but attest it subsequently on his acknowledgment of his signature. This question has been answered in the negative by the Caclutta Court in *Girindra Nath Mukerjee* v. *Bejoy Gopal Mukerjee*(1) and *Abdul Karim* v. *Salimun*(2) and in the affirmative by the Bombay and Allahabad High Courts in *Ramji* v. *Bai Parvati*(3) and *Ganga Dei* v. *Shiam Sundar*(4).

As to what is meant by attesting an instrument the appellants have relied on numerous old cases under section 5 of the Statute of Frauds, of which *Stonehouse* v. *Evelyn*(5), *Grayson* v. *Atkinson*(6), *Ellis* v. *Smith*(7), and *White* v. *Trustees of the British Museum*(8) were cited before us. In these cases it was held that under the provision which required a will of lands to be "attested and subscribed in the presence of the devisor by three or more credible witnesses," it was unnecessary for the testator actually to sign his will in the presence of the witnesses and that it was sufficient if he acknowledged it to be his will. This contention, however, was disapproved by many of the Judges who felt bound to follow it on the principle of *stare decisis*, and the objections to it have nowhere been more forcibly expressed than by Lord Brougham in delivering the judgment of the Privy Council in *Casement* v. *Fulton*(9), a case under the Indian Wills Act No. XXV of 1838. "The Statute of Frauds (29 Car. II. C. 3, s. 5), requires the will to be signed by the testator, in the presence of the witnesses;

(1) I.L.R., 26 Calc., 246.
(2) I.L.R., 27 Calc., 190.
(3) I.L.R., 27 Bom., 91.
(4) I.L.R., 26 All., 69.
(5) (1734), 3 P. Wms., 251.
(6) 2 Ves. Sen., 454.
(7) 1 Ves. Jun., 11.
(8) 6 Bing., 310.
(9) 3 M.I.A., 395.

SHAMU PATTER v. ABDUL KADIR RAVUTHAN.

nevertheless, the construction put upon that important provision has been that an acknowledgment is equivalent to a signature. How far this latitude of interpretation was justified in principle, we need not now stop to inquire, else it might well be suggested that to do an act in the presence of a witness, and to acknowledge having done it when the witness was not present, are two entirely different things—as different as the witnessing a fact or act, and the witnessing a confession of that fact or act. But it is too late to raise any such objection; we may, nevertheless, observe that the greatest Judges who have dealt with the subject have admitted the force of such considerations, and lamented the latitude given to the statutory provision by their predecessors, who first broke in upon its strictness. When Lord Hardwicke, in 1752, was first called upon to adopt this construction, he expressed that it had for a long while been *vexata quæstio*; but still he felt the weight of authority too great to adopt the course he manifestly inclined to (*Grayson* v. *Atkinson*(1)). Two years after, the point was more solemnly considered in *Ellis* v. *Smith*(2), and adjudged by the same great lawyer, who then had the assistance of Sir J. Strange, M.R., Willes, C.J., and Parker, C.B. All these eminent men expressed their opinion, that had the question been open, and that they were called upon now to decide it for the first time, they should not have held acknowledgments sufficient. But they found on examining the cases that the case was not *res integra*."

In the English Wills Act 1 Vict. C. 36, followed in the Indian Wills Act No. XXV of 1838 and the Indian Succession Act of 1865, section 50, the Legislature when intending that acknowledgment of the signature should be sufficient in the case of wills did not think fit to leave this upon the construction placed upon the word 'attest' in the connection in which it occurs in section 5 of the Statute of Frauds, but expressly enacted that the signature must be "made or acknowledged" by the testator in the presence of two or more witnesses, thus reproducing what had for a very long time been understood to be sufficient in the case of wills of land, but no longer leaving it to rest on a questionable construction of the Statute of Frauds.

Mr. Sundara Iyer has not been able to cite to us any case not under section 5 of the Statute of Frauds in which attestation was

(1) 2 Ves. Sen., 454.
(2) 1 Ves. Jun., 11.

SHAMU PATTER v. ABDUL KADIR RAVUTHAN.

held to be sufficiently proved when it appeared that the deed was not executed in the presence of the witnesses but subsequently acknowledged before them by the maker. *England* v. *Roper*(1) and *Parke* v. *Mears*(2) deal with proof of execution and not with proof of attestation where attestation is necessary. The meaning of the word 'attest' has often come up in regard to the execution of powers which are required to be attested, but I cannot find that it has ever been suggested that attestation of an acknowledgment of the appointor's signature would do. In Farwell on 'Powers,' p. 137, it is said that the term 'attest' means "a witness shall be present to testify that the appointor has done the act required by the power." In *Burdett* v. *Spilsbury*(3) where the opinion of the Judges was taken, Lord Campbell observes at p. 417 "What is the meaning of an attesting witness to a deed? Why it is a witness who has seen the deed executed, and who signs it as a witness" and Lord Chancellor Lyndhurst says similarly "The party who sees the will executed is in fact a witness to it; if he subscribes as a witness, he is then an attesting witness." This was the meaning put upon the word in *Sharpe* v. *Birch*(4) and by Sir George Jessel in *Ford* v. *Kettle*(5). In the latter case Sir George Jessel says at p. 143 "What then does 'attestation' mean? It is a well known legal term. The ordinary form of attestation is 'signed, sealed and delivered' by the person who executes in the presence of the attesting witness. That is what 'attestation' means. The thing must be done in the presence of the man who in the future will be able to testify that it was done. The authorities show that there is no attestation unless the thing is done in the presence of the attesting witness." These words afford good guidance as to the meaning to be put on the word attestation in construing an Indian statute. The decisions of the Bombay and Allahabad High Courts in *Ramji* v. *Bai Parvati*(6) and *Ganga Dei* v. *Shiam Sundar*(7) proceed on the ground that section 50 (cl. 3) of the Indian Succession Act which prescribes the manner in which wills must be attested requires the attesting witness either to see the testator sign, or to receive from him a personal acknowledgment of his signature, and that this provision must be taken as

(1) 1 Stark, 304.
(2) 2 Bos. & P., 217.
(3) 10 Cl. & F., 340.
(4) 8 Q.B.D., 111.
(5) 9 Q.B.D., 139.
(6) I.L.R., 27 Bom., 91.
(7) I.L.R., 26 All., 69.

SHAMU PATTER v. ABDUL KADIR RAVUTHAN.

a statutory definition of attestation applicable to other Indian Acts as well. With great respect I am unable to share this view. I do not think we should be justified in treating the provisions of section 50 (cl. 3) of the Indian Succession Act, as though they appeared in an Interpretation Act and applying them to other Acts. These provisions have a special history as already pointed out and follow the provisions of the Wills Act, 1 Vict. C. 36, which gave statutory authority to the construction put upon section 5 of the Statute of Frauds, and in my opinion it would not be justifiable to apply them to other Acts. If the Legislature had intended that mortgages should be recognized in this way, they would, I think, have said so.

It is further objected on behalf of the appellant that this point was taken too late as the execution was admitted by the third defendant who filed a written statement on behalf of defendants Nos. 5 to 7. The mortgagors, defendants Nos. 1 and 2, were *ex parte*, and defendants Nos. 5 to 7 were only attaching creditors. It was therefore necessary for the plaintiff to prove his right to a mortgage decree against defendants Nos. 1 and 2. This he failed to do when it was elicited in cross-examination that the attesting witnesses were not present when the mortgage was executed.

Under these circumstances the Subordinate Judge was, I think, justified in framing the further issue and deciding it for the defendants. The appeal must be dismissed with costs.

SANKARAN-NAIR, J.—The question is whether the instrument sued upon is 'attested' as required by section 59 of the Transfer of Property Act. There are two witnesses, Chami and Sivarama Menon. Chami admitted that he did not see the document being written or signed and that he attested it at the Sub-Registry office at the request of the mortgagee. As this was in the presence of the mortgagors to whom the mortgage amount was then paid in his presence, it must be taken to be proved that though there was no oral acknowledgment, the mortgagors in effect admitted their execution. Sivarama Menon stated that he did not know where and when the document was written, that he did not see its execution by the first and second defendants and that he only attested it on their admission. Section 59 of the Transfer of Property Act enacts that "a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses." Is this document 'attested'?

SHAMU PATTER v. ABDUL KADIR RAVUTHAN.

It is contended before us that as the witnesses signed their names on the admission of the mortgagors of their signatures they have 'attested' the instrument.

The word 'attest' means to bear witness to; affirm the truth or genuineness of. A person cannot be a witness to, or affirm the genuineness of, an instrument unless he was present at the execution thereof. The subsequent admission may be false. If the mental conviction of a person is enough for him to be a witness, such conviction may be produced not only by the admission of the party executing, but also by other unimpeachable testimony even against the declaration of the executant. Apparently for this reason, the attesting witness must be one who was present at the execution. So according to Blackstone's Commentaries, Vol. II, page 307, the 'attestation' of a deed is "the execution of it in the presence of witnesses." According to Lord St. Leonards the attestation should be in this form: "Signed by the abovenamed testator in the presence of us present at the same time who have hereunto signed our names"—Hand Book of Real Property. *Freshfield* v. *Reed*(1) has decided that when used in an instrument "the term 'attest' manifestly implies that a witness shall be present to testify that the party who is to execute the deed has done the act." Lord Selborne relied upon this decision in *Seal* v. *Claridge*(2) when he was considering the effect of the Bills of Sale Act, 1878. He said "What is the meaning of the word 'attestation' apart from the Bills of Sale Act, 1878? The word implies the presence of some person, who stands by but is not a party to the transaction." So also Jessel, M.R., in *Ford* v. *Kettle*(3), *Seal* v. *Claridge*(2), *Sharpe* v. *Birch*(4), *Ford* v. *Kettle*(3) are decisions on the Bills of Sale Act where the same view was taken as to the meaning of this word.

On the other hand, the cases *Ellis* v. *Smith*(5), *Grayson* v. *Atkinson*(6), *Stonehouse* v. *Evelyn*(7), and *White* v. *Trustees of the British Museum*(8) have been cited to show that in decisions upon the Statute of Frauds it has been repeatedly held that the witnesses need not be present at the execution, but the acknowledgment by the testator of his signature to the witnesses followed by their own signatures is sufficient, and they will be treated as attesting witnesses under the section.

(1) 9 M. & W., 404.
(2) 7 Q.B.D., 519.
(3) 9 Q.B.D., 141.
(4) 8 Q.B.D., 114.
(5) 1 Ves. Jun., 11 (30 Eng. Rep., 205).
(6) 2 Ves. Sen., 454 (28 Eng. Rep., 291).
(7) 3 P. Wms., 254 (24 Eng. Rep., 1051).
(8) 6 Bing., 310.

SHAMU PATTER v. ABDUL KADIR RAVUTHAN.

Lord Campbell, C.J., however said of a will under section 5 of the Statute of Frauds "that the will should be attested by the witnesses, *i.e.*, that they should be present as witnesses and see it signed by the testator" (*Roberts* v. *Phillips*(1)), and in *Bryan* v. *White*(2), Dr. Lushington said "'Attest' means the persons shall be present and see what passes, and shall, when required, bear witness to the facts."

As to the decisions on the Statute of Frauds holding that an acknowledgment by the testator is sufficient for the witnesses to sign, I do not attach great weight to them. All the four Judges including the Lord Chancellor in *Ellis* v. *Smith*(3) said that they were not satisfied that an acknowledgment is sufficient as it lets in inconveniences and perjuries which the Statute was designed to prevent and is destructive of those barriers the Statute erected against perjury and fraud, though they also said that it was not open to them to decide otherwise as it was not *res integra* and *stare decisis* seemed the wisest course.

The balance of English authority is decidedly in favour of adopting the natural meaning of the term.

The decisions of the Indian High Courts are not uniform. No decision of this Court has been brought to our notice. The learned Judges of the Calcutta High Court are of opinion that the witnesses must be present when the mortgage instrument is signed—see *Girindra Nath Mukerjee* v. *Bejoy Gopal Mukerjee*(4), *Abdul Karim* v. *Salimun*(5), *Sasi Bhusan Pal* v. *Chandra Peshkar*(6) and *Dinamoyee Debi* v. *Bon Behari Kapur*(7).

On the other hand, it has been decided by the Bombay High Court in *Rumji* v. *Bai Parvati*(8) and the Allahabad High Court in *Ganga Dei* v. *Shiam Sundar*(9) that the attestation of a mortgage deed required by section 59 of the Transfer of Property Act includes attestation, after execution of the deed, of the acknowledgment by the executant of his signature.

(1) 4 E. & B. 450 at p. 453 [24 L.J. (N. S.) Q.B., 171].
(2) 2 Rob., 315 at p. 317.
(3) 1 Ves. Jun., 11 (30 Eng. Rep., 205)
(4) I.L.R., 26 Calc., 248.
(5) I.L.R., 27 Calc., 193.
(6) I.L.R., 33 Calc., 864.
(7) 7 Calc. W.N. 160.
(8) I.L.R., 27 Bom., 91.
(9) I.L.R., 26 All., 69.

SHAMU PATTER v. ABDUL KADIR RAVUTHAN.

I agree with the Calcutta High Court. The natural meaning of the word 'attest' as I have shown is in favour of that view. A person signing a will in the presence of a testator after receiving from him a personal acknowledgment of his signature or mark 'attests' a will under section 50 of the Indian Succession Act. The absence of a similar provision for the acknowledgment of execution in section 59 of the Transfer of Property Act shows that attestation of the actual execution is necessary. The Bombay and the Allahabad cases decide that when the word 'attest' is expressly and in terms declared to bear a certain meaning in the Indian Succession Act, it must be taken to have the same meaning in the subsequent enactment, the Transfer of Property Act, even in the absence of any such legislative declaration; and in fact this is the only argument advanced by the learned Judges who decided those cases. My inference is the other way. The so-called attestation based on the acknowledgment is ordinarily superfluous as evidence, as the document is registered and the executant's acknowledgment of his signature before a public officer is entitled to greater weight. A will operates only on the death of a testator, and an acknowledgment by him therefore might perhaps be reasonably considered sufficient by the Legislature as it is open to a testator at the time of the acknowledgment or subsequent thereto to make a will in the same terms without prejudice to another person's interest, while in the case of a present transfer of property the law might well insist upon proof of the *voluntary* execution of the document *on the date* it purports to bear in the interests, among others, of those who might claim under grants by the executant between the date of the alleged execution and the acknowledgment. It is desirable to have proof of execution rather than proof of the executant's acknowledgment to prove such execution.

For these reasons I would confirm the decree of the lower Court and dismiss the appeal with costs.

WALLIS AND SANKARAN-NAIR, JJ.—The Memorandum of Objections was not argued and must be dismissed with costs.

APPELLATE CIVIL.

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

RAMAN CHETTIYAR (DEFENDANT), APPELLANT,

v.

GOPALACHARI (PLAINTIFF), RESPONDENT.*

1907. December 10, 11. 1908. January 21.

Jurisdiction—Civil Procedure Code, s. 17, expl. III—Cause of action arises only where money is expressly or impliedly payable under the contract and not under any general rule of law.

The rule of general law that where a contract is silent as to the place of payment, it is the duty of the debtor to seek out his creditor and pay him does not control the express provisions of section 17, explanation III of the Code of Civil Procedure, and cannot be applied in determining where, for the purposes of the section, the cause of action has arisen. The place where the cause of action arises under section 17, explanation III, is the place where money is payable, expressly or impliedly, under *the contract itself*, and not under any *general rule of law*.

When a promissory note payable on demand is made at T and no place is fixed expressly, or impliedly, for payment, the mere fact that the creditor is described as residing at K which is within the jurisdiction of a Court different from that exercising jurisdiction at T does not, by virtue of the general rule of law stated above, make K the place of payment for the purposes of section 17, explanation III of the Civil Procedure Code, and the Court at K has, in the absence of evidence that the money was payable at K in the ordinary course of business, no jurisdiction to entertain a suit against the debtor who is not resident within the local limits of its jurisdiction.

SUIT to recover balance due on a promissory-note executed by the defendant in favor of the plaintiff.

The defendant was a resident of Tanjore where the promissory-note was executed, while the plaintiff was a resident of Kumbakonam, where the suit was brought. It was objected by the defendant that the Court at Kumbakonam had no jurisdiction. The Subordinate Judge held that he had jurisdiction and passed a decree in favor of the plaintiff. His judgment was confirmed on appeal.

Defendant appealed to the High Court.

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* Second Appeal No. 1564 of 1904, presented against the decree of F. D. P. Oldfield, Esq., District Judge of Tanjore, in Appeal Suit No. 501 of 1904, presented against the decree of M.R.Ry. T. T. Rangachariar, Subordinate Judge of Kumbakonam, in Original Suit No. 32 of 1903.

RAMAN CHETTIYAR v. GOPALA-CHARI.

C. Narasimhachariar for *R. Sadagopachariar* and *T. Narasimha Ayyangar* for appellant.

The Hon. Sir *V. C. Desikachariar* for *P. R. Sundram Ayyar*, and *N. R. K. Thathachariar* for respondent.

JUDGMENT (SIR ARNOLD WHITE, C.J.).—The note sued on in the present case was executed within the local limits of the jurisdiction of the Tanjore Court. The note is payable on demand and is not payable at any specified place. The defendant resides at Tanjore. The plaintiff resides at Kumbakonam and brought his suit in the Kumbakonam Court. The question is has that Court jurisdiction? The matter is governed by section 17 of the Code of Civil Procedure which provides that a suit must be instituted in the Court within the local limits of whose jurisdiction the cause of action arises. Under explanation III to this section one of the places at which the cause of action arises within the meaning of the section is the place where in performance of the contract any money to which the suit relates is expressly or impliedly payable. The note itself states that the maker of the note resides at Tanjore and that the payee resides at Kumbakonam. As regards the document itself I do not think that the statement in the document that the plaintiff resides at Kumbakonam can be said in itself to imply that the money payable under the note was payable at Kumbakonam. I do not think it necessary to decide whether the question of the implication of payment in a particular place is to be considered only with reference to the terms of the contract, or whether the circumstances in which the contract was made may also be taken into account. I assume that, for the purpose of applying explanation III, the explanation may be construed in the same way as the words "according to the terms thereof ought to be performed within the jurisdiction" occurring in Order XI, R. 1 (*e*) of the English Rules of the Supreme Court, *i.e.*, you must look at the contract and at the facts which existed at the time the contract was made, and then determine whether, having regard to the terms, the contract was one which ought to be performed within the jurisdiction. See the judgment of Cotton, L.J., in *Reynolds* v. *Coleman*(1) and the judgment of Lindley, L.J., in *Rein* v. *Stein*(2).

Now, in the present case, what are the proved facts which can be relied on to give rise to the implication that payment was to be

(1) 36 Ch.D., 453.

(2) (1892) 1 Q.B., 753.

RAMAN CHETTIYAR v. GOPALA-CHARI.

made at Kumbakonam? So far as I can see the only fact is the fact that the plaintiff resides there, and that, in my judgment is not sufficient. The District Judge observes "If the defendant proposed to act in the ordinary course of business, he would pay plaintiff, where plaintiff was, at Kumbakonam, admittedly his residence." But there is no evidence that it was the practice between the parties for the defendant to make payments to the plaintiff at Kumbakonam and in referring to the "ordinary course of business" I think the Judge only had in mind the ordinary rule that a debtor should follow his creditor. I do not think this general rule can be relied on as controlling the express words of a statute prescribing the conditions which give a Court local jurisdiction. This view would seem to be in accordance with the principle of the decision of the House of Lords in *Comber* v. *Leyland*(1). The other view would involve the proposition that unless the contract or the circumstances in which the contract was made give rise to a contrary implication a creditor may sue in any Court within the local jurisdiction of which he happens to be when his right to sue arises. This seems to me to be quite inconsistent with the express provisions of section 17.

Illustration (*b*) to the section throws some light on the intention of the legislature. If the plaintiff's place of residence gave rise to an implication as to the place where the money to which the suit relates was payable, *A* would have been entitled to sue *B* and *C* at Simla.

As in the present case the only fact, either with reference to the terms of the contract, or with reference to the circumstances in which the contract was made, which can be said to raise an implication that the money was to be payable at Kumbakonam is the fact that the plaintiff resides there, and as this fact is not sufficient in my view to raise this implication, I am of opinion that the Kumbakonam Court had no jurisdiction to entertain the suit. It is not necessary to consider the other question which was argued in this appeal. I would allow the appeal with costs throughout, and return the plaint for presentation to the proper Court.

Miller, J.—This appeal arises out of a suit on a promissory-note for Rs. 7,000 (Rupees seven thousand). The first

(1) (1898) A.C., 525.

RAMAN CHETTIYAR v. GOPALA-CHARI.

question arising for decision is whether the Subordinate Judge of Kumbakonam had jurisdiction to try the suit?

The promissory-note was executed in Tanjore and was payable on demand, no place of payment being fixed in it. Tanjore is not within the local jurisdiction of the Subordinate Judge of Kumbakonam, but the plaintiff resides in Kumbakonam, and claims the right to sue there on the ground that the debt is impliedly payable there (section 17, explanation III (iii), Civil Procedure Code).

The jurisdiction of the Court is to be ascertained from the provisions of the Code, *i.e.*, in the present case from explanation III to section 17.

The District Judge says that in the ordinary course of business payment would be made at Kumbakonam where the plaintiff resides, but assuming that we are entitled to hold that the money is impliedly payable in the ordinary course of business, there is nothing to show that the plaintiff had a place of business at Kumbakonam, or that he ordinarily collected his debts at Kumbakonam. The District Judge does not point to any evidence as to the ordinary course of business, and we have not been shown any. The District Judge probably refers to the rule of law that the debtor must seek his creditor to pay him, and the argument before us was directed on behalf of the plaintiff to establish the position that we ought to read into the contract a reference to this rule of law.

But it seems to me clear that by the phrase 'expressly or impliedly payable' we are to understand payable according to the terms of the contract, which are expressed or can be inferred on a construction of the language, or from the circumstances. The rule as stated by Bowen, L.J., in "The Eider"(1) is that, when no place of payment is specified, *either expressly or by implication*, the debtor must seek his creditor. Is there in the present contract an 'implied' undertaking to pay at Kumbakonam? The money is payable on demand and the natural inference is that it is payable where the demand is communicated to the debtor. Beyond the fact that the creditor is described as residing in Kumbakonam from which it seems to me nothing can be implied, there is no word in the promissory-note suggesting

1 (1893) L.R., P.D., 136.

RAMAN CHETTIYAR v. GOPALA-CHARI.

Kumbakonam as the place of payment. Nor are there any circumstances conveying this suggestion. The money was not sent from Kumbakonam to Tanjore, it is not alleged that the debts which were transferred to the plaintiff were payable in Kumbakonam, and no part of the negotiation is shown to have taken place in Kumbakonam.

The case is therefore one in which the place of payment is not specified either expressly or by implication, and it seems to me necessarily to follow that sub-division (iii) of explanation III does not apply.

Are we then entitled to apply the general rule of law? I think not. We are bound to seek the jurisdiction of the Court within the provisions of the Code, and if sub-division (ii) of explanation III is not applicable we have to see if any other sub-division is applicable. It was not suggested here or apparently in either of the lower Courts that sub-division (ii) can be applied if sub-division (iii) is inapplicable, and the Court having jurisdiction is therefore the Court of the place where the contract was made, (sub-division (i)), or where the defendant resides (section 17 (*b*)).

Reliance was placed on a dictum of Tyabji, J., in *Motilal* v. *Surajmal*(1), but the learned Judge, there, was interpreting section 12 of the Letters Patent of the High Court which does not define what is meant by the place where the cause of action arises. The English cases to which we were referred depended on the provisions of Order XI R1 which have reference to contracts which "ought to be performed within the jurisdiction", provisions which give room for the introduction of the general rule of law, but which are not found in section 17 of the Code of Civil Procedure.

If the framers of the Code had intended that a plaintiff should, in the absence of a contract to the contrary, be allowed to sue at his place of residence to recover debts due to him in pursuance of contracts made elsewhere, there is no apparent reason why they should not have said so; they had an excellent opportunity of making this clear in drafting illustration (*b*) to section 17, and the fact that they did not avail themselves of that opportunity supports, I venture to think, the view which I take of the present case.

(1) I.L.R., 30 Bom., 167.

RAMAN CHETTIYAR v. GOPALACHARI.

Section 49 of the Contract Act cannot govern this case, for here the money is payable on demand and not "without application by the promisee."

I am therefore of opinion that the Kumbakonam Court had no jurisdiction to try the present suit, and for that reason would, without deciding any other question, reverse the decrees of both the Courts below and return the plaint to be presented to the proper Court (section 57-C, Civil Procedure Code).

APPELLATE CIVIL.

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

1907. November 11. December 2.

PATTATHERUVATH PATHUMMA AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

MANNAMKUNNIYIL ABDULLA HAJI AND TWO OTHERS (DEFENDANTS NOS. 1, 2 AND 4 AND THE LEGAL REPRESENTATIVES OF THE FIRST DEFENDANT), RESPONDENTS.*

Marumakkattayam Law—Gift to woman governed by such law, effect of.

A gift of property to a woman governed by Marumakkattayam law and to her children, by their father does not of itself constitute the mother and her children, a separate tarwad, but the donees take such property with the incidents of tarwad property.

Where the gift is made by a Muhammadan husband governed by Makkattayam law to his wife, who is also governed by Marumakkattayam law, and to her children the property becomes the exclusive property of the donees with the incidents of tarwad property subject to Marumakkattayam law, and on the death of the mother it does not pass to her heirs under the Muhammadan law.

THE first plaintiff was the daughter, and the first defendant the son of one Ayissa, a Muhammadan woman governed by the Marumakkattayam law. Properties were given to Ayissa and her children by her husband Uttotti, a Muhammadan governed by Makkattayam law. On the death of Ayissa, the first

* Second Appeal No. 1401 of 1904, presented against the decree of M.R.Ry. A. Venkitaramana Poi, District Judge of North Malabar, in Appeal Suit No. 431 of 1903, presented against the decree of M.R.Ry. M. G. Krishna Row, District Munsif of Quilandy, in Original Suit No. 456 of 1901.

PATTATHERUVATI PATHUMMA v. MANNAMKUNNIYIL ABDULLA HAJI.

defendant alienated some of the properties in favour of the second defendant. The first plaintiff, on behalf of herself and her minor daughters, the second and third plaintiffs, brought this suit to set a side these alienations on the ground that the properties, on the death of Ayissa, lapsed to the tarwad to which the plaintiffs and first defendant belonged, and of which the first defendant was Karnavan, and that the alienations by the first defendant were invalid. The first and second defendants pleaded *inter alia* that if the properties belonged to Ayissa, both the first plaintiff and first defendant became entitled thereto as her heirs under the Makkattayam law by which the father was governed. The District Munsif upheld the plaintiff's contention and passed a decree in favour of plaintiffs. The District Judge, on appeal, held that the properties belonged to first plaintiff and first defendant as Ayissa's heirs under the Muhammadan law and dismissed the suit.

The plaintiffs appealed to the High Court.

T. R. Ramachandra Ayyar for appellants.

Mr. *T. Richmond* for second respondent.

JUDGMENT.—In this case it appears that one Uttotti, a Mopla, made a gift of land to his wife Ayissa who belonged to a tarwad governed by the Marumakkattayam law, and the question is, to whom does the land descend on Ayissa's death. The District Judge has dealt with the case as if the question were to whom it descended on the death of Uttotti. Uttotti being a Muhammadan, the presumption may be that his property would descend according to Muhammadan law, according to *Assan* v. *Pathumma*(1) and *Kunhimbi Umma* v. *Kandy Moithin*(2), the cases relied on by the District Judge. We think however that the present case is governed by the decision of the Full Bench on facts very similar to the present in *Kunhacha Umma* v. *Kutti Mammi Hajee*(3) which has been followed and explained in *Koroth Amman Kutti* v. *Perungottil Appu Nambiar*(4). In the first of these cases, property given to one Ayissumma and her children after the death of her husband Taruvai in accordance with his orally expressed wish was held to be taken by Ayissumma, who was governed by the Marumakkattayam law, and her children as their exclusive

(1) I.L.R., 22 Mad., 494.
(2) I.L.R., 27 Mad., 77.
(3) I.L.R., 16 Mad., 201.
(4) I.L.R., 29 Mad., 322.

PATTA-THERUVATH PATHUMMA v. MANNAM-KUNNIYIL ABDULLA HAJI.

property with the incidents of tarwad property. In that case the donor Taruvai was a Muhammadan, and it was stated in argument at page 206 that he was governed by the Makkattayam law, but the fact that the donor was a Muhammadan was not treated as affecting the decision. In *Koroth Amman Kutti* v. *Perungottil Appu Nambiar*(1) it was held that in the case of a gift to a woman governed by the Marumakkattayam law and to her children by their father the donees take such property with the incidents of tarwad property, but that the gift by the father does not of itself constitute the mother and children a separate tarwad. In the present case, though the property was purchased in the name of the mother Ayissa, the District Judge holds, we think rightly, that it was intended for her children as well. If so, according to the decision of the Full Bench, the land became the exclusive property of Ayissa and her children with the incidents of tarwad property. Under these circumstances the alienations complained of by the first plaintiff are invalid and the plaintiffs have a right to a decree for redemption.

We must accordingly reverse the decree of the District Judge and give the plaintiffs a decree as prayed for with costs throughout, and six months for redemption from date of decree.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Sankaran-Nair.

1907. November 27. December 5.

MOIDIYAN'S SON AMBIALATH VEETTIL PUNNAYIL KUTTU (DEFENDANT), APPELLANT,

v.

ANEDATH VALIYIL LAKSHMI AMMAL'S SON RAMAN NAIR AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Limitation Act, Act XV of 1877, sched. II, arts. 62, 95, 97—Suit to recover money obtained by deceitful misrepresentation does not fall within art. 62 or 97, but within art. 95—Starting point of limitation.

A, by fraudulently representing to *B*, to whom he was indebted that a sum of money was due to *A* from *C*, induced *B* to take an assignment of the alleged

(1) I.L.R., 29 Mad., 322.

* Second Appeal No. 256 of 1905, presented against the decree of L. G. Moore, Esq., District Judge of South Malabar, in Appeal Suit No. 461 of 1904, presented against the decree of M.R.Ry. A. Srinivasa Ayyangar, District Munsif of Chingleput, in Original Suit No. 417 of 1903.

MOIDIYAN'S SON PUNNAYIL KUTTU v. RAMAN NAIR.

debt due from *C* in satisfaction of the debt due from *A* to *B*. In a suit by *B* as assignee, against *C*, the latter in his written statement denied the existence of any debt due to *A*, and *B*'s suit was dismissed after trial on the ground that *C* owed nothing to *A*. In a suit by *B* to recover from *A* damages on the ground that *A* had, by deceitful representations, induced *B* to take the assignment:

Held, that the suit as regards limitation did not fall within article 62 or 97 of schedule II of the Limitation Act, but within article 95, and that the fraud must be held to have been discovered only when the Court found that no debt was due from *C* to *A* and not when *C* in the written statement denied the existence of any such debt.

When it is uncertain when the fraud was discovered, the onus is on the defendant to show that the suit is out of time.

SUIT to recover damages for loss sustained by the plaintiff by the deceitful misrepresentations of defendant.

The facts were fully stated in the judgment of the lower Appellate Court which was as follows:—

"Defendant and two other persons started a Kuri fund with a capital of Rs. 600 in February 1892. One Pathunni Umma and two other persons, subscribers to the Kuri (which was an auction Kuri) were the successful bidders at the first auction for Rs. 344 odd, and executed a document, exhibit B, on 9th March 1892 in favour of defendant and two others, the managers of the fund, undertaking to pay subscriptions regularly at the rate of Rs. 5 a month in consideration for having received a lump sum of Rs. 344 from them. In case of failure to pay subscriptions regularly the document provides for the payment of balance of subscriptions in a lump sum with interest. Defendant owed Rs. 511 and odd to first plaintiff who was also a subscriber to the Kuri connection with chit fund. Defendant sold the right of collecting money (future subscriptions) under B to first plaintiff by a transfer deed (exhibit A) on 17th May 1899. Plaintiffs afterwards instituted a suit (Original Suit No. 631 of 1899) in the Chowghat Munsif's Court against Pathunni Umma and others to recover the money that the latter had to pay under exhibit B. Defendant was made a party to the suit which was dismissed as it was held that Pathunni Umma and the other executants of B were not bound to pay anything since the fund had collapsed owing to the default of the manager (defendant). The suit was dismissed on 29th September 1900, the decree being upheld on appeal. The suit now under appeal was instituted on 27th July 1903.

"Appellant's vakil argues that plaintiff's suit not having been brought within three years from the date of execution of the

transfer deed A was barred by limitation. The main question for determination in this appeal is whether article 62 or article 97 of the second schedule of the Limitation Act applies to the present case. The Munsif held that article 62 was inapplicable. Respondents' vakil contends that limitation begins to run from the date of the decree in Original Suit No. 631 of 1899, viz., 29th September 1900. And that the suit having been instituted within three years from that date was not barred by limitation."

"I think that article 97 applies. It cannot be said that there was failure of consideration from the date of exhibit A or from the time when Pathunni Umma and her co-executant made default in paying subscriptions, *i.e.*, apparently in September 1899. It appears to me that there was failure of consideration from the time that plaintiffs having sued to recover the money under A found themselves unable to recover it in other words from the date of the decree in the suit. Plaintiffs had then a right to sue defendant to recover the money due under A upon a failure of consideration. The Munsif was, I think, right in holding that plaintiffs' suit was not barred."

The District Judge confirmed the decree of the Munsif awarding damages as claimed in the plaint to plaintiffs.

The defendant appealed to the High Court.

J. L. Rosario for appellant.

C. V. Anantakrishna Ayyar for respondents.

JUDGMENT.—This case has been dealt with in the lower Courts as if the question were whether the suit is one for money had and received by the defendant for the plaintiffs' use and so governed by article 62 of the Limitation Act, or one for money paid upon an existing consideration which afterwards failed and so governed by article 97. In our opinion neither of these articles is applicable to the present suit. The plaint states that, as a result of auction, chit fund transactions Rs. 405 was found due by the defendant to the first plaintiff, that the defendant represented that Rs. 511-14-0 was due to him by Pathunni Umma and two others, who were also members of the chit fund, and asked the first plaintiff to take an assignment of this debt which the first plaintiff did, that the first plaintiff subsequently sued Pathunni Umma and the two others making the present defendant a party, when it was found that Pathunni Umma and the others did not owe anything to the present defendant. It was also found that

Pathunni Umma and others were regularly paying their subscriptions and the defendant was receiving them till September 1899 for some months after the date of exhibit B, the assignment to the first plaintiff. It is then set out in paragraphs 6 and 7 of the plaint that as the defendant deceitfully made the representation to the first plaintiff that the money was due from Pathunni Umma and the others, and that he was empowered to assign the debt, the first plaintiff was entitled to recover damages, and in paragraph 10 the cause of action is said to have arisen on the 30th July 1901, the date of the appellate decree in the first plaintiff's suit against Pathunni. In our opinion this is clearly a suit to recover damages for fraud and such a suit is governed by article 95. (*Bank of Madras* v. *Multan Chand Kanyalal*(1)). The question then is when did the fraud become known to the plaintiffs. It has been contended for the appellant that this happened in November 1899 when Pathunni and the others put in their written statement repudiating liability in Original Suit No. 631 of 1899—the suit filed against them by the first plaintiff. This written statement was notice to the first plaintiff that if Pathunni's case was true, he had been defrauded by the present defendant, but he was not bound to assume that the case set up by Pathunni was true, and there is no evidence that he knew it to be true until the Munsif's decree in that suit which was dated the 29th September 1900, and unless the plaintiffs be shown to have had knowledge earlier, the suit is within time. When it is doubtful at what precise time the fraud became known to the plaintiffs, the *onus* is on the defendant to show that the suit is out of time (*Rahimbhoy Habibbhoy* v. *Charles Agnew Turner*(2)). This burden the defendant has failed to discharge, we are therefore of opinion that the lower Courts were right in holding that this suit was not barred. On the facts found in the previous case, and also in this case, the conduct of the defendant must be held to have been fraudulent, as he well knew that nothing was due when he executed the assignment and he went on himself collecting the subscription which fell due subsequently until the fund collapsed owing to his own default. We accordingly dismiss the second appeal with costs.

(1) I.L.R., 27 Mad., 343. (2) I.L.R., 17 Bom., 341.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Sankaran-Nair.

1907. December 11. 1908. January 8.

ANNAMALAI MUDALIAR (PETITIONER), APPELLANT,

v.

RAMIER AND OTHERS (RESPONDENTS), RESPONDENTS.*

Limitation Act, Act XV of 1877, sched. II, art. 179 cl. (4)—Civil Procedure Code, s. 232—Application by transferee decree-holder to be recognized as such is a step in aid of execution in accordance with law.

An application purporting to be under section 232, Civil Procedure Code, by the transferee of a decree, praying to be recognised as assignee plaintiff in the suit and, stating that when so recognised, he would file an execution petition, *i.e.*, when the Court passed an order as prayed for, and the defendant does not appeal against such order, is a step in aid of execution, and an application in accordance with law within the meaning of article 179, clause (4) of schedule II of the Limitation Act.

THE facts are sufficiently stated in the judgment.

T. Narasimha Ayyangar for appellant.

T. V. Seshagiri Ayyar for respondents.

JUDGMENT.—In this case the appellant, a transferee decree-holder, on the 2nd December 1901 presented a petition under section 232, Civil Procedure Code, which, after stating that he had obtained an assignment of the decree, and that when recognised a transferee-plaintiff he would have to obtain an order absolute and then file an execution petition, prayed the Court to pass an order recognising him as assignee-plaintiff in the suit. It was ordered, accordingly, on the 15th February 1902. On the 11th March 1904 the appellant applied for an order absolute under section 89 of the Transfer of Property Act, but the lower Court held the application to be barred as more than three years had elapsed since the date of the decree (15th August 1900), and the application for the 2nd December 1901 was not, in the opinion of the Court, an application to take a step in aid of execution in accordance with law within the meaning of clause 4 of

* Civil Miscellaneous Appeal No. 251 of 1904, presented against the order of M.R.Ry. K. Ramachandra Ayyar, Subordinate Judge of Negapatam, in Civil Miscellaneous Petition No. 241 of 1904, in Original Suit No. 23 of 1900.

Saunadanappa v. *Shivbasawa*, (I.L.R., 31 Bom., 354), not followed.
Annaji Rau v. *Ragu Bai*, (6 M.H.C.R., 400), followed.

[THE case is reported only on the question of law relating to payment of interest.]

Suit by the plaintiffs to recover from the defendant various sums of money paid to the first defendant under an agreement which fell through, with interest on such amount.

There was no agreement to pay interest and no demand in writing. The Subordinate Judge disallowed interest.

The plaintiff appealed against the portion of the decree disallowing interest and the defendants in respect of certain sums awarded to plaintiff.

P. R. Sundara Ayyar and *V. Purushothama Ayyar* for appellants in Appeal Suit No. 144 of 1904.

Mr. *H. Lubeck* for respondent.

JUDGMENT.—[After dealing with the facts of the case, their Lordships proceeded as follows :—]

As regards the question of interest we think the appellants were not entitled to any interest before the filing of the plaint, as there was no agreement to pay interest and no demand in writing to bring the case within the provisions of the Interest Act. On this point we are not prepared to differ from the decision in *Kamalammal* v. *Peeru Meera Levvai Rowthen*(1). As regards the recent case of *Saunadanappa* v. *Shivbasawa*(2), which awarded interest on the ground that the parties were Hindus and that it was according to Hindu usage to pay interest in such cases, it has been settled in this Court ever since the case of *Annaji Rau* v. *Ragu Bai* alias *Sitha Bai and Jivu Bai*(3), that Hindu Law is not binding in such matters as the payment of interest.

The appeal must therefore be dismissed with costs.

(1) I.L.R., 20 Mad., 481. (2) I.L.R., 31 Bom., 354.
(3) 6 Mad., H.C.R., 400.

APPELLATE CIVIL.

Before Mr. Justice Wallis.

1907. November 6. December 10. 1908. February 11, 25.

AIYATHURAI RAVUTHAN (SECOND DEFENDANT), APPELLANT,

v.

SANTHU MEERA RAVUTHAN AND ANOTHER (PLAINTIFF AND FIRST DEFENDANT), RESPONDENTS.*

Civil Procedure Code, Act XIV of 1882, ss. 26, 28—The word 'same matter' in section 28 wider than the words 'same cause of action' in section 26—Suit sustainable against several defendants if in respect of 'same matter' although in respect of several causes of action.

The words 'same matter' in section 28 of the Code of Civil Procedure have a wider scope than the words 'same cause of action' in section 26 of the Code of Civil Procedure, and a suit against several defendants is not bad for misjoinder if the suit, although in respect of different causes of action against different defendants is in respect of the same matter.

The English decisions on the scope of Order XVI, Rule 4, are not applicable to cases of joinder of defendants under section 28 of the Code of Civil Procedure.

Muthappa Chetty v. *Muthu Palani Chetty*, (I.L.R., 27 Mad., 80), not followed.

A suit by the transferee of a mortgage for sale against the mortgagor, in which is also included a claim for damages against the transferor, the original mortgagee, if it should appear that any portion of the mortgage debt had been discharged by the mortgagor before the transfer and so was not recoverable from the mortgagor, is a suit in respect of the 'same matter' within section 28 of the Code of Civil Procedure, and is not bad for misjoinder.

THE facts are sufficiently set out in the judgment.

This case first came on for hearing before Sir Arnold White, C.J., and Benson, J., when the Court delivered the following judgment.

Ramachandra Ayyar for *V. Krishnasami Ayyar* for appellant.

V. C. Desikachariar for first respondent.

K. Balamukunda Ayyar for second respondent.

JUDGMENT—Sir ARNOLD WHITE, C.J.—In this case the plaint alleges that the first defendant executed a mortgage to the second defendant to secure moneys due by the first defendant to the second defendant; that the second defendant assigned the mortgage to the plaintiff; that the plaintiff gave notice of the assignment to the first

* Second Appeal No. 1550 of 1904, presented against the decree of M.R.Ry. M. Visvanatha Ayyar, Subordinate Judge of Madura (West), in Appeal Suit No. 238 of 1904, presented against the decree of M.R.Ry. T. S. Krishna Ayyar, District Munsif of Dindigul, in Original Suit No. 297 of 1903.

defendant and demanded payment, and that the first defendant stated he had paid Rs. 200 to the second defendant. The first defendant's case is that he paid the Rs. 200 to the second defendant before the latter assigned the mortgage to the plaintiff. The second defendant denies this alleged payment. The plaintiff asked for a decree for the amount due under the mortgage and for sale of the mortgaged property as against both defendants.

The District Munsif held the suit was bad for misjoinder. The Subordinate Judge held there was no misjoinder. The plaintiff is, of course, not entitled to the relief for which he asked, viz., a mortgage decree against both defendants; but the lower Appellate Court gave him a decree on the mortgage as against the first defendant and a decree for Rs. 200 as against the second defendant.

Although the plaintiff does not expressly claim the Rs. 200 in the alternative from the first or second defendant, in substance his claim is for a mortgage decree for the amount mentioned in the mortgage as against the first defendant if the Rs. 200 has not been paid off, and in the alternative, if the Rs. 200 has been paid off, for a mortgage decree for the amount mentioned, less the Rs. 200, as against the first defendant, and for Rs. 200 by way of damages as against the second defendant.

The question of misjoinder turns on whether the plaintiff's right to relief is alleged to exist as against the two defendants in respect of the 'same matter' within the meaning of section 28 of the Code of Civil Procedure. The plaintiff's alleged right of relief as against the first defendant is a right of relief based on the mortgage. His right of relief as against the second defendant would seem to be damages for the breach of an implied covenant that the debt due on the mortgage was outstanding at the date of the assignment, or damages for the fraudulent suppression of the fact that Rs. 200 due on the mortgage had been paid off. In *Muthappa Chetty* v. *Muthu Palani Chetty*(1), it was held that on the true construction of section 28, two distinct causes of action could not be joined against two defendants in one suit, and I see no reason to doubt that that decision was right. If, in the present case, the causes of action alleged against the first defendant is distinct from that alleged against the second, I think the suit is bad for misjoinder. As regards *Meyappa Chetty* v. *Periannan Chetty*(2), which was cited to

(1) I.L.R., 27 Mad., 80.

(2) I.L.R., 29 Mad., 50.

AIYATHURAI RAVUTHAN v. SANTHU MEERA RAVUTHAN.

same cause of action" into section 26 did not really make any difference, and therefore English decisions on Rule 1 are applicable to cases of joinder of plaintiffs under section 26. It does not, however, follow that English decisions as to Rule 4 are applicable to cases of joinder of defendants under section 28.

Although the decision in *Muthappa Chetty* v. *Muthu Palani Chetty*(1) may perhaps be supported on the ground that the facts in that case were not such as to admit of the joinder of defendants there attempted on any view of section 28, yet the decision proceeds on the authority of *Sadler* v. *Great Western Railway Company*(2), in which it was held by the House of Lords that a plaintiff could not, under Rule 4, join separate cause of action against different defendants in one suit. With great respect, I am of opinion, that English decisions on the scope of Rule 4 are not necessarily applicable to cases in India coming under section 28. These decisions treat Rule 1 and Rule 4 as not concerned with joinder of causes of action at all, but merely with joinder of parties. The fact, however, that under the Civil Procedure Code, joinder of plaintiffs is only permitted when the relief is claimed in respect of the same cause of action, while in the case of defendants joinder is permitted when the relief is claimed in respect of the same matter, goes, in my opinion, to show that it was not intended to restrict the joinder of defendants to cases in which relief is sought in respect of the same cause of action, and, if this had been the intention, the words "in respect of the same cause of action" would have been used in section 28 as well as in section 26. The use of the less definite words "in respect of the same matter" in section 28 would seem to show that it was intended to allow joinder of defendants not only when relief was sought in respect of the same cause of action, but also when relief is sought in respect of separate causes of action against the different defendants so long as they all arise "in respect of the same matter." The inconveniences of allowing defendants only to be joined in respect of the same cause of action in the strict sense, and the consequent multiplicity of suits and failure of justice that must often result, are forcibly pointed out by Lindley, M. R., in *Frankenburg* v. *Great Horseless Carriage Company*(3), where the Court of Appeal put a liberal

(1) I.L.R., 27 Mad., 80.
(2) (1896), A.C., 450.
(3) (1900), I.Q.B., 504.

AIYATHURAI RAVUTHAN v. SANTHU MEERA RAVUTHAN.

construction upon the term "cause of action" for the purpose of avoiding such inconveniences. Any other decision would, it is there pointed out, have revolutionised the practice of the Chancery Division. This, in my opinion, explains why the words "in respect of the same cause of action" in section 26 are replaced by "in respect of the same matter" in section 28, the intention being that claims to relief might be joined in one suit against several defendants, whether they constituted separate causes of action or not, so long as they were "in respect of the same matter." That the words "in respect of the same matter" in section 28 are wider than the words "in respect of the same cause of action" has been pointed out by Sir Bhashyam Ayyangar in *Dampanaboyina Gangi* v. *Addala Ramaswami*(1). If section 28 is wider than section 26, it is also wider than Order XVI, Rule 1 as it originally stood, and is also wider than Rule 4 which has been held to be as restricted as Rule 1 with regard to joinder of causes of action. The conclusion follows that English decisions under Rule 4 are not applicable to section 28, Civil Procedure Code, as the scope of the section is wider than that of the rule. The decision in *Muthappa Chetty* v. *Muthu Palani Chetty*(2) proceeds on the view that the English decisions, as to the scope of Rule 4, must govern cases under section 28, Civil Procedure Code. If this is not so, and the English decision on Rule 4 can be treated as inapplicable, the present case presents no difficulty, and there is a uniform course of decisions in favour of allowing joinders such as that in the present case, so long as the relief is sought "in respect of the same matter." *Buddree Doss* v. *Hoare, Miller & Co.*(3), *Rajolhur Chowdhry* v. *Kalikristna Bhattá Charjya*(4), *Madan Mohun Lal* v. *Holloway*(5), which two cases closely resemble the present; *Meyappa Chetty* v. *Periannan Chetty*(6) and *Mowji Monji* v. *Kuverji Nanaji*(7).

For these reasons I agree with the conclusion arrived at by Benson, J., and dismiss the second appeal with costs. The second defendant must pay the first defendant's separate costs of the appeal in this Court.

(1) I.L.R., 25 Mad., 736 at p. 745.
(2) I.L.R., 27 Mad., 80.
(3) I.L.R., 8 Calc., 171.
(4) I.L.R., 8 Calc., 963.
(5) I.L.R., 12 Calc., 555.
(6) I.L.R., 29 Mad., 50.
(7) I.L.R., 31 Bom., 516.

APPELLATE CIVIL.

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

1907. September 26. October 23. November 20. 1908. March 3.

THENAPPA CHETTIAR AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

MARIMUTHU NADAN AND OTHERS (DEFENDANTS, AND FOURTH DEFENDANT'S LEGAL REPRESENTATIVES), RESPONDENTS.*

Mortgage, interest on—Rate fixed by Court in suit by prior mortgagee not binding in a subsequent suit by puisne mortgagee to redeem.

When in a suit by a prior mortgagee a decree for sale is passed which fixes the rate of interest after the date for redemption, the rate so fixed is not binding as between the prior mortgagee and a puisne mortgagee, who was not made a party to the suit. In a suit by such puisne mortgagee for redemption against the prior mortgagee, the mortgage will be considered as subsisting and interest will be awarded on the footing of the mortgage without reference to the decree in the prior suit.

Umes Chunder Sircar v. *Zahur Fatima*, (I.L.R., 18 Calc., 164), followed.

Gangadas Bhutter v. *Jogendra Nath Mitter*, (11 C.W.N., 403), dissented.

SUIT by the plaintiffs to recover the amount due on two promissory notes executed by first defendant, and to enforce payment by the sale of the plaint properties under the terms of a security bond, dated 25th July 1898. The defendants Nos. 3 to 5 were made parties as they had prior mortgages on some of the plaint properties. The plaintiffs prayed that the properties be sold subject to the prior mortgages.

The third defendant had previously brought a suit to enforce his mortgage but he did not make the plaintiffs parties therein. The third defendant obtained a decree for sale, in execution of which, he purchased certain items of the plaint properties, while the fourth defendant purchased other items.

Defendants Nos. 3 and 4 objected *inter alia* that they had made certain improvements in the property and that the plaintiffs were only entitled to redeem and not to sell subject to the prior mortgages.

The District Munsif passed a decree for sale of all the plaint

* Second Appeal No. 177 of 1904, presented against the decree of F. D. P. Oldfield, Esq., District Judge of Tanjore, in Appeal Suit No. 938 of 1902, presented against the decree of M.R.Ry. P. Narayana Chariar, District Munsif of Kumbakonam, in Original Suit No. 23 of 1901.

properties subject, in the case of these purchased by defendants Nos. 3 and 4 to the prior mortgages on them.

On appeal, the District Judge modified the decree by completely exonerating the items purchased by defendants Nos. 3 and 4.

The plaintiffs appealed.

B. Sitarama Rau for *K. Srinivasa Ayyangar* for appellants.

K. Ramachandra Ayyar for third and seventh to ninth respondents.

After remanding the case for findings, the Court passed the following

JUDGMENT.—The plaintiffs are mortgagees of certain property including items Nos. 2 and 4. The third and fourth defendants are prior mortgagees of those two items. The third defendant sued on his mortgage in Original Suit No. 2 of 1900, making the fourth defendant a party but not the plaintiffs. The third defendant himself purchased item No. 2 at the sale held under the decree obtained by him in his suit, and the fourth defendant purchased item No. 4 at the same sale. The plaintiffs have now to redeem the prior mortgages and the present question is as to the conditions of redemption. The plaintiffs claim to proceed on the footing that the mortgages were enforced by the decree in Original Suit No. 2 of 1900 and to take the account on that footing; the prior mortgagees claim payment on the footing that their mortgages are still existing. The practical question is one of the rate of interest to be paid on the mortgage money. In our opinion the decision of the Privy Council in *Umes Chunder Sircar* v. *Zahur Fatima*(1) concludes the question of the terms of redemption, and we cannot therefore follow the case of *Gangadas Bhutter* v. *Jogendra Nath Mitter*(2). The learned Judges do in that case, no doubt, find themselves able to hold that their decision is not inconsistent with that of the Privy Council. But we find ourselves unable to reconcile the two cases. It is true that the Privy Council allow interest at the contract rate only up to the date on which Zahur, the prior mortgagee, took possession under the sale held in execution of her own decree, but the reason for that is clearly explained by their Lordships at the top of page 180 of the report in the Calcutta series, and there is nothing to indicate that the interest after possession which they held might fairly be taken to be

(1) I.L.R., 18 Calc., 164. (2) 11 C.W.N., 403.

equivalent to the profits, was interest at the *post diem* rate awarded by the Court, and not interest at the rate provided by the contract.

On the other hand, their Lordships' observations show clearly, we think, that the decree in the prior mortgagee's suit is to be disregarded in considering the terms of redemption as between the prior and puisne mortgagees.

After pointing out wherein lies the Court's power to regulate interest after decree their Lordships continue "the decree can only operate as between the parties to the suit, and those who claim under them. The plaintiff getting the security of a decree has his interest reduced in the generality of cases. But the plaintiff in this case comes to take away from Zahur the benefit of the decree. It would be unjust if he could use the decree to cut down her interest, while he deprives her of the whole advantage of it. His case is that, as to him, Zahur is still but a mortgagee, and if so, she should be allowed such benefit as her mortgage gives her. If Zahur had not got a decree, and the plaintiff had come to redeem her mortgage, he must have paid whatever interest her contract entitled her to; and the Court would have had no jurisdiction to cut it down, and that is the position in which the parties are placed by the decree in this suit."

This passage from their Lordships' judgment leaves no room for the contention urged before us that the puisne mortgagee ought to be allowed to choose whether to adopt or to disregard the account directed by the decree. To allow him to do so would be to allow him to do what their Lordships say it would be *unjust* to allow him to do. The fact is that, the puisne mortgagee not being a party, the suit ought not to affect either his rights or his liabilities. It is contended that the prior mortgagee by excluding him from the suit can obtain an advantage for himself, but that advantage is entirely dependent on the will of the puisne mortgagee; he can redeem when he pleases, before, pending, or after the suit. If he has no notice of the prior encumbrance or of the suit he is no worse off after the decree than before the suit. Either way he is bound by the prior mortgage.

The equitable considerations which appear to have prevailed with the learned Judges in *Gangadas Bhatter* v. *Jogendra Nath Mitter*(1) seem to be applicable only to a case in which the prior

(1) 11 C.W.N., 403.

mortgagee has notice of the subsequent encumbrance and the subsequent encumbrancer has no notice of the prior mortgage; in such a case it may be just to penalize the prior mortgagee for his disregard of the provisions of section 85 of the Transfer of Property Act. The present case is not such a case, and is we think covered by the Privy Council decision.

The District Judge has taken an account of the profits received by the prior mortgagee after entering into possession and has set them off against the interest. That being so we do not think we can take the profits as the equivalent of the interest as was done in the Privy Council case. The rule there adopted is not laid down as a rule of law but as a rule "just and convenient and not objected to by either party."

We, therefore, accept the District Judge's finding and adopt his account for the final decree. If the plaintiffs do not redeem the third and fourth defendants, the plaintiffs will have no costs from the third and fourth defendants and will pay their costs. Six months will be allowed for redemption.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Munro.

PERIA KARUPPAN (THIRD DEFENDANT), APPELLANT,

v.

SUBRAMANIAN CHETTI AND OTHERS (PLAINTIFF AND DEFENDANTS NOS. 1 AND 4), RESPONDENTS.*

1908. February 13.

Landlord and Tenant—Notice determining tenancy—Denial of landlord's title after suit does not render previous notice unnecessary.

A tenant is entitled to reasonable notice before ejectment, and fifteen days' notice to a cultivating tenant in the middle of the cultivating season is not sufficient notice.

A landlord in a suit for ejectment against a tenant is bound to prove a complete cause of action when the suit was instituted, and the tenant, who for the first time denies the landlord's title in his written statement, is not by such

* Second Appeal No. 181 of 1905, presented against the decree of M.R.Ry. W. Gopalachariar, Subordinate Judge of Madura (East), in Appeal Suit No. 252 of 1904, presented against the decree of M.R.Ry. V. R. Kuppusami Iyer, District Munsif of Sivaganga, in Original Suit No. 260 of 1901.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Sankaran-Nair.

1908. January 10.

HUMMADE BEARI (PLAINTIFF), APPELLANT,

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL BY THE COLLECTOR OF SOUTH CANARA (DEFENDANT), RESPONDENT.*

Darkhast, grant of land on—Grant good if made by competent authority, unless set aside on appeal—Omission to consult one whose opinion is not binding, does not vitiate the grant.

A grant of land purporting to have been made under the darkhast rules by the officer empowered by the rules to make the grant is binding on the Crown unless it is revoked by an officer of a higher grade on appeal.

The omission on the part of the officer making the grant to consult an authority whom he is directed to consult by an order of Government, which, however, does not make the opinion of such authority binding on him, is a mere irregularity which does not invalidate the grant.

SUIT against the Secretary of State for a declaration that an order passed by the Collector of South Canara cancelling the grant of the plaint lands on darkhast to plaintiff and demanding surrender of possession or execution of lease deed is illegal, and not binding on the plaintiff.

The plaintiff applied for the plaint lands on darkhast, but the Tahsildar, at first, refused to assess the same to him. His order was revoked by the Sub-Divisional Officer on appeal, and the land was assessed in the name of plaintiff in 1895. In 1901, the Collector of South Canara issued an order cancelling the grant on the ground that the land was within port limits, and that under the Circular Order of the Board of Revenue, the application should have been referred to the Presidency Port Officer before it was complied with. The Collector called on the plaintiff either to vacate the land or to execute a lease deed for the same, and intimated that in default of plaintiff doing either, penal assessment would be levied. The plaintiff brought this suit.

* Second Appeal No. 343 of 1905, presented against the decree of H. O. D. Harding, Esq., District Judge of South Canara, in Appeal Suit No. 84 of 1904, presented against the decree of Mr. C. D. J. Pinto, in Original Suit No. 343 of 1902.

The District Munsif dismissed the suit with costs. The District Judge upheld the decision on the ground that the grant was *ultra vires*.

Plaintiff appealed to the High Court.

K. Narayana Row for appellant.

The Government Pleader for respondent.

JUDGMENT—MUNRO, J.—In 1895 certain land within the limits of the port of Koombla was granted on darkhast to the plaintiff (appellant) by the Divisional Officer on appeal from the order of the Tahsildar refusing to grant it. Before making the grant the Divisional Officer did not refer the plaintiff's application to the Presidency Port Officer as required by Government Order, dated 4th July 1890, Mis. No. 4107, Revenue, embodied in the Board's Proceedings, No. 434, dated the 21st July 1890, exhibit II. On this ground the Collector, five years later, cancelled the grant, and called upon the plaintiff to execute a muchilika in respect of the land or vacate the same by a certain date, failing which, penal assessment would be imposed. The plaintiff then sued for a declaration that the Collector's order was not binding upon him, and, having failed in both the Courts below, has filed this second appeal.

The Counsel for the Crown was unable to support the decree except on the ground that the grant by the Divisional Officer was bad inasmuch as the Presidency Port Officer was not first consulted.

For the appellant it was contended that the failure to consult the Presidency Port Officer was a mere irregularity which did not justify the cancellation of the grant.

The grant by the Divisional Officer in appeal was binding upon the Crown and could not be revoked by the Collector if within the scope of the Divisional Officer's authority. *The Secretary of State for India in Council* v. *Kasturi Reddi*(1). The only question then is whether, in the face of the Government Order above referred to, the Divisional Officer had authority to make the grant without consulting the Presidency Port Officer. In *Sappani Asari* v. *The Collector of Coimbatore*(2), the question arose whether a grant by a Tahsildar without consulting the Municipal Council, as by the rules he was required to do, was an act within the scope of his authority.

(1) I.L.R., 26 Mad., 268.

(2) I.L.R., 26 Mad., 742.

Bhashyam Ayyangar, J., for reasons which appear at pages 753 and 754 of the report, held that the grant was within the scope of the Tahsildar's authority. With his remarks I entirely agree, *mutatis mutandis*, they exactly apply to the present case. Though under the Government Order the Divisional Officer was enjoined to consult the Presidency Port Officer before making a grant of land in port limits, the ultimate decision rested with him. The Government Order does not say that he was bound to follow the opinion of the Presidency Port Officer. I therefore think that the Divisional Officer in making the grant was acting within the scope of his authority, and that the grant binds the Crown. The lower Court's decree is therefore reversed and the plaintiff will have a decree as prayed for with costs throughout.

SANKARAN-NAIR, J.—The land in dispute was granted on darkhast by the Tahsildar under the darkhast rules on the 20th February 1895 (exhibit K). The Tahsildar had previously rejected the application of the plaintiff and directed the land to be sold by public auction, but that order had been reversed by the Divisional Officer on the 29th December 1894, who ordered that the land should be granted to the plaintiff (exhibit J), and the Tahsildar accordingly assessed the land in the plaintiff's name and placed him in possession. The Munsif has also found that the plaintiff has effected improvements which are now valued at Rs. 1,839-5-6.

On the 21st November 1901, the Collector ordered that the plaintiff should be asked to execute a lease for these lands on certain conditions or vacate the land, failing which, a prohibitory assessment of one rupee a cent was to be levied from him (see exhibit O).

No order in terms cancelling the grant has been produced, though it is admitted that the grant of February 1895 has been cancelled. None has been communicated to the plaintiff.

The plaintiff now sues for a declaration of his right under his grant and contends that the order of the Collector is invalid. The Munsif dismissed the suit on the ground that the land is within the port of Koombla, and therefore the grant is illegal and invalid under section 67 of Act X of 1889.

The Judge, in appeal, also held that the grant was *ultra vires* and was properly cancelled. It is quite clear that section 67 of Act X of 1889 has nothing whatever to do with this case. It

authorizes "any local authority in whom any immoveable property in or near a port is vested" to alienate such property for certain purposes with the consent of the local Government. It is not alleged that the property now in dispute is vested in any local authority. The learned counsel for the respondent does not support the judgment on this ground. But he contends that the grant was made against the orders passed by the Board of Revenue that all applications for land in a port must be referred to a Presidency Port Officer before they are complied with, and that, therefore, the grant is irregular and unauthorized.

A grant purporting to have been made under the darkhast rules by an officer empowered by them to make it is binding on the Crown unless it is revoked or annulled by an officer of a higher grade on an appeal being preferred to him. See *The Secretary for India in Council* v. *Kasturi Reddi*(1).

In the case before us no appeal was preferred within the time allowed by the Port Officer or any person interested. On the other hand the plaintiff was placed in possession and allowed to continue in possession. It is not even now alleged that any objection has been raised by the Port Officer.

It is pointed out in *Collector of Salem* v. *Rangappa*(2) that where the plaintiff has taken possession and is in possession under a pattah which can be issued only after the expiry of the time allowed for appeal, and when the pattah was not issued conditionally or by an officer not competent to act in the matter, the Collector is not entitled to dispute the plaintiff's title on the ground that the pattah was granted under a mistake by the Tahsildar without knowledge of all the facts. No fraud was alleged.

In *Periaroyalu Reddi* v. *Royalu Reddi*(3) it was decided that a Civil Court is not entitled to cancel a pattah granted under the darkhast rules on the ground that the formalities prescribed by the darkhast rules have not been observed. It was pointed out in that case that "darkhast rules are departmental, and if they are infringed, the remedy for such infringement is also departmental"; or in other words the appellate authority may set it aside within the time allowed.

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(1) I.L.R., 26 Mad., 268. (2) I.L.R., 12 Mad., 406.
(3) I.L.R., 18 Mad., 434.

HUMMAIE BEARI v. SECRETARY OF STATE FOR INDIA.

In this case the appellate officer has not cancelled the grant within the time allowed by law. It is unnecessary, therefore, to consider whether the Collector could have set aside the grant on account of the failure by the Tahsildar to give notice to the Port Officer in the absence of any objection on the part of that officer.

The notice to the Port Officer is only a formality, and the omission to give such notice cannot be more than an irregularity, as the revenue officers are not bound to follow the opinion of the Port Officer, and are entitled to make the grant even in opposition to it. If the grant in favour of the plaintiff is taken to have been made by the Tahsildar on the 20th February 1895 (exhibit K), then, as he was a competent officer to make the grant, and his order has not been cancelled by the Appellate Court within the time allowed, the plaintiff has acquired a valid title to the property.

If, on the other hand, the grant must be deemed to have been made by the Divisional Officer by his order (exhibit J) passed on appeal on the 29th December 1894 from a previous order of the Tahsildar refusing the plaintiff's application, the same result follows, as there was no appeal from the order passed by the Divisional Officer within the prescribed time.

The lower Court's decrees are therefore reversed, and a decree will be passed in favour of the plaintiff with costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Sankaran-Nair.

1908. January 3.

SETTAPPA GOUNDAN AND OTHERS (COUNTER-PETITIONERS), APPELLANTS,

v.

MUTHIA GOUNDAN AND SEVEN OTHERS (PETITIONERS), RESPONDENTS.*

Transfer of Property Act, Act IV of 1882, s. 52—Lis pendens exists until the final decree in appeal is passed.

The functions of an Appellate Court are not the same in India as in England and America.

* Civil Miscellaneous Appeal No. 193 of 1906, presented against the order of Lionel Vibert, Esq., District Judge of Coimbatore, in Civil Miscellaneous Petition No. 245 of 1906, dated the 5th November 1906.

SETTAPPA GOUNDAN v. MUTHIA GOUNDAN.

In India, the decree of the Appellate Court is, under the Code of Civil Procedure, the final decree in the case, and the proceedings in appeal must, for the purposes of section 52 of the Transfer of Property Act, be treated as a continuation of the proceedings in the lower Court.

A transfer of property, which is the subject matter of contentious litigation, by a party thereto *after* the date of the decree of the lower Court and *before* an appeal is preferred against such decree, will be affected by the principle of *lis pendens* under section 52 of the Transfer of Property Act.

THIS appeal arose out of proceedings in execution of a decree passed in Original Suit No. 32 of 1899.

The facts necessary for the purposes of the report are set out in the judgment.

A. Nilakanta Ayyar for appellants.

T. R. Krishnaswami Ayyar for respondents.

JUDGMENT.—The appellant is the purchaser of certain properties from the first defendant in Original Suit No. 32 of 1899, which was a suit for partition brought by the respondent. The purchase was made after the decree in the Court of First Instance which awarded the property now in dispute to the first defendant and before an appeal was filed. In appeal the decree of the first Court was modified and the property now in dispute awarded to the respondent. The appellant contends that the sale is binding on the respondent (the plaintiff in the original suit) as his vendor sold the property to him as the managing member of the family to discharge debts binding on the family. It is clear from the sale-deed that the vendor did not profess to act on behalf of the family. He sold properties which are therein described to be his own separate properties and self-acquisition. The debts are not stated to be family debts. The decree in the partition suit does not, as between the plaintiff and the first defendant therein, make the plaintiff (respondent) liable to pay the same. It is then argued that the appellant is at any rate entitled to recover the consideration money as the respondent has enjoyed the benefit of the transaction by the discharge of the debts which are binding on him. There is no evidence in this case that any family debt has been paid off or that the plaintiff (respondent) has in any way derived any benefit. It is then urged that an opportunity should now be given to enable the appellant to produce such evidence. But no valid reason is alleged before us for his omission to adduce such evidence in the lower Court. The lower Court has also found that the sale is invalid as it contravenes

SETTAPPA GOUNDAN v. MUTHIA GOUNDAN.

the provisions of section 52, Transfer of Property Act. It is contended that, as the properties were sold after the decree was passed by the Court of First Instance and before any appeal was filed from that decree, section 52 does not apply, and reliance was placed on the opinions expressed in Sugden's 'Vendors and Purchasers,' p. 758, Fisher on 'Mortgage,' p. 532; 2 White and Tudors, p. 247; and the cases reported in II Coote, p. 1344; Ghose on 'Mortgage,' p. 792; 17 American Decisions, p. 603; and 39 American Decisions, p. 441. The same view appears to have been taken by *Glover, J.*, in *Chunder Koomar Lahoree* v. *Gopee Kristo Gossamee*(1). We are not inclined to accept this view.

It does not appear that the functions of an Appellate Court are the same in England and America as in India. The decree of the Appellate Court is under the Code of Civil Procedure, the final decree in the case, and the proceedings in the Appellate Court, therefore, must be treated, so far as the question before us is concerned, as a continuation of the proceedings in the lower Court. It is not open to a defeated suitor to file an appeal immediately, as he has to obtain copies of decree and judgment and he ought not to suffer for the delay imposed by law. There is no reason why this delay should prejudice him in this respect any more than the delays due to adjournments or stay of proceedings. The law of *lis pendens* in this country is founded on the necessity, if possible, of a final adjudication, and it appears unjust that a plaintiff should be prejudiced by any act of the defendant subsequent to the institution of the suit and with notice thereof; if the plaintiff fails in the first Court in his second suit for the same property against the alienee, that decision also will be of no avail to him against a second or subsequent alienee.

For these reasons we agree with *Mitter, J.*, in *Chunder Koomar Lahoree* v. *Gopee Kristo Gossamee*(1), and the Calcutta High Court (*Dinonath Ghose* v. *Shama Bibi*(2)).

We accordingly dismiss the appeal with costs.

(1) 20 W.R., 205. (2) I.L.R., 28 Calc., 23.

APPELLATE CRIMINAL.

Before Mr. Justice Benson and Mr. Justice Boddam.

THE PUBLIC PROSECUTOR, APPELLANT, 1908. April 7.

v.

RAMASWAMI KONAN, ACCUSED.*

Penal Code, Act XLV of 1860, s. 225-B—Offence under section committed when a prisoner escapes while the peon having custody of him is asleep.

A man legally arrested for an offence must submit to be tried and dealt with according to law.

A prisoner who escapes, after he is arrested and before he is delivered by due course of law, owing to the neglect or consent of the person having him in custody is guilty of an offence under section 225-B of the Penal Code.

Queen-Empress v. *Muppan*, (I.L.R., 18 Mad., 401), followed.

THE complainant in this case was a process-server in the Court of the District Munsif of Tirukkoyilur. He arrested the accused under a civil warrant and brought him to Tiruvannamalai after night fall on his way to the Court. The complainant made the accused sleep by his side in the pial of a house in Tiruvannamalai, and the accused escaped while the complainant was asleep. The complainant, having obtained the sanction of Court, prosecuted the accused for an offence under section 225-B of the Penal Code. The Second-class Magistrate acquitted the accused on the authority of a case quoted from Weir's 'Law of Offences.'

The Government appealed against the acquittal to the High Court.

The Public Prosecutor for appellant.

The accused was not represented.

JUDGMENT.—We are unable to accept the view taken in the case quoted from Weir's 'Law of Offences,' vol. I, p. 202, and relied on by the Sub-Magistrate. We take it that the law is correctly stated in the case of the *Queen-Empress* v. *Mupppn*(1) in the following terms:—

"A man legally arrested for an offence must submit to be tried and dealt with according to law. If he gains his liberty

* Criminal Appeal No. 153 of 1908, presented under section 417 of the Code of Criminal Procedure against the judgment of acquittal passed on the accused by M.R.Ry. C. S. Sivaramakrishna Sarma, Stationary Second-class Magistrate of Tiruvannamalai, in Calendar Case No. 815 of 1907.

(1) I.L.R., 18 Mad., 401.

THE PUBLIC PROSECUTOR v. RAMASWAMI KONAN.

before he is delivered by due course of law, he commits the offence of 'escape.' It has been long established that even when the escape is effected by the consent or the neglect of the person that kept the prisoner in custody, the latter is no less guilty, as neither such illegal consent nor neglect absolves the prisoner from the duty of submitting to the judgment of the law (1 Russ, 5th, p. 567; Roscoe, 11th edition, p. 453; and Bishop's Criminal Law, 7th edition, section 1104)."

The fact that the peon who had the custody of the accused went to sleep did not in any way put an end to the custody, or affect the accused's duty to submit to the judgment of the law.

We must, therefore, set aside the acquittal, and direct the Sub-Magistrate to restore the case to his file, and to try it afresh in accordance with law.

APPELLATE CRIMINAL.

Before Mr. Justice Wallis and Mr. Justice Munro.

1908, February 27.

ARUNACHELLAM,

v.

EMPEROR.*

Criminal Procedure Code—Act V of 1898, *ss.* 337 (2), 339—*Accused to whom pardon tendered ought to be examined as a witness and not be put into the dock at once.*

An accused person to whom pardon has been tendered and who has accepted such pardon, ought not, when he shows an intention not to give the evidence which he has led the prosecution to expect, to be put back into the dock without being examined as a witness. He should, under such circumstances, be examined as a witness as directed by section 337 (2) of the Criminal Procedure Code, and then dealt with under section 339 of the Code.

Such a person should, if tried, be tried separately and after the trial of the other accused is over.

Queen-Empress v. *Ramasami*, (I.L.R., 24 Mad., 321), followed.

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* Referred Case No. 14 of 1908 (Criminal Revision Case No. 77 of 1908), for the orders of the High Court, under section 438 of the Code of Criminal Procedure, by J. H. Robertson, Esq., District Magistrate of Salem, in his letter, dated 4th February 1908, Referred No. 204-M.R. of 1908.

ARUNACHELLAM v. EMPEROR.

THE facts are sufficiently stated in the letter of reference to the High Court which was as follows:—

I have the honour to submit herewith for the orders of the High Court the records in P.R. 27 of 1907 on the file of the Stationary Sub-Magistrate, Atur.

The accused in the case, who are 9 in number, were charged before the Sub-Magistrate with having, on the night of the 20th November last, committed dacoity—an offence punishable under section 395, Indian Penal Code—in the field shed of one Chidambara Padayachi of Thandagoundanpoliem village. In the course of the Police investigation in the case, the ninth accused Arunachalam was arrested on suspicion, and when examined (by the Police) on 25th November 1907, he, it is reported, gave out the full details of the dacoity on the night in question implicating himself and the other accused. A mahazar was accordingly drawn up and several of the stolen properties secured on search with the information furnished by the ninth accused. Such of the accused as were arrested, including the ninth, were produced before the Sub-Magistrate on the 27th instant for remand. Accordingly, the Sub-Magistrate in his proceedings, dated 27th November 1907, remanded them till 3rd December 1907. As the Police represented to the Magistrate that the ninth accused was willing to make a confession, the Magistrate allowed him two days, and on the 29th he took him to the Court, explained to him that he was under no obligation to answer any question at all, warned him that it was not intended to make him an approver and that anything he said would be used against him. It is noted by the Sub-Magistrate (the exact words of the accused not having been recorded) that the accused expressed his willingness to make a true disclosure of the facts knowing the consequences of such disclosure. He accordingly made a long confessional statement and this was recorded by the Magistrate (on the same day, *i.e.*, 29th November 1907).

In the meanwhile, the Police applied to the District Magistrate for sanction to make this accused an approver. As there were reasonable grounds for granting the same, the sanction applied for was accorded by me on 4th December 1907. On 9th December 1907, the Sub-Magistrate tendered the pardon to the accused on condition of his making a full and true disclosure of the whole circumstances within his knowledge relative to the offence in the case, and the accused, it is noted by the

ARUNACHELLAM v. EMPEROR.

Sub-Magistrate, accepted the pardon on that condition. When, however, the Magistrate proceeded to examine him on oath as a witness, he began to retract his former statement, and said that he was asked by the Sub-Inspector of Police and others to speak against the present accused and that his former statement was false. (Note:—Here again only a note is made by the Magistrate regarding the above facts and the exact words of the accused have not been recorded.) On the next day (*i.e.*, on 10th December 1907), the Sub-Magistrate treated this man as an accused and examined him as such along with the other accused. At this stage, the man made a long confessional statement corroborating his original statement before the Magistrate on 29th November 1907. He further said that the statements made by him on 29th November 1907 and on this occasion (*i.e.*, 10th December 1907) were voluntarily made, that he retracted on 9th December 1907 his former statement (*i.e.*, the one made on 29th November 1907) as the other accused dissuaded him from speaking the truth. On reconsideration he thought it desirable to give out the truth and acted accordingly.

As the Sub-Magistrate considered that a *primâ facie* case was made out against the man (ninth accused) according to his own statement made on 10th December 1907, he framed a charge against him on 14th December 1907 along with the other accused for an offence under section 395, Indian Penal Code, and committed him along with the others on 16th December 1907 to the Court of Sessions.

The Sub-Magistrate's procedure seems in my opinion to be illegal for the following reasons:—

(*a*) The Sub-Magistrate has not recorded the statement made by the accused on 9th December 1907 retracting his former statement.

(*b*) Even after allowing that irregularity, his subsequent procedure in having at once treated him as an accused and examined as such while the pardon tendered to him was in force (the same not having been revoked either by the Sub-Magistrate or the District Magistrate who sanctioned it), is wrong and is opposed to the ruling in *Queen-Empress* v. *Ramasami*(1).

(1) I.L.R., 24 Mad., 321.

ARUNACHELLAM v. EMPEROR.

(*c*) Further it has been ruled in the same decision that an approver who has forfeited the pardon should not at once be committed to stand his trial with the other accused, and nothing should be done against him until after the trial of the other accused is over and the trial against him should then proceed *de novo*.

(*d*) Lastly, the Sub-Magistrate's action in having at once treated the approver as an accused, has deprived the remaining accused of the opportunity of cross-examining him as to the truth of his confessional statement on which and other circumstantial evidence the remaining accused have been charged, and committed to the Sessions. This is an irregularity which cannot but prejudice the remaining accused.

A copy of the Sub-Magistrate's explanation in the matter is herewith enclosed. As the original records in the case have already been submitted to the Sessions Judge, copies of them which had been furnished to the Public Prosecutor are herewith submitted.

The case has been adjourned for trial by the Sessions Judge to the 3rd March 1908.

The Public Prosecutor in support of reference.

ORDER.—Section 337 (2) of the Criminal Procedure Code provides that every person accepting a pardon under this section shall be examined as a witness in the case. We think that the Stationary Second-class Magistrate of Atur should have put Arunachellam, the ninth accused, into the box and have examined him, and should then have dealt with him under section 339, Criminal Procedure Code, if necessary, according to the ruling in *Queen-Empress* v. *Ramasami*(1).

The accused ought not, we think, to have been put back into the dock when he showed an intention of not giving the evidence which he had led the prosecution to expect. According to the case of *Queen-Empress* v. *Ramasami*(1), a prisoner to whom a pardon has been tendered should, if tried at all, be tried separately and after the trial of the other accused is over. One result of putting him back into the dock is that the statement which he has made as an accused person can be taken into consideration against the other accused, and this statement has proved to be in effect the same as that which he was expected to make when a pardon was tendered

(1) I.L.R., 24 Mad., 321.

ARUNACHELLAM v. EMPEROR.

him. We think that the commitment of all the accused must be quashed and fresh inquiry held at which the ninth accused should be examined as required by section 337 (2) of the Criminal Procedure Code.

APPELLATE CRIMINAL.

Before Mr. Justice Wallis.

1908. February 21.

GANAPATHI BHATTA

v.

EMPEROR.*

Criminal Procedure Code, Act V of 1898, s. 117 (4)—Parties in conflict with one another cannot be dealt with in one enquiry—Such joinder illegal.

Two or more persons are not 'associated together in the matter under enquiry' within the meaning of section 117 (4) of the Criminal Procedure Code when there is a conflict between them, and they cannot therefore be dealt with in the same enquiry under the provisions of that section.

Such a joinder is not a mere irregularity but an illegality which will vitiate the proceedings.

THE first accused was the moktesser of a certain temple and the second accused an archaka of the temple. The first accused dismissed the second on the ground of misconduct and appointed the third accused in his place. The first and third accused began to collect men to oust the second accused from the temple and the second accused likewise collected men to assert his rights.

The Police reported to the Magistrate that there was a likelihood of a breach of the peace. The Deputy Magistrate issued notice to the accused to show cause why they should not be bound over to keep the peace. He joined them all in the same enquiry and after recording evidence, he directed them to execute bonds to keep the peace for a year.

The District Magistrate confirmed the order on revision, holding that the joining of the third accused in a single enquiry was an irregularity by which they were not prejudiced.

* Criminal Revision Case No. 474 of 1907, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the decision of M.R.Ry. R. Rama Rau, General Duty Deputy Collector of South Canara, in Miscellaneous Case No. 14 of 1907.

GANAPATHI BHATTA v. EMPEROR.

The first accused moved the High Court under section 439 of the Criminal Procedure Code.

Mr. *K. Ramanatha Shenai* and *K. P. Madhava Rao* for petitioners.

The Public Prosecutor *contra*.

ORDER.—Under section 117 (4) of the Code of Criminal Procedure where two or more persons have been "associated together in the matter under enquiry" they may be dealt with in the same or separate enquiries as the Magistrate may think fit. Where the parties have been in conflict with one another, I do not think they can be said to have been associated together in the matter under enquiry within the meaning of the section. Consequently the joinder in the present case is unauthorised. Such a joinder might often have inconvenient consequences (*Kamal Narain Chowdry* v. *Emperor*(1)). The question then is, is the joinder an illegality. I am inclined to think that it is. If so, *Subramania Aiyar* v. *King-Emperor*(2) applies, and the order against the first accused must accordingly be discharged.

APPELLATE CRIMINAL.

Before Mr. Justice Benson and Mr. Justice Miller.

1908. February 12, 13.

ALAGU AMBALAM AND OTHERS

v.

EMPEROR.*

Criminal Procedure Code, Act V of 1898, ss. 407, 428—District Magistrate may withdraw part-heard appeals—Such Magistrate not bound to examine witnesses summoned.

Section 407 of the Criminal Procedure Code places no restriction on the power of the District Magistrate to withdraw appeals from Subordinate Magistrate, and it is competent to him to withdraw part-heard appeals.

There is nothing in section 428 of the Code which renders it obligatory on the District Magistrate so withdrawing an appeal to examine witnesses summoned by the Subordinate Magistrate from whom the appeal is withdrawn.

(1) 11 C.W.N., 472. (2) I.L.R., 25 Mad., 61.

* Criminal Revision Case No. 396 of 1907, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the order of the Court of the Additional District Magistrate of Madura in Criminal Appeal No. 41 of 1907, presented against the order of the Second-class Magistrate of Tiruppattur, in Calendar Case No. 265 of 1907.

ALAGU AMBALAM v. EMPEROR.

THE petitioners, who were convicted of offences under sections 323 and 379 of the Indian Penal Code by the Second-class Magistrate of Tiruppattur, appealed to the First-class Deputy Magistrate of Devakkottah. The appeal was partly heard, and then adjourned for the examination of four additional witnesses as Court witnesses at the instance of the accused (petitioners). The complainant presented a petition to the Additional District Magistrate of Madura stating that the examination of the witnesses was unnecessary and also applying for a transfer of the case. The Additional District Magistrate transferred the case to his own file, and confirmed the conviction without examining the additional Court witnesses summoned by the Sub-Divisional Magistrate. The accused presented a revision petition to the High Court.

P. R. Sundara Ayyar and *C. V. Ananthakrishna Ayyar* for petitioners.

The Public Prosecutor *contra.*

K. N. Aiya for the complainant.

JUDGMENT.—In this case, a criminal appeal against a conviction by a Second-class Magistrate was presented to the First-class Sub-Divisional Magistrate. After partly hearing the appeal he resolved to examine certain persons as Court witnesses and issued summonses to them. Thereupon one of the parties to the appeal petitioned the Additional District Magistrate to transfer the appeal to another Court, alleging that the examination of further witnesses was wholly unnecessary. The Additional District Magistrate after hearing the appellants and the complainant, transferred the appeal to his own file, and, without examining the further witnesses, disposed of the appeal, confirming the conviction. We are asked now as a Court of Revision, to set aside the proceedings of the Additional District Magistrate on two grounds, *first*, that he had no jurisdiction to transfer an appeal which had been partly heard by the Sub-Divisional Magistrate, and *second*, that if he had power to make the transfer he was bound to examine the witnesses to whom the Sub-Divisional Magistrate had issued summons.

We do not think that there is any ground for either contention. No decision on the point is cited, and we are not aware that any exists. The petitioners rely on the analogy of the case of *Kumarasami Reddiar* v. *Subbaraya Reddiar*(1) in regard to

(1) I.L.R., 23 Mad., 314.

ALAGU AMBALAM v. EMPEROR.

certain civil appeals, but we do not think that that case has any bearing on the present question. To decide the present question, we must look to the terms of the Criminal Procedure Code. Section 407 provides for an appeal, in cases like the present, to the District Magistrate, and adds that, if the District Magistrate so directs any appeal or class of appeals may be presented to and heard by a First-class Magistrate subordinate to him and empowered by the Local Government to hear such appeals. It further provides that "The District Magistrate may withdraw from such Magistrate any appeal or class of appeals so presented." There is no limitation in the section or elsewhere in the Code of Criminal Procedure on this power of withdrawal, and we should not be justified in introducing a limitation in respect of part-heard appeals, which the Ligislature has not thought fit to enact.

As observed by the Privy Council in the case of *Gokul Mandar* v. *Pudmanund Singh*(1), 'The essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction." If the Legislature desired to impose the suggested limitation, it would have found no difficulty in enacting it—moreover, the power of withdrawal is given with a view to promote the ends of justice and the convenience of parties, and there is no reason why the promotion of these objects should be barred in the case of part-heard appeals.

The second objection is equally untenable. Under section 428 of the Code of Criminal Procedure, the Appellate Court, if it thinks additional evidence necessary, may take such evidence before deciding the appeal; but there is nothing in the Code of Criminal Procedure, or in reason, to render it illegal or irregular for the Appellate Court to dispense with such evidence if further consideration or argument leads the Court to the conclusion that such evidence is not necessary. The Court to which an appeal is transferred for disposal, and on which the responsibility for its correct disposal rests, is certainly not bound by any opinion as to the necessity for taking further evidence, formed by the Court

(1) L.R., 29 I.A., 196.

ALAGU AMBALAM v. EMPEROR.

from which the appeal was transferred, and which is no longer responsible for the due decision of the appeal. We dismiss the petition.

APPELLATE CRIMINAL.

Before Mr. Justice Miller.

1908. March 13, 18.

ALUVALA GURUVIAH

v.

EMPEROR.*

Criminal Procedure Code, Act V of 1898, ss. 133, 136, 140—Where order under s. 133 not complied with, prosecution sustainable under s. 136 without notice under s. 140—Order under s. 133 cannot direct works to be done which are not necessary for the safety of the public.

Where an order issued by a Magistrate under section 133 of the Criminal Procedure Code is not complied with or protested against within the time fixed by the order, a prosecution of the person disobeying under section 136, is sustainable without notice under section 140.

Where a well adjoining a road is dangerous to the public as well as to the existence of the road, an order under section 133 can direct the construction of such works only as are necessary for the safety of the public and not of works necessary for the safety of the road.

Queen-Empress v. *Bishamber Lal*, (I.L.R., 13 All., 577), approved.

A WELL under the control of the accused petitioner, alongside a public road was in a state of disrepair and threatened the safety of the public as well as the existence of the road. The Deputy Magistrate acting under section 133 of the Criminal Procedure Code issued a notice to the accused calling upon him to protect, according to the instructions of the Local Fund Overseer, the well from danger to the public, within the 14th July, or to appear before the Magistrate on the 6th July to have the order cancelled or modified. The Overseer directed the accused to raise a masonry

* Criminal Revision Case No. 527 of 1907, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the judgment of R. Ramachandra Rao, Esq., District Magistrate of Kurnool, in Criminal Appeal No. 21 of 1906, confirming the conviction but modifying the sentence passed by M.R.My. K. Subramaniam, Stationary Second-class Magistrate of Atmakur Division, in Calendar Case No. 183 of 1906.

ALUVALA GURUVIAH v. EMPEROR.

wall fencing. This was not done within the 14th July, nor did the accused protest against the order on the 6th. On the 20th July the Deputy Magistrate acting under section 136, Criminal Procedure Code, sanctioned the prosecution of the accused under section 188, Indian Penal Code. The accused was accordingly tried and convicted by the Sub-Magistrate and sentenced to pay a fine of Rs. 20. On appeal, the District Magistrate upheld the conviction but reduced the sentence to a fine of Rs. 5.

Accused presented revision petition under sections 435 and 439 of the Criminial Procedure Code to the High Court.

Dr. *S. Swaminadhan* for the petitioner.

The Public Prosecutor *contra.*

JUDGMENT.—Dr. Swaminadhan raises two questions on behalf of the petitioner: (1) whether the conditional order under section 133, Criminal Procedure Code, is illegal, and (2) whether, in the absence of the notice required by section 140 the conviction can be sustained.

The petitioner did not come forward to object to the order under section 133 which directed him to protect his well "according to the instructions of the Local Fund Overseer." Assuming that the order is not such as is contemplated by section 133, I do not, in these circumstances, think it necessary to interfere with the conviction in revision.

The question whether the notice prescribed by section 140 must be given before any punishment can be inflicted for disobedience of the order passed under section 133, is not free from difficulty.

If the order is made absolute under section 137 or section 139, then clearly no punishment can follow unless the procedure laid down in section 140 is adopted, but neither section 137 nor section 139 declares, as section 136 does, the liability to punishment. The Public Prosecutor, with the support of *Queen-Empress* v. *Bishamber Lal*(1), contends that whenever the time fixed in the order under section 133 has been allowed by the person against whom that order is made to pass without compliance with the order or protest against it, the liability to punishment attaches at once to that person and may be enforced irrespective of section 140.

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(1) I.L.R., 13 All., 577.

ALUVALA GURUVIAH v. EMPEROR.

Both sections 136 and 140 impose a duty on the Magistrate; he 'shall' make the order absolute, and he 'shall' thereupon give time for compliance with it and point out the penalty attached to disobedience. Must he then, if he enforces the penalty under section 136, at the same time, give further time for compliance with the order and threaten a further penalty for disobedience? Again, if it is necessary to give warning of the penalty when a notice is issued under section 140, should it not be equally necessary to give the same warning before enforcing a penalty for disobedience to the order under section 133? I have found some difficulty in finding an answer to these questions which shall be quite satisfactory, and at the hearing I was disposed to take the view presented by Dr. Swaminadhan on behelf of the petitioner, but on consideration I think that view does not give effect to the declaration of liability enacted in section 136, or to the difference between that section and sections 137 and 139. The view taken by the Allahabad High Court does give full effect to section 136 and is on that account the better interpretation, and I adopt that view and dismiss the petition.

I do not know if the Magistrate contemplates further proceedings but I think it desirable to point out that the petitioner is only bound to provide for the safety of the public, and not to inprove so far as it is threatened by the existence of his well the road, and it will be the duty of the Magistrate to see if further proceedings are taken that he is not required to do more than the law requires him to do.

APPELLATE CIVIL.

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

MARY HARRIETT ANNIE WILSON (PLAINTIFF), APPELLANT,

v.

GEORGE OAKES AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1908. March 3, 5, 9, 10, 23.

Will, construction of—Technical words to have their legal effect unless intention to contrary apparent on the face of will—The words 'in trust' do not always create a trust—Merger—Where trust in favour of party in whom legal estate vested, equitable estate merges in the legal estate—General disposition of whole estate will not be cut down unless intention so to cut down is clear—Will must be construed as a whole—The words 'as she may require' mean 'as may be necessary.'

In construing wills, the test to be applied is, what did the testator mean, having regard to the words used? 'Technical words or words of known legal import must have their legal effect even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical terms in their proper sense.' *Per* Lord Davey in *Lalit Mohan Singh Roy* v. *Chukkun Lal Roy*, (I.L.R., 24 Calc., 834 at p. 846), referred to.

The words 'in trust' do not invariably create a trust.

The principle that a trustee cannot take beneficially has no application where the trust is in terms in favour of the party in whom the legal estate is vested.

Where both the legal and equitable estate are given to the same person the two estates merge, and the person to whom they are given takes the legal estate.

Where a testator devises *all* his property the generality of the disposition will not be cut down unless the intention so to cut down is clear.

The will must be construed as a whole and in a manner consistent with the intentions of the testator and its general tenor.

The words 'as to her may seem best' mean 'as she may think fit.'

Where a person is authorised to draw money for certain purposes 'as he may require,' he can draw only such amounts 'as may be necessary' for the purpose, and not any amount 'as he may think fit.'

A will contained the following, *inter alia*, clauses:—

(I) "I will and bequeath to my dear wife Anne in trust and for her maintenance and support during her life all the money, property, goods and chattels of which I may die possessed whatsoever and wheresoever situated and I appoint my dear wife Anne sole administratrix of this my last will and testament."

(X) "I further will that my dear wife Anne as sole executrix of this my last will and testament shall draw from current deposit accounts whether here or

* Appeal No. 1 of 1907, presented against the *interim* decree of J. C. Fernandez, Esq., Subordinate Judge of Nilgiris, dated the 18th July 1906, in Original Suit No. 84 of 1904.

MARY HARRIETT ANNIE WILSON v. GEORGE OAKES.

in Great Britain such sum or sums of money as she may require for her maintenance and for the working and maintenance of my property, and that she shall receive and dispose of all proceeds, rents, and profits from the said property as to her may seem best in the interest of the property and I empower her to sell all or any part of the property at any time when it may appear to her that a favourable opportunity occurs."

On the question whether the widow of the testator took an absolute life estate, or whether the words 'in trust' in clause (I) read with the words 'she shall receive and dispose of . . . in the interest of the property' in clause (X) constituted her a trustee in respect of such portion of the income as was not required by her for her maintenance and support:

Held (1) That the words 'in trust' in clause (I) were not intended to create any trust but only to indicate the nature of her estate and that she should enjoy only the income for her life and should not deal with the corpus except as authorised by the will.

(2) That clause (X) did not create any trust, and that the words 'she shall receive and dispose . . . in the interests of the property' were simply enabling words, which authorised her to apply, as she thought fit, the income of the property upon the property. The testator intended that she should have an unfettered discretion in the maintenance and development of the property without being questioned by any one interested in the reversion.

(3) That a life estate was given to the widow by the words 'during her life,' and such estate was not cut down by the words 'for her maintenance and support' which were simple words of description or motive; and that if a trust was intended it was for her benefit only, in which case the legal and equitable estate merged, and she took the legal estate.

(4) The words 'as she may require' in clause (X) did not authorise the widow to draw any amount 'as she thought fit' but only such amount 'as should be necessary' for the purposes stated.

(5) That there was nothing in clause (X) which showed a clear intention on the part of the testator to cut down the estate given by clause (I), and the widow accordingly, took a life estate.

W. G. McIvor died in 1876. By his last will and testament he appointed his wife, Anne McIvor, sole executrix. The will contained, *inter alia*, the following clauses:—

"(I) I will and bequeath to my dear wife Anne in trust and for her maintenance and support during her life all the money, property, goods, and chattels of which I may die possessed whatsoever and wheresoever situated, and I appoint my dear wife Anne sole administratrix of this my last will and testament."

"(X) I further will that my dear wife Anne as sole executrix of this my last will and testament shall draw from current deposit accounts whether here or in Great Britain such sum or sums of money as she may require for her maintenance and for the working and maintenance of my property, and that she shall receive and

MARY HARRIETT ANNIE WILSON v. GEORGE OAKES.

dispose of all proceeds, rents, and profits from the said property as to her may seem best in the interest of the property, and I empower her to sell all or any part of the property at any time when it may appear to her that a favourable opportunity occurs."

Anne McIvor obtained probate of the will and remained in possession of the estate till her death in November 1903. By her last will and testament Anne McIvor appointed the defendants her executors, and the defendants obtained probate of her will in the High Court.

The plaintiff applied for, and obtained, Letters of Administration *de bonis non* to the estate of W. G. McIvor.

The present suit was brought by the plaintiff, as administratrix of the estate of W. G. McIvor, to recover from the estate of the deceased Anne McIvor several sums alleged to be due on account of malfeasance, misfeasance, etc., committed by Anne McIvor as executrix of the estate of W. G. McIvor.

It was contended by the plaintiff that, on a true construction of the will of W. G. McIvor, it was the duty of the said Anne McIvor, deceased, as executrix thereunder, to apply the rents and profits of the testator's real estate and the income of all money representing the preceeds of sale of such real estate to the working and maintenance of the testator's properties, and subject thereto, to invest and deal with the surplus of such rents and profits as capital money for the benefit of the residuary legatees, but the said Anne McIvor, deceased, wrongfully and in breach of trust applied the said rents and profits to her own use and benefit.

The plaintiff sought to recover the amounts so misapplied by Anne McIvor.

The defendants contended, *inter alia*, that on a proper construction of the will, Anne McIvor had a full life interest unaffected by any trust, and that the whole income was at her absolute disposal.

The estate which Anne McIvor took under the will, and the rights she had over the income derived from such estate formed the subject-matter of the dispute between the parties.

The first issue, dealing with this question, was as follows:—

'(*a*) What, on the true construction of the will of W. G. McIvor, were the rights and obligations of his widow, Anne McIvor, in the corpus and income of the personalty left by him,

and in the income of the immoveable properties left by him, other than those absolutely bequeathed to her, or of their sale-proceeds?'

'(*b*) Was there any trust in favour of the reversionary legatees in respect of such corpus and income not applied by Anne McIvor for purposes of her own maintenance and support and for the working and maintenance of the property left by her husband W. G. McIvor?'

The material portions of the judgment of the Subordinate Judge dealing with these issues were as follows :—

"I approached the question of the construction of the will in question with some diffidence but, after a careful consideration of the able arguments advanced, and the authorities cited by the Advocate-General for the plaintiff and Mr. Napier for the defendants in support of their respective constructions of the testator's will, I have unhesitatingly come to the conclusion that the construction developed by the plaintiff during the trial in modification of the construction suggested in the plaint is not warranted by the intentions of the testator as gathered from the language employed by him in the will, and that the construction put forward by the defendants with a slight reservation is in accordance with such intentions, and therefore proper and reasonable.

It may be broadly affirmed that the whole object to be attained in construing a will is to ascertain the intention expressed by the testator, to discover that intention from the words used in the will, and to give effect to it as far as possible. What is sometimes called the Golden Rule of construction was thus propounded by Lord Wensleydale in *Grey* v. *Pearson* (26 L.J.Ch., 481). 'In construing wills, and, indeed, statutes and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to absurdity, or some repugnance or inconsistency with the rest of the instrument; in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity, repugnancy, or inconsistency, but no further.' The same learned Lord repeated that dictum couched in somewhat different language in *Abbot* v. *Middleton* (28 L.J.Ch., 114), as follows:— 'The question in expounding a will is, not what the testator meant, but what is the meaning of his words. The use of the expression that the intention of the testator is to be the guide, unaccompanied with

the constant explanation that it is to be sought in his words, and a rigorous attention to them, is apt to lead the mind, insensibly to speculate upon what the testator may be supposed to have intended to do instead of strictly attending to the true question, which is, what that which he has written means.' To much the same effect are the observations of the Privy Council on the proper mode of construing wills in *Soorjeemoney Dossee* v. *Denobundoo Mullick* (6 M.I.A., 526 at p. 550). The general rules of construction applicable to wills are set out in William's 'Law of Executors and Administrators,' 9th edn., Vol. II, pp. 928–940, and the corresponding rules in force in India are to be found in section 61 *et seq.* of the Indian Succession Act X of 1865. I propose to refer to only such of them as come into application in construing the testator's will.

I would also observe *in limine* that the Courts, when construing a will, have consistently objected to have a bead-roll of cases cited in which wills were under consideration phrased in language different from that which may be before them for determination. So seldom is it that two wills are identical in their language; such little words may make such a difference in the meaning. Thus it comes about that, except on isolated words and phrases, the citation of cases often fails to be of much real service towards finding out the meaning of any particular will that may be in question. Not that I underrate the laborious research of the learned counsel on both sides who cited case after case in support of their respective constructions of the will in question, but their real value is more restricted in the construction of wills than in other cognate matters in which precedents afford light and guidance. It was only very recently that Sir Arnold White, C.J., had occasion to express himself in *Yetherajalu Naidu* v. *Mukunthu Naidu* (I.L.R., 27 Mad., 363 at p. 370) as follows on this matter :— '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.' The same view was given expression to by Kay, J., in *In re Pounder* (56 L.J. Ch.D., 113

at p. 115). 'Cases are only valuable upon the construction of wills when they lay down a canon of construction. It has long been established that the will of one testator cannot be construed by reference to that of another.' To the same effect is the view of Lindley, L.J., in *In re Williams* (L.R., [1897], Ch.D., 12 at p. 22) expressed as follows:—'This case is in my opinion one of great difficulty, and I am quite aware that there are decisions in the books which if followed would be in the daughter's favour. But our task is to construe the will before us, and other cases are useless except so far as they establish some principle of law. There is no principle except to ascertain the intention of the testator from the words he has used, and to ascertain and give effect to the legal consequences of that intention when ascertained.' Following in the wake of these decisions, I do not propose to discuss every case cited in detail but only to refer to them so far as they formulate canons of construction applicable to the peculiar language employed in the will under consideration to embody the wishes of the testator with regard to the disposal of his property.

The main contention advanced on behalf of the plaintiff in construing the testator's will was that it created an express trust in favour of the reversionary legatees in respect of the surplus income of the testator's estate left after meeting the charges for the maintenance of his widow and the upkeep of his property, and it was sought to evolve this express trust from clauses I and X of the will. It was further contended on behalf of plaintiff that clause I creates the trust, and that clause X prescribes the manner in which it should be carried out. As I have already observed, the only words which lend support to this contention are 'in trust' in clause I of the will, and 'in the interest of the property' in clause X thereof. It is clear from clause I of the will that the testator intended to give thereby a life estate in his entire property to his widow 'for her maintenance and support.' The use of the words 'in trust, in almost immediate collocation cannot by itself constitute, the widow, Anne McIvor a trustee, for it has been held that these words do not invariably create a trust, though no doubt they offer an indication of one, (*Lallubhai Bapubhai* v. *Mankuvarbai* (I.L.R., 2 Bom., 388 at p. 409)). Similarly it was held in *Comiskey* v. *Bowring Hanbury* (L.R., [1905], App. Cases, 84 at p. 89) that the corresponding words 'in confidence' may or may not create a trust, and that whether they do so or not must

be determined by the context of the particular will in which you find them. Unless, therefore, the indication of a trust conveyed by the words 'in trust' is amplified by further disclosing the subject-matter of the trust, and the objects of it, it would be unsafe to read a trust into those words. It is the plaintiff's case that this amplification is contained in clause X of the will.

It is an undebateable proposition of law that there can be no trust raised where there is uncertainty. The rule, as laid down by Lord Alvanley, and since recognized as the correct principle, is, that a trust is created in those cases only 'where a testator points out the objects, the property, and the way in which it shall go.' *Malim* v. *Keighley* (2 Ves., Jr., 335), Lewin on 'Trusts,' 10th edn., p. 143. The same principle is embodied in section 6 of the Indian Trusts Act II of 1882, which being subsequent in date to the will in question is, however, not applicable. In the present case it is not possible to say that this well-recognized principle has been observed in the creation of the alleged trust, and that the subject-matter of the trust, its objects and the mode of its execution have been indicated with anything like reasonable certainty.

As regards the subject-matter of the alleged trust, there is nothing in the will in question to point to the fact that the testator contemplated a surplus from the income of his property after meeting the maintenance of his wife and the upkeep of his property. There is no express reference to any such surplus in either clause I or clause X of the will. Clause I contains a clear manifestation of the testator's intention that his wife should take his entire estate during the period of her life 'for her maintenance and support,' in other words a full life estate. Unless the gift so made can be limited to the maintenance and support of the widow, no question of any surplus arises. It was strongly urged on behalf of the plaintiff that the gift in clause I of the will must be limited to the purpose specified therein, viz., the maintenance and support of the widow, but it was strenuously contended on behalf of the defendants that the words 'for her maintenance and support' indicate the motive of the gift and do not in any way limit the life estate given to the widow. Upon the authorities cited, I feel no hesitation in accepting the contention of the defendants. To quote from Theobald on 'Wills,' 6th edn., p. 470, 'Expressions amounting to no more than a

declaration of the motive of the testator in making a gift, as, for instance, that it is made to enable the donee to support his or her children, will not raise a trust.' *A fortiori* must it be the case when the declared motive of the gift is the support of the donee herself, as in this case. See also Lewin on 'Trusts,' 10th edn., pp. 148–149. In *Webb* v. *Kelly* (47 R.R., 288), it was held by the Vice-Chancellor that a gift for the maintenance and education of the legatee was an absolute gift. The case of *In re Jones* (67 L.J., 211) is also an authority in favour of the defendants. That was a case of a gift by will of all a testator's real and personal estate to his wife for her absolute use and benefit, so that during her lifetime, for the purpose of her maintenance and support, she should have the fullest power to sell and dispose of his said estate absolutely, and there was a gift over, after her death, as to such parts of the testator's real and personal estate as she shall not have disposed of as aforesaid, subject to the payment of the wife's funeral expenses. It was held that the qualifying words indicating the maintenance of the widow as the motive or object of the gift could not be read as cutting down the previous words relating to the absolute gift, and that they were words appearing to be meant as expressive of the object of the testator having made the absolute gift (p. 212). I must, however, point out that in one respect that was a stronger case than this, inasmuch as, the gift expressly purported to be absolute, which element is wanting in clause I of the will in question. Nevertheless, the principle underlying the decision in that case is applicable to this, *mutatis mutandis*. *Mackett* v. *Mackett* (L.R., 14 Eq., 49) is another case in point. There the testator gave his personal estate absolutely and without qualification to Sarah Mackett for her sole and separate use and then added these words: 'and the proceeds to be applied by her in the bringing up and maintenance of' her children. These words were held to be expressive of the motive of his gift and to lay no restriction upon the legatee Sarah Mackett. They were construed to mean this: 'In order to enable her to provide for her children, I give her this property for her own absolute and unfettered use' (p. 53). Similarly, clause I of the will in question ought, in my opinion, to be construed as conveying this meaning: 'In order to enable my dear wife Anne to maintain and support herself during her life, I will and bequeath to her all the money, property, goods and

chattels of which I may die possessed whatsoever and wheresoever situated.' The only difference is that, in the two cases just above referred to, the limitation, which was sought to be placed, and which the Court refused to recognize, was one on the absolute estate or fee simple, whereas here it is on the life estate, which, though an estate of freehold, is not an estate in fee simple. It stands to reason that if words of limitation expressive of maintenance as the object of the gift cannot circumscribe an absolute estate, much less can they narrow the scope of a life estate, for it must be conceded that there is greater correspondence between a life estate and a gift for maintenance than between the latter and an absolute estate. In a case like this, therefore, there is greater reason for thinking that the testator intended the gift for maintenance to be co-extensive with the life estate created by clause I of the will. Unless therefore this intention is negatived by clear and precise words indicative of the testator's intention to still further curtail the life estate, it would not be in accordance with law and principle to engraft a further limitation on an estate limited in itself. Curiously enough, not a single case was cited in which a life estate vested in possession with the donee and conferred on him for purposes of his maintenance was sought to be restricted to such purpose and the surplus left deviated for some other object. A purpose of this kind would generally be effected from appointing a trustee other than the person whose maintenance is provided for, charged with the duty of applying such portion of the trust fund as is necessary for maintenance, and making a gift over of the surplus. But, in this case, the testator constituted, according to the plaintiff, his wife both trustee and beneficiary for purposes of her maintenance and made no express reference to, or gift over of, any surplus, the idea of which does not appear to have at all crossed his mental horizon. Moreover, it is only when there is a direction to apply the whole or any part of the income or capital of a fund for the maintenance of a specified person that it does not entitle him to more than is required for the purpose. It was so held in the case of *In re Sanderson's Trust* (3 K. & J., 497). A distinction was there made between a gift of 'the whole or any part,' and a gift of an entire fund, or the entire interest of a fund, for a particular purpose assigned: in the latter, although the purpose fails, the Court holds the donee entitled to the entire fund or interest (as

the case may be), treating the purpose merely as the motive of the gift. The following observations of Vice-Chancellor Sir W. Page Wood in his judgment in that case are very pertinent: 'In reference to gifts of this description, there are two classes of cases between which the general distinction is sufficiently clear, although the precise line of demarcation is occasionally somewhat difficult to ascertain. If a gross sum be given, or if the whole income of the property be given, and a special purpose be assigned for that gift, this Court always regards the gift as absolute, and the purpose merely as the motive of the gift, and therefore holds that the gift takes effect as to the whole sum or the whole income, as the case may be. Thus, were there is the gift of a sum to apprentice a child, or to buy a commission for a son, the Court gives effect to the entire gift; and whether the sum can or cannot be applied for the purpose of buying the commission or apprenticing the child, the Court holds that the child is entitled to the whole of it.' So again, with regard to maintenance, as to which the distinction between the two classes of cases is very clearly put by Sir William Grant in *Hanson* v. *Graham* (6 Ves., 249) where he says, that 'if an entire fund is given for the maintenance of children or the like, they take the whole fund absolutely, and the maintenance is treated in effect as simply the motive in making the gift; while, on the other hand, if a portion only of the fund is given for maintenance, then they are entitled to draw out so much only as may be necessary for the purpose specified' (p. 503). This principle must equally apply to the case of a life estate given for maintenance and, construing clause I of the will in question in its light, there can be no doubt that the testator intended to give a full life estate to his wife for her maintenance and support untrammelled by considerations of any surplus from the income thereof being required to be hoarded up or invested for the benefit of the reversionary legatees. It is true she had not the *plenum dominium*, but Mrs. McIvor was certainly entitled to exercise the plenitude of rights incidental to a life estate under clause I of her husband's will, which makes such life estate coincident with the gift of it for her maintenance and support.

The case of *Krishnarao Ramachandra* v. *Benabai* (I.L.R., 20 Bom., 571) relied on by the defendants is also an authority in their favour. In that case it was held that a direction in a will to trustees to pay to a Hindu lady (Benabai) so much of

certain dividends as she might from time to time require for her own use and support, and to accumulate the surplus not required by her upon certain trusts specified, entitled the legatee to receive, if she required it, the whole interest as it fell due, but not to claim afterwards amounts which she did not require as they fell due and which had been accumulated, whether the trust for which accumulation was directed was valid or invalid. The following extract from the judgment of Mr. Justice Candy makes the position clear so far as it has a bearing on the point under discussion: 'I do not think that the words "for her own use and support" cut down the bequest or made it less than an absolute gift to be at Benabai's disposal whenever she demanded it. But I think that it is equally clear that the money was only to be paid to her as she might *from time to time require it: i.e.*, as the interest accrued, if Benabai asked for it, it was to be paid to her; if she did not ask for it, it was to be accumulated and eventually added to the principal fund' (p. 583). The present case appears to be much stronger. Firstly, the income of the alleged trust fund was not to filter to Mrs. McIvor through trustees in whom the legal estate was vested, she being both trustee and beneficiary according to the plaintiff's case. Secondly, the income was at Mrs. McIvor's own disposal, and there was no necessity for her to requisition it according to her needs. Thirdly, there was no express direction to her to accumulate such portion of it as she did not appropriate towards her maintenance and support for the benefit of others. Applying the principle of the Bombay case quoted above, I am of opinion that Mrs. McIvor had a full life estate conferred on her in the testator's property by clause I of the will on account of her maintenance and support.

The cases of *Hanson* v. *Graham* (6 Ves., 239), *In re Bowlby* (L.R., 1904, 2 Ch.D., 685) and *In re Sanderson's Trust* (3 K. & J., 497) were relied on by the Advocate-General for the plaintiff in support of the contention that a bequest directing that a person shall have a right of maintenance out of a certain fund and that the rest shall follow the fate of the capital is perfectly valid. The cases cited, no doubt, establish this proposition, but the real question in this case is whether the will in question does contain a direction that the portion of the income of the testator's estate not applied to the maintenance and support of his wife and the upkeep of his property shall be added

on to the corpus of the estate for the benefit of the reversionary legatees. As I construe the will, it appears to me that the nebulous phrase 'in the interest of the property' out of which it is sought to spell out a direction of this kind does not lend itself to that construction. This position will be demonstrated more fully further on. I think the facts of this case are somewhat in accord with those of *Barlow* v. *Orde* (13 M.I.A., 277), which, though not cited in the course of the argument, may, I think, be referred to with advantage. There the income of certain estates was left by will to devisees for life, with a gift over of the corpus on their death, and a portion of the income, instead of being divided among the tenants-for-life, was applied to the purchase of other estates. It was held by the Privy Council that those estates did not belong to the remainder-men, but formed the absolute property of the tenants-for-life and passed to their devisees. To bring that case into line with this, of course, it is necessary to assume that Mrs. McIvor was a full tenant-for-life, a proper conclusion in my opinion to arrive at.

For the purpose of creating a surplus of the income, it was further suggested on behalf of the plaintiff that it lay hidden in the words 'she shall receive and dispose of all proceeds, rents and profits from the said property as to her may seem best in the interests of the property' occurring in clause X of the testator's will, it being contended that the words 'in the interest of the property' meant by adding to the property or improving it. No doubt, such addition would serve the double purpose of swelling the fund from which Mrs. McIvor was to derive her maintenance and also profiting the ultimate reversioners by augmenting the corpus of the estate they were interested in after the termination of Mrs. McIvor's life estate. But unless such a far-fetched conclusion is clearly indicated by the words used by the testator, I would decline to deduce it. If the testator contemplated any such thing, I must say that he used very dubious language, and that the words 'in the interest of the property' are a regular *multum in parvo*. Having regard to the generally precise character of the language used by the testator in his will and which serves as a sufficient exponent of his intentions, I cannot bring myself to believe that he veiled his wishes in clause X of the will and made an attempt at mystification of the kind suggested. Nothing would have been easier for the testator than to be more explicit

and say in plain and simple language understood of all that he wishes his wife to dispose of the income of his property which she was to take under clause I of the will by appropriating such portion of it as was necessary for her own maintenance and the upkeep of his property and accumulating the rest and adding it to the corpus for the benefit of the ultimate reversioners. In the case in 20 Bombay already referred to, there was some such express direction. In the absence of any such clear indication of his intentions, a construction must be sought of the words in question more in consonance with the scheme of the will propounded by the testator. Such a construction is not in my opinion difficult to arrive at. Had the testator directed his wife to receive and dispose of all proceeds, rents and profits from his property in the interest of the property without more, there would have been ample scope for hazarding all sorts of guesses as to what he really meant, and it may even have lent some colour to the suggestion of the plaintiff that she was bound to apply them towards her maintenance and the upkeep of the property *pro tanto*, and spend the rest in the improvement of the corpus, the interests of the property being identical with the interests of the persons who derive benefit therefrom under the will. But the words 'as to her may seem best' make all the difference and furnish an index to the working of the testator's mind in a clear and unmistakeable manner. These words should, in my opinion, be construed as giving Mrs. McIvor an absolute discretion in the utilization of the income of the testator's property in the interest thereof, such interests being admittedly those of the life-tenant, Mrs. McIvor, and the reversioners represented by the plaintiff. I would add a third and a fourth who were lost sight of during the argument, and they are the testator's sister Jane McIvor, whose annuity was to come out of the same property and who was also therefore interested in the property, and Mrs. McIvor, again, as absolute devisee of McIvor Villa. I am fortified in the above view by several authorities which I proceed to cite.

'A gift to the testator's widow to be at her disposal in any way she may think best for the benefit of herself and family imposes no trust on the widow. The widow is to be the judge of what she is to have and what the children are to have, and that is a trust which the Court will not execute.' This apposite quotation from Theobald on 'Wills,' 6th edn., p. 475, is based

mainly on the decision in *Lambe* v. *Eames* (L.R., 6 Ch. App. 597), which is almost on-all-fours with the present case. There, the testator gave his estate to his widow 'to be at her disposal *in any way she may think best*, for the benefit of herself and family.' The widow by her will gave a part of the testator's estate to a person outside the family, an illegitimate son of one of the testator's sons. The gift was held valid. The words in quotation marks were held to mean that the testator clearly intended his wife to deal with the property as she pleased, and that it could not be suggested that she was to take what she liked and that what she had not spent was to go at her death for the benefit of her children. The following observations of Sir G. Mellish, L.J., are quite to the point: 'At all events, she was to determine the interest which each child was to take, and also her own, and I do not understand how a Court of Equity can execute a trust where the testator says he has such confidence in his widow that he wishes her, and not the Court of Chancery, to say what share she shall have and what share the children shall have' (p. 601).

Lambe v. *Eames* (L.R., 6 Ch. App., 597) was followed in *Mackett* v. *Mackett*, (L.R., 14 Eq., 49), referred to above, wherein Sir James Bacon, V.C., observes as follows:—'In truth, the case resembles that of *Lambe* v. *Eames* (L.R., 6 Ch. App., 597) in every respect; and the result becomes more clear when one comes to put these words (quoted above) into active operation. If she (Mrs. Mackett) is not to take the whole absolutely and without qualification, then how much is she to take? If the property is not to be disposed of as she, in her unfettered discretion, shall think fit—if the proportions in which it is to be distributed are not to be regulated by her sole will and discretion —there is no meaning in words' (p. 53). The case of *Mackett* v. *Mackett* (L.R., 14 Eq., 49) is therefore also an authority in favour of the view that clause X of the will gives *carte blanche* to Mrs. McIvor in disposing of the income of the testator's estate. *Le Marchant* v. *Le Marchant* (L.R., 18 Eq., 414) relied on for the plaintiff is not in conflict with *Lambe* v. *Eames* (L.R., 6 Ch. App., 597), which is thus explained therein: 'Now my decision in *Lambe* v. *Eames* (L.R., 6 Ch. App., 597), affirmed by the Lords Justices, was chiefly relied on; but I think that reference to the words there shows it to be a very different case from the present. Because the words there were "to be at her

disposal in any way she may think best for the benefit of herself and family." If it had been "for the benefit of the family" only, or "after her decease," I should be of opinion that there was a trust, and she could only have it for life, and then it must go to the family in any way she might think best' (p. 416). In *Stead* v. *Mellor* (5 Ch.D., 225), a testatrix gave her personal estate to trustees upon trust to hold the residue in trust for her nieces living at her death, using these words 'my desire being that they shall distribute such residue as they shall think will be most agreeable to my wishes.' Jessel, M.R., held that the nieces were made judges of the mode of distribution, and that the residue was placed at their absolute disposal, and that they took it for their own benefit. This case too, therefore, is an authority in favour of the view that Mrs. McIvor was, by the words 'as she may think best in the interest of the property,' made sole judge of the utilization of the income of the testator's property in her own interests and those of the reversioners as created by the will. *Briggs* v. *Penny* (3 Mac. and G., 546), which may be said to be an authority the other way, is fully discussed in *Stead* v. *Mellor* (5 C.D., 225), and I do not therefore think it necessary to labour the point of the decision in that case.

As I construe the words 'she shall receive and dispose of all proceeds, rents and profits from the said property as to her may seem best in the interest of the property,' I see no limitation in them or cutting down of the full life-estate conferred on Mrs. McIvor by clause I of the will with the motive or object of providing for her maintenance and support, and not merely restricted to that purpose. In my opinion, those words mean that Mrs. McIvor had absolute and unfettered discretion to appropriate the whole of the income towards her maintenance and support and make savings from it after providing, if she thought fit, for the maintenance of the corpus intact and in such good condition as proper and reasonable expenditure suited to the exigencies of the different kinds of property comprised therein would conduce thereto, or, that she could in the exercise of the absolute discretion vested in her invest the surplus left after meeting the expenses of her maintenance and the upkeep of the property in adding to the corpus. Had she made use of her discretion in the latter manner, *e.g.*, by erecting houses or other buildings on the grounds of Lushington Hall and Glenrock, or on the Hulikal estate, I should

certainly have held that such accretions to the corpus passed to the reversioners, manifesting, as such action on her part would have done, an intention to benefit the reversioners to that extent instead of herself. But Mrs. McIvor was shrewd enough, as the evidence shows to keep the savings from the income quite apart from the corpus of the estate, and to rigidly maintain the distinction of *meum* and *tuum* between the one and the other. The above construction brings clause X of the will into harmony with clause I thereof, and avoids a conflict between the two. Hence the doctrine of repugnancy relied on by the defendants, and which prevents a testator when he has made a gift from controlling the subsequent devolution of the property thus acquired by his gift, and which is enunciated in such cases as *In re Wilcock's Settlement* (L.R., 1875–76, 1 Ch.D., 229), *Constable* v. *Bull* (18 L.J., N.S., part I, p. 302), and *Administrator-General* v. *White* (I.L.R., 13 Mad., 379), does not come into operation here. Even assuming for argument's sake that there is a conflict between clause I and clause X of the will and that the full life-estate conferred by clause I of the will purports to be cut down by clause X thereof to an estate for life for maintenance only, I am of opinion that the repugnancy, so created, is not of such a nature as to bring this case within the purview of the doctrine of repugnancy as now established, especially as the repugnancy, if any, here is not between an absolute estate and a limited estate, but between a limited estate like a life-estate and a further limitation of it by carving out of the life estate a smaller one restricted to maintenance and support only.

It will thus be seen that there is not only no surplus income created by the will for the benefit of the reversioners, but also that there is no express gift of such surplus. To quote from Theobald on 'Wills,' 6th edn., p. 478. 'The legacy will not be cut down to the amount actually required for the named purpose, unless the surplus, after satisfying that purpose, is *expressly* given over' *In re Lee's Trusts* (L.R., 10 Eq., 157). Here the alleged gift over of the surplus is, if at all, implied, and hence this is another valid reason for holding that the gift of the life-estate in clause I is not cut down by anything in clause X of the will.

Having thus demonstrated that the subject-matter of the alleged trust in respect of the surplus income is not only shrouded in the greatest uncertainty and doubt, but that, on a proper

construction of the testator's will, it is practically non-existent, I proceed, to inquire whether the requirements of the alleged trust are fulfilled by a disclosure of the beneficiaries with reasonable certainty. A mere glance at clause I of the will is enough to convince one that, assuming a trust, the only *cestui que trust* who can possibly be unearthed from it is the testator's wife herself, but then she is a trustee as well, the object of the trust being her own maintenance and support. The plaintiff, however, wanders farther afield in search of another object of the trust, and she points to clause X of the will as unveiling it. It is her case that these other objects are to be found masked in the words 'she shall receive and dispose of all proceeds, rents and profits from the said property as to her may seem best in the interest of the property' which I have had occasion to quote before. According to the plaintiff the persons intere[illegible] in the property under the testator's will were Mrs. McIvor [illegible]se maintenance was to come out of it, and the reversionary [illegible]tees whose estate in remainder was locked up in it, and hence Mrs. McIvor was bound to apply the income of the property towards these two purposes only, which leads to the result that Mrs. McIvor and the reversionary legatees were the beneficiaries or the objects of the trust. But, as I have already pointed out, the words 'as to her may seem best' placed the income at the absolute disposal of Mrs. McIvor to be applied towards the one purpose or the other, or towards both, in any manner she thought fit. It follows therefore that the reversionary legatees cannot with any degree of reasonable certainty be deemed to be beneficiaries.

I conclude therefore that the objects of the alleged trust are also not indicated with reasonable certainty by the testator in his will, and I would go a step further and say that the plaintiff and her following of residuary legatees cannot, on a proper construction of the will, be said to be the beneficiaries they claim to be. The will does not also, in my opinion, point out with sufficient definiteness and certainty the mode of execution of the alleged trust, the way in which it shall go. The direction in clause X of the will to spend the income 'as to her may seem best in the interest of the property' is too vague and nebulous to amount to a declaration of trust.

I have also observed that the words 'in trust' do not invariably create a trust unless supplemented by pointing out the

subject-matter and objects of the trust. The meaning of those words in clause I of the will is patent to my mind. The testator must have used them to denote that his wife was to take the estate conferred on her by clause I of the will with limitations involved in the creation of a reversionary estate therein by subsequent clauses of the will, and in contrast to the absolute estate conferred on her by clause X of the will. In other words, the testator wished to impress it on his wife by those words that she should take only a life-estate in his property and preserve the corpus for the benefit of the reversioners.

Lastly, I would observe that a well recognized rule of construction is thus expressed *benignæ faciendæ sunt interpretationes, propter simplicitatem laicorum, ut res magis valeat, quam pereat; et verba intentioni non e contra debent inservire, i.e.*, constructions are to be made liberally on account of the ignorance of the unprofessional, so that the thing may rather avail than perish, and words ought to be made subservient to the intention, not contrary to it. Even applying this rule to the case of a will propounded by a layman who used such words as 'in trust' without apprehending their full legal import, I would say that it is impossible to buttress up the alleged trust, making every allowance for insufficient language and want of technical forms of expression. The intention of the testator as manifested in the whole will being the polar star which ought to guide the Court in its construction provided no rule of law is thereby infringed, I would say that the *tout ensemble* of the will is most emphatically against the alleged trust in favour of the reversioners and decidedly in favour of a full life-estate conferred on Mrs. McIvor.

There is only one point more for me to touch upon before recording my finding on the first issue involving the construction of the testator's will, and that bears on the meaning of the words 'as she may require' in clause X of the will. These words occur in connection with the power given by the testator to his 'dear wife Anne as sole executrix' to draw 'from current deposit accounts whether here or in Great Britain such sum or sums of money as she may require for her maintenance and for the working and maintenance of my property.' It was contended for the defendants on the authority of *Krishnarao Ramachandra* v. *Benabai*, (I.L.R., 20 Bom., 571) that these words must be construed as conferring an absolute discretion on Mrs. McIvor to draw from

the fund indicated as she pleased, but I am not prepared to uphold this contention of the defendants. Had the testator so intended, he would have used the words 'as to her may seem best.' To my thinking, the words 'as she may require' mean 'as she may see necessity for,' 'in case of necessity,' the necessity contemplated being the contingency of the income accruing from the life-estate created by clause I proving insufficient or inadequate at any particular time for Mrs. McIvor's maintenance and support referred to as the motive therein for conferring it, as also for the further charge of the upkeep of the testator's property if his wife thought fit.

For the above reasons, I find on the first issue (1) that Anne McIvor had a full life estate in the entire corpus of the property left by the testator, whether moveable or immoveable, with the only exception of 'McIvor Villa in Coonoor with the two pieces of land adjoining,' which was absolutely devised to her by clause VI of the will, the motive or object of such gift being to provide for her maintenance and support with the option of meeting the cost of the upkeep of the testator's property also out of the income of the life-estate, (2) that she had the further right of drawing, in case of necessity arising from the insufficiency of the income of such corpus for the two purposes just above mentioned, on that portion of the corpus answering to the description of 'current deposit accounts' but not on fixed deposits, (3) that she was bound to preserve, for the benefit of the reversioners represented by the plaintiff, the whole corpus *minus* McIvor Villa and its appurtenances, and *minus* also any portion of the 'current deposit accounts' which there was no necessity for drawing for the aforementioned two purposes, (4) that she was entitled to utilize the income of the corpus of the testator's property other than McIvor Villa and its appurtenances in any way she thought best, having absolute discretion in that behalf either by appropriating it entirely towards her maintenance and support, or towards it and the upkeep of the testator's property, and saving for her individual benefit any portion thereof not so applied, or apportioning such savings between herself and the reversioners, promoting the interests of the latter by devoting a portion to additions or improvements to the corpus, (5) that the testator's will creates no valid trust binding on Mrs. McIvor as trustee and operating in favour of the reversioners as beneficiaries in

respect of any surplus income not strictly applied by her towards her maintenance and support and the upkeep of the testator's property, (6) that she was bound to deal with the sale-proceeds of any portion of the corpus sold by her in exercise of the power of sale conferred by the testator's will in the same manner as the property so converted into money, (7) that she was bound to effect such sales to the advantage of herself and the ultimate reversioners, and (8) that she was also bound to meet the annuity bequeathed to the testator's sister by clause XII of his will, whether from the corpus or the income it is not necessary for the purposes of this case to decide."

The Subordinate Judge passed a preliminary decree, in accordance with his findings on this issue and on the other issues raised in the case.

The plaintiff appealed to the High Court, mainly, against the finding of the Subordinate Judge on the first issue, with respect to the nature of the estate taken by Mrs. McIvor under the will. The defendant filed a memorandum of objections, questioning the construction put by the Subordinate Judge on the words "as she may require" in clause X of the will.

The Hon. The Advocate-General for appellant.

Mr. *C. F. Napier* for respondents.

JUDGMENT (Sir ARNOLD WHITE, C.J.).—In this case the plaintiff sues as administratrix of the estate of one William Graham McIvor. The defendants are the executors of the will of Anne McIvor, his wife. William McIvor made a will on 24th May 1876 and died on 8th June 1876. Anne McIvor took out probate of this will on 3rd August 1876 and took possession of the testator's estate, and remained in possession until her death. Anne McIvor made her will on 27th March 1900 and died on 23rd November 1903. The plaintiff, as representing the estate of William Graham McIvor, claims relief against the defendants, as representing the estate of Anne McIvor. The hearing of the suit before the Subordinate Judge of the Nilgiris was very protracted and a great number of questions of law and fact were raised before him and disposed of by him.

The learned Judge held amongst other things that, under the will, Mrs. McIvor took an ordinary life-estate and that the will did not operate so as to create a trust for the benefit of the residuary legatees. He also held that the defendants were not liable for

waste in respect of a portion of the property known as the Hulikal coffee estate. The appeal is against the decree of the Subordinate Judge with reference to these questions. There is also a cross appeal by the respondents. The question raised by the cross appeal mainly turns on the construction of a particular clause in the will.

In construing the will in question the test we have to apply is what did the testator mean having regard to the words he used, and in applying this test we must give effect to the principle that "technical words or words of known legal import must have their legal effect even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical terms in their proper sense." Per Lord Davey in *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy*(1).

Applying these tests, I am of opinion that the will did not create a trust in favour of the residuary legatees, and that Mrs. McIvor took an ordinary life-estate.

It is clear that there would be no ground for the appellant's argument that the will operated so as to create a trust were it not for the words "in trust" which occur in paragraph I.

The argument was that these words occurring in paragraph I should be imported into paragraph X, and that their effect was to constitute Mrs. McIvor a trustee of the property for the purposes mentioned in paragraph X of the will for the benefit of the parties entitled under the residuary devise and bequest; or if the trust, though validly created, was not legally enforceable, for the benefit, by way of a resulting trust, of the next-of-kin of the testator (see section 83 of the Indian Trusts Act).

The way in which the appellant sought to establish the trust was, as I have said, to import the words "in trust" into paragraph X and then to read the words "that she shall receive and dispose of all proceeds, rents and profits from the said property as to her may seem best in the interest of the property" as defining the purpose of the trust.

The testator did not in terms appoint his wife a trustee. He refers to her in the will, apparently, indiscriminately, as administratrix and executrix. In paragraph I he wills and

(1) I.L.R., 24 Calc., 834 at p. 846.

MARY HARRIETT ANNIE WILSON v. GEORGE OAKES.

bequeaths, in the most general language which he could adopt, all his property to his wife "in trust and for her maintenance and support during her life," and, after making this disposition, he appoints her his sole administratrix. The will was obviously drawn by the testator himself, or at any rate by a layman, and, in my opinion, in using the words "in trust" the only object which the testator had in view was the nature of the estate which he intended his wife to take, and that he considered the words appropriate as indicating that she should enjoy the income of the property for life, but that she should not be entitled to deal with the *corpus* except as specially directed and empowered by the will.

I think I should be warranted in holding that reading the will as a whole it was clear the testator did not intend to use the words "in trust" in their technical sense, but it is not necessary for me to go as far as this. I am prepared to give their legal effect to the words "in trust," and I think their legal effect is to give both the legal and the equitable estate to Mrs. McIvor, that the two estates merge and Mrs. McIvor takes the legal estate. The cases in which the Courts have held a trustee does not take beneficially have no application to a case of this sort, where, as it seems to me, if the testator intended to create a trust at all, the trust was in terms in favour of the party in whom the legal estate was vested. The question whether the will operated so as to create a trust cannot be considered apart from the question whether Mrs. McIvor took under the will a life estate, or something less than a life estate, because if, on the true construction of paragraph I, the only interest she took is a right to be maintained and supported during her life, this would go a long way to support the view that the testator intended the property to vest for the benefit of the residuary legatees.

As regards paragraph I, I am of opinion that the words "for her maintenance and support" are words of description or motive, and in no way cut down the estate "during her life" which the testator in terms gave to his wife. I do not propose to discuss the authorities which were cited on the one side and the other with reference to this question; but I think I am right in saying that in no case has it been held that, where there has been a devise or bequest of *all* a man's property, the generality of the disposition has been held to be cut down unless the intention that it should be

MARY HARRIETT ANNIE WILSON v. GEORGE OAKES.

so cut down is clear. In this particular case we cannot overlook the fact that the party to whom the bequest was made was not a stranger but the testator's wife for whom, as the will abundantly shows, he was desirous of making generous provision.

I now turn to paragraph X. The first observation which occurs to me is that, notwithstanding that the wife is referred to "as sole executrix," it is an enabling paragraph. The first clause enables her to do what, as tenant for life, she could not do, viz., spend a portion of the *corpus* on her own maintenance and the working and maintenance of the property. The last clause gives a power of sale in the widest possible terms. The intermediate clause, according to the appellant's contention, so far from having any enabling effect, or being in any way for Mrs. McIvor's benefit, imposes on her the obligation of spending on the property every rupee which was not required for her own maintenance, wholly regardless of whether or not such expenditure was prudent or desirable. Now it seems to me clear that what the testator intended by this clause was to make it clear that Mrs. McIvor's discretion with regard to the maintenance and development of the property should be unfettered, and should not be questioned by any party who might be interested in the reversion. I cannot read the clause as if the words "as to her may seem best" were eliminated, and I read the clause as meaning that the income of the property which she spends upon the property should be applied as she thinks fit. The construction which the appellant asks us to put upon the words in paragraph X, which he relies on as defining the purpose of the trust, involves giving a different meaning to the word "shall" (shall receive and dispose, etc.) from that which it obviously bears in the first clause of the paragraph ('shall draw from,' viz., shall be entitled to), and it is quite inconsistent with the general tenor of the paragraph and with the express power of sale given by the last clause of the paragraph. This power of sale would have enabled Mrs. McIvor, if she were so minded, to sell every acre of the property and invest the proceeds, and if this had been done, there would have been no "property" (in the sense in which the word is used in paragraph X) and no income from the property. Further the effect of this construction would be practically to destroy the life estate which, in my view, Mrs. McIvor took under paragraph I of the will.

MARY HARRIETT ANNIE WILSON v. GEORGE OAKES.

at the time the drawings in question were made. I would dismiss the appeal with costs.

I would also dismiss the cross-appeal with costs.

MILLER, J.—I have had the advantage of reading the judgment which the learned Chief Justice has just delivered and I agree with all that he has said. It seems clear to me that, in paragraph X of the will, the testator was conferring on his wife certain powers which, in his view, would not belong to her as tenant for life and the exercise of which might, if they were not expressly conferred upon her by him, be questioned by those who would take the property after her death. The words "as sole executrix" may perhaps have reference to this view. She was to have certain powers of administration in respect of the *corpus* of the estate. She was empowered to draw on part of it in case of need; she was to have uncontrolled power to deal with the income in what she might consider the most profitable way, the testator no doubt reasonably assuming that till a favourable opportunity for conversion should occur she would endeavour to maintain the property in as prosperous a condition as might be possible; and she was empowered at a favourable opportunity to convert the whole into cash.

It is impossible, I think, to read the second clause of this paragraph as a direction to expend all the income on the property. To do so, we have to read the word 'all' as meaning "all except what is required for other purposes for which provision is made in this will," we have to give to the word 'shall' a different meaning in each of two consecutive clauses of the same paragraph in both of which it stands in the same position, and we have to hold that the testator inserted one of the most important clauses in the will, a clause by which the disposal of the income is to be regulated and which would naturally find place in paragraph I, in between two clauses by which he gave his widow the most extensive powers of dealing with the property. We have also to attenuate the significance of, if not altogether to eliminate, the phrase "as to her may seem best," and we have to suppose that the testator did not contemplate the probability of his wife exercising the power which he expressly and immediately conferred upon her of selling all the 'property,' at a favourable opportunity. It is far easier, and it is I think far more reasonable, to construe the clause in question as enabling Mrs. McIvor to

MARY HARRIETT ANNIE WILSON v. GEORGE OAKES.

exercise her own discretion in the matter of expenditure on the maintenance of the property, especially when it is remembered that the testator was a childless husband making provision for his widow. I do not think that any indication of a trust is to be found in paragraph X, and that being so, the words "in trust" in paragraph I do not present any great difficulty. I have had little doubt from the moment the Advocate-General read the will to us that the testator did not use these words in the technical sense in which a lawyer would use them. He did not intend to appoint his widow a trustee, but merely intended to convey his desire that she should preserve the corpus of the estate until her death. But giving their legal effect to the words it seems clear that there is no beneficiary other than the trustee herself. Apart from paragraph X, out of which no trust can be derived, there is nothing in the will to suggest that the testator contemplated the preservation of any of the income of the property, for the use of any person except his wife, while paragraph I indicates sufficiently clearly that the whole of it was intended for her use, described as her maintenance and support. The only trust which can be spelt out of the will is a conveyance to Mrs. McIvor in trust to pay an annuity to the testator's sister, and the rest of the income to herself for her life. It is said that it is not likely that the testator would have been at the pains to create a trust for such a purpose, but the answer seems to be that, if we are to consider what it is likely that he meant to do, we shall find that he did not intend to create any trust at all; but if in order to give due effect to the language of the will we have to hold that he did intend to declare a trust then that is the trust which the will declares. None other can be found in it except by putting on paragraph X a construction which it cannot reasonably be expected to bear.

I therefore agree with the conclusions of the Subordinate Judge as a result of his construction of the will. As regards the question of fact, assuming it to arise, I think it has been properly dealt with by the Subordinate Judge. Evidence that a coffee estate which was under cultivation in 1876 is not now cultivated with coffee is to my mind hardly even *primâ facie* evidence that it has been improperly treated or neglected, and here there is evidence which explains the present condition of affairs without indicating that Mrs. McIvor is to blame for it. As regards the cross appeal, I do not think it altogether likely that the testator was in the first clause

MARY HARRIETT ANNIE WILSON v. GEORGE OAKES.

of paragraph X intentionally making provision for the needs of his wife until the estate should be put in funds by the sale of crops, but whether that be so or not, the only evidence to which our attention was called, *i.e.*, the accounts, is insufficient to prove that the sums drawn from the banks were either utilized for the maintenance and support of Mrs. McIvor or for the upkeep and working of the estate, or were required for either of those purposes.

I agree, therefore, in dismissing with costs both the appeal and the cross-appeal.

APPELLATE CIVIL.

Before Mr. Justice Benson, and Mr. Justice Miller.

1908. February 13, 14, 26.

SRI RAJA VENKATA NARASIMHA APPA ROW BAHADUR (PLAINTIFF), APPELLANT,

v.

SRI RAJAH SURANENI VENKATA PURUSHOTHAMA JAGANADHA GOPALA ROW BAHADUR AND OTHERS (DEFENDANTS), RESPONDENTS.*

Hindu Law.—Will, construction of—Legatee must be in existence at the date of the testator's death—Appointed daughter, custom relating to—Indian Succession Act, s. 100.

The will of a Hindu testator, to which the provisions of the Hindu Wills Act did not apply, contained, *inter alia*, the following paragraph :—

"We have no male issue. As a suitable boy could not be found among the *gnatis*, no adoption has been made till now. If our wife Lakshmi Devamma Row finds a suitable boy among our *gnatis*, she shall make an adoption according to her will and in accordance with the law. If no boy is found and if our daughter Venkata Chinnayya has a son, that boy becomes a 'Douhitra karta' (heir as daughter's son) according to the law: so, that boy alone should become the 'karta' for the entire property belonging to me. According to the law the 'kartaship' rests in our wife. So, our funeral rites as well as the acts (rites) to be done subsequently should be caused to be done through our wife alone."

At the testator's death his daughter was five years old. Subsequently, she had sons, all of whom predeceased her. The testator's widow died in 1893 and the daughter in 1902. The present suit was brought by the daughter's husband claiming as the heir of his eldest son, who was living in 1893, and who, it was contended, took the estate on the widow's death under the will. The plaintiff contended that under the will the daughter's son had all the rights of an adopted son :

Held, on the construction of the will—

(1) That the testator's daughter was not 'appointed' by him to raise a son for him.

The practice of 'appointing' a daughter is now generally reputed to be obsolete and it lies on the person who alleges that she was so appointed by the will to prove that such a custom exists, as the words of the will do not warrant the inference that the testator intended to revive a dead custom.

(2) That the daughter's sons, not having been born at the testator's death, took nothing under the will.

Section 100 of the Succession Act contemplates a power of disposition extending further in time than that allowed by the Hindu Law, and the principle enacted by that section does not apply to the case.

* Appeal No. 98 of 1904, presented against the decree and judgment of M.R.Ry. I. L. Narayana Row Naidu, Subordinate Judge of Kistna at Masulipatam, in Original Suit No. 1 of 1903.

SRI RAJA VENKATA NARASIMHA APPA ROW v. SRI RAJAH SURANENI VENKATA PURUSHOTHAMA JAGANADHA GOPALA ROW.

RAJA Suraneni Jaganatha Lakshma Row, Zamindar of Mailawaram, died in 1859, leaving behind him a widow Lakshmi Devamma Row and a daughter Venkata Chinnayya Row, (the deceased wife of plaintiff), then a child of five years of age.

He left a will, dated 28th July 1859, the first paragraph of which ran as follows :—

"We have no male issue. As a suitable boy could not be found among the *gnatis*, no adoption has been made till now. If our wife Lakshmi Devamma Row finds a suitable boy among our *gnatis*, she shall make an adoption according to her will and in accordance with the law. If no boy is found and if our daughter Venkata Chinnayya has a son, that boy becomes a 'Douhitra karta' (heir as daughter's son) according to the law: so, that boy alone should become the 'karta' for the entire property belonging to me. According to the law the 'kartaship' rests in our wife. So, our funeral rites as well as the acts (rites) to be done subsequently should be caused to be done through our wife alone."

On the death of the testator, his widow succeeded to his estate, which consisted of one and a quarter share of the Mailawaram estate, the hereditary trusteeship of the Dwaraka Tirumalai temple and moveables, etc. His daughter Venkata Chinnayya Row was married to the plaintiff. On the widow's death in 1893, the daughter succeeded to the estate and remained in possession till 1902 when she died. The daughter had several sons, all of whom predeceased her. One of them died prior to 1902, but was alive in 1893, when the widow died.

The defendants were the sons of the testator's divided younger brother Venkata Gopala Narasimha Row who died in 1887.

On the death of the daughter, the plaintiff took possession of the moveables and the temple together with properties belonging to it. The defendants took possession of the share of the deceased testator in the Mailawaram estate, as his reversionary heirs.

The plaintiff's case was that under the terms of the will, the testator's grandson, (*i.e.*) the plaintiff's son, who was alive in 1893, became entitled to the estate on the death of the testator's widow, that on his death it passed to his mother, and, on her death, to the plaintiff. Other contentions were urged which were thus stated by the lower Court.

"The two brothers (viz., Jaganatha Lakshma Row and V. Gopala Narasimha Row) admittedly entered into a samakhya (agreement, exhibit I) in 1855, by which the plaintiff's father-in-law Jaganadha became entitled to the suit one and a quarter share in the estate, while the defendants' father Gopala took one share. In 13 M.I.A., 113, the Privy Council held that the said samakhya rendered the two brothers divided in status for all intents and purposes. It is not disputed that Jaganadha was capable of devising the suit property away by a testamentary instrument, as he could alienate it by sale or gifts *inter vivos*. The defendants however contend that the will A said to have been executed by Jaganadha is a forgery. But for the purposes of present investigation we shall assume that it is a genuine document. It is upon that assumption that the questions of law under consideration have been argued, the defendants' contention being that even upon the various constructions which according to the plaint the will is capable of, the plaintiff has no *locus standi* to maintain this suit."

"Jaganadha died in 1859, leaving a widow Lakshmi Devamma Row, and an unmarried daughter Venkata Chinnayya Row him surviving. On 28th July, he executed the suit will A. Both the widow and the daughter are now dead. Chinnayya Row was married to the plaintiff and she brought forth several sons who all predeceased her. The first among these sons was Raja Venkata Sobbanachela Jaganadha Lakshmirayappa Row Garu who died on 18th August 1890. Lakshmi Devamma did not adopt a boy in pursuance of the directions given in the will, and died on 3rd June 1893. This plaintiff's contention is that as the

paramount intention of Jaganadha's will was that the title to all his property should in the absence of adoption vest in his grandson, when born, and that the property should actually pass into the possession of that after-born grandson who would be living at the time of his wife's death, the property vested in plaintiff's last son Raghunadha Appa Row, who survived his grandmother Venkamma Row (testater's widow) and that on the death of the said grandson Raghunadha Row the property went back to his mother Chinnayya Row, and after her death to the plaintiff according to the recognized doctrines of Hindu Law."

"Other plausible constructions which the plaintiff places on the will are: (1) That the birth of the first grandson defeated, the right and enjoyment of his wife and the property vested in him at once. (2) That although the property became vested in the first grandson, as soon as he was born his enjoyment was postponed until after the death of the testator's widow. (3) That life estate was given to the widow and a gift was made over to the grandson. (4) That all the grandsons that came into existence from time to time took the estate as a class with rights of survivorship in any of the three modes indicated above. The plaintiff's case is that according to any of the aforesaid constructions, his wife Chinnayya Row took the estate on the death of his sons and that on her death the succession has fallen upon him."

Defendants denied the genuineness of the will and contended that the plaintiff had no *locus standi*.

They claimed as the reversionary heirs of the testator entitled to succeed on the death of the daughter.

The Subordinate Judge dismissed the suit.

Plaintiff appealed.

T. V. Seshagiri Aiyar and *P. Nagabhushanam* for appellant.

Sir *V. Bhashyam Ayyangar*, The Hon. Mr. *V. Krishnaswami Ayyar* and *C. R. Tiruvenkata Chariar* for respondents.

JUDGMENT.—For the decision of this appeal we have to consider a portion of the will of Raja Suraneni Jaganatha Lakshma Rao, Zamindar of Mailavaram, who died on the 31st July 1859. We assume for the purpose of this judgment that the will is genuine, a point which is in dispute. The important portion is the paragraph numbered 1 in the translation. It runs as follows:—

"We have no male issue. As a suitable boy could not be found among the *gnatis* no adoption has been made till now. If

our wife, Lakshmi Devamma Rao, finds a suitable boy among our *gnatis* she shall make an adoption according to her will and in accordance with the law. If no boy is found and if our daughter Venkata Chinnayya has a son that boy becomes (or 'will become') a *dauhitra karta* (daughter's son heir) according to the law (*Dharma Sastras*): so, that boy alone should become the karta for the entire property belonging to us. According to the law the kartaship rests in our wife. So our funeral rites as well as the acts to be done subsequently should be caused to be done through our wife alone."

The plaintiff is the husband of the testator's daughter Venkata Chinnayya Rao who died in 1902, after the death of her two sons. The defendants are sons of the testator's divided younger brother Venkata Gopala Narasimha Rao who died in 1887.

Mr. Seshagiri Ayyar on behalf of the appellant contended, first, that on a proper construction of the will the testator's daughter was 'appointed' by her father to raise a son for him in accordance with a practice which is now generally reputed to be obsolete. We need not determine whether in any event the language of the will could be made to bear this construction; it clearly could be so construed only if there were in existence a living custom to which the words can be referred. It is not such language as could be interpreted as indicating the testator's intention to revive a dead custom, or create a new kind of heir for himself, unknown to the law of the present day, supposing him to have the power to do either of those things. It is clearly upon the plaintiff to prove the existence of the custom if he intends to rely on it (vide *Thakoor Jeebnath Singh* v. *The Court of Wards*(1)); and he has not taken any issue or otherwise raised the question before the Court of First Instance. It is a question which it may be impossible to decide without an elaborate investigation of the usages and practices of the Velama community, and it is therefore not a question which can properly be raised for the first time in the Appellate Court. In these circumstances we have declined to hear argument upon this suggested construction of the will.

Mr. Seshagiri Ayyar then contends that the will confers upon the widow a life estate with remainder to the son of her daughter Chinnayya Rao, or an estate defeasible on the birth of a son to

(1) L.R., 2 I.A., 163.

that lady. The fatal obstacle to his success upon this ground is the fact that neither of the sons of Chinnayya Rao was born in the life-time of the testator. We are asked to apply to the case the principle enacted in section 100 of the Indian Succession Act, and transferred from that Act to the Hindu Wills Act; but that section, as is pointed out by the learned authors of West and Buhler's Hindu Law, contemplates a power of disposition extending further in time than the Hindu Law allows, as by that law some one in existence at the testator's own death must be the ultimate legatee. (West and Buhler, 3rd edition, page 224). It is needless, we think, to cite authority in support of this statement of the Hindu Law, and we find nothing against it in the judgment of Sir Subramania Ayyar in *Yethirajulu Naidu* v. *Mukunthu Naidu*(1), to which our attention was invited. The Hindu Wills Act, assuming that it has altered the law in the case of wills to which it is applicable, has, of course, no application to the present case.

The appeal is dismissed with costs.

APPELLATE CRIMINAL.

Before Sir Arnold White, Chief Justice, Mr. Justice Benson, Mr. Justice Boddam, Mr. Justice Wallis, and Mr. Justice Sankaran-Nair.

CHIDAMBARAM PILLAI AND OTHERS

v.

EMPEROR.*

1908. March 30, 31.

Criminal Procedure Code, Act V of 1898, ss. 36, 107—Magistrate to whom person is not sent under s. 107 (3) cannot exercise the power of committing to custody under s. 107 (4)—Section 36 does not confer such power.

A Magistrate has no jurisdiction to remand a person to custody under section 107 (4) of the Criminal Procedure Code when such person is not sent to him by another Magistrate under section 107 (3). Section 36 of the Code cannot, when

(1) I.L.R., 28 Mad., 363.

* Criminal Revision Case No. 149 of 1908, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the order of L. M. Wynch, Esq., District Magistrate of Tinnevelly, dated 12th March 1908, in Miscellaneous Case No. 4 of 1908, and to quash the proceedings instituted against the petitioners under section 107 of Criminal Procedure Code, by the District Magistrate of Tinnevelly.

CHIDAMBARAM PILLAI v. EMPEROR.

read with section 107 (3), be construed as conferring such jurisdiction on a District Magistrate.

THE facts necessary for this report are stated in the petition presented by petitioners to the District Magistrate and the order thereon. The petition was as follows:—

"That the accused intend to move the High Court for a transfer of this case from the file of this Court to that of another, and, hence, apply for an adjournment for a fortnight.

That no proceedings can be instituted under section 107 of Criminal Procedure Code for the alleged action of the accused, and that the accused have reason to believe that section 107 of Criminal Procedure Code is resorted to by this Court simply with a view to detain the accused in custody under clause 4 of section 107, Criminal Procedure Code.

That the accused offer to give the security required, simply to avoid their detention in custody, without now attempting to show cause why they should not be ordered to give the security, no doubt, retaining the right of showing cause after the orders of the High Court are obtained on the application the accused intend putting under section 526, Criminal Procedure Code."

Upon this petition, the Magistrate passed the following

ORDER.—"This application was put in immediately after the Court had called upon the petitioners to plead under sections 117 and 242 of the Criminal Procedure Code, and they had said that they did not admit the truth of the information referred to in the notice under section 112, Criminal Procedure Code. I am not prepared to accept the security offered in these terms, and under section 107 (4) of the Criminal Procedure Code I direct that the persons before the Court, Messrs. Subramaniasiva, and Chidambaram Pillai, and Padmanabha Iyengar be remanded to custody until the completion of the enquiry. An adjournment is granted till the 1st April to enable the petitioners to put in their application to the High Court."

Against this order the petitioners preferred a revision petition to the High Court.

P. Narayanamoorthy and *C. S. Govindaraja Mudaliar* for petitioners.

Mr. *C. F. Napier* for the Public Prosecutor, *contra*.

ORDER.—We are of opinion that, on the construction of section 107 (4) of the Code of Criminal Procedure under which the

CHIDAMBARAM PILLAI v. EMPEROR.

District Magistrate purported to act, his order cannot be supported, as the petitioners were not sent before him by any other Magistrate under sub-section (3) so as to bring the case within sub-section (4). Mr. Napier has, however, contended that the effect of section 36 of the Code is to vest in the District Magistrate the power to arrest and send in custody which is conferred by sub-section (3), so as to enable the District Magistrate to make an order of detention under sub-section (4). We are unable to accede to this contention. Even if section 36 can be construed as giving powers which are not specifically referred to in schedule III, having regard to the terms of sub-section (3) of section 107, we are of opinion that the power is not one which vests in the Magistrate to whom the person is to be sent.

It was further contended by Mr. Napier that if the order could not be supported under the provisions of section 107 (4), it might be supported under section 114, read with sections 65 and 344 of the Criminal Procedure Code. Assuming that the proviso to section 114 applies in the case of a person who is before the Court (as to which we express no opinion), we do not think the order can be supported under section 114, as the District Magistrate has not followed the procedure therein prescribed. As we are of opinion that the order of the District Magistrate remanding the petitioners to custody until the completion of the inquiry, was made without jurisdiction, we must set it aside. In this view, the question, whether a person against whom a valid order under section 107 (4) has been made, is entitled on giving security to be released on bail under the provisions of section 496 of the Criminal Procedure Code until the completion of the inquiry, does not arise. We express no opinion on this question.

If security for appearance has been given under the order of this Court, dated March 20th, 1908, the bail bonds will be discharged. If any person is in custody under the order for detention made by the District Magistrate, he must be discharged so far as that order is concerned.

APPELLATE CRIMINAL.

Before Mr. Justice Benson and Mr. Justice Boddam.

1908. April 7.

BHASKARI KASAVARAYUDU (COUNTER-PETITIONER), PETITIONER,

v.

BHASKARAM CHALAPATIRAYUDU (PETITIONER), COUNTER-PETITIONER.*

Criminal Procedure Code, Act V of 1898, *s.* 145—*Possession by the manager of a joint Hindu family can be protected by a Magistrate by proceedings under s.* 145 *of the Code.*

The managing member of a coparcenary governed by the Mitakshara law has a recognised position of superiority with well-defined rights of management and possession independent of the consent of the other members of the coparcenary.

A Magistrate has jurisdiction to protect a manager in such possession by proceedings under section 145, Criminal Procedure Code.

Sri Mohan Thakur v. *Narsing Mohan Thakur*, (I.L.R., 27 Calc., 259), referred to and approved.

THE facts of this case are sufficiently stated in the order of the Head Assistant Magistrate which was as follows:—

"These proceedings have orginated in certain disputes regarding the Agraharam lands of Sarikandapalem. Petitioner and counter-petitioner are undivided members of a joint family owning the Agraharam. Both parties claim possession as managers of the estate, the claim to possession arising out of the claim of each party to the exclusive right to grant cowles for the joint property and appropriate the produce."

The questions raised are—

(1) Whether this Court has jurisdiction to act under section 145, Criminal Procedure Code, when a dispute arises between members of a joint family with regard to the joint property, and when these members claim possession as managers?

* Criminal Revision Case No. 435 of 1907, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the Order of J. W. Bhore, Esq., Head Assistant Collector of Narasarowpet, in Possession Case No. 4 of 1907, dated the 12th September 1907.

(2) If it has jurisdiction, who is the manager in possession in the case?

(3) Is a breach of the peace imminent?

"With regard to the first of these questions it would appear that 27 Calc., 259, is in point. From the judgment in that case, it would appear, it is within the jurisdiction of a Court acting under section 145, Criminal Procedure Code, to decide the question of possession between joint owners of an undivided family governed by the Mitakshara law."

"As to the question of possession in this case what is claimed by the petitioner Chalapatirayudu is that, as the managing member of the joint family, he is in possession of the whole property and will be until partition is effected. On the other hand the counter-petitioner claims to be the managing member of the family. The balance of the evidence and the custom and usage governing the joint family under the Mitakshara school of law points clearly to Chalapatirayudu, the petitioner, being the managing member of the family, and, as such, in possession of the joint property."

"In view of the fact that the counter-petitioner has recently granted leases for half the Agraharam lands, and that it is more than likely that endeavours will be made to enforce these leases as soon as sowing operations are begun, there is every apprehension of an imminent breach of the peace."

"I accordingly find that the petitioner Chalapatirayudu is in possession as manager of the Agraharam lands. Until the counter-petitioner effects a division of the joint property, or until the petitioner Chalapatirayudu is evicted in due course of law, I forbid all disturbance of his possession."

Against this order a criminal revision petition was preferred to the High Court.

V. Ramesam for petitioner.

Mr. *P. R. Grant* for the Public Prosecutor opposed the petition.

G. Krishnaswami Ayyar for respondent.

ORDER.—The finding is that the counter-petitioner is the managing member of the joint Hindu family that owns the property in dispute, and that, as such, he is in possession of the joint family property. We think that the view taken in *Sri Mohan Thakur* v. *Narsing Mohan Thakur*(1) is correct. The

(1) I.L.R., 27 Calc., 259.

BHASKARI KASAVA-RAYUDU v. BHASKARAM CHALAPATI-RAYUDU.

cases quoted by the petitioner are all either cases of co-trustees or of ordinary partners in which the rights of each trustee or partner are equal. None of them are cases like the present of a coparcenary under the Mitakshara law in which the managing member has a recognized position of superiority, with well-defined rights of management and possession independent of the consent of the other members of the family.

Mr. Mayne, in paragraph 292 of the seventh edition of his Hindu Law when discussing the mode in which the joint family property is to be enjoyed by the coparceners, says, "In Malabar and Canara . . . the head of the family is entitled to its entire possession and is absolute in its management," and also that, "A family governed by Mitakshara law is in a very similar position except as to their right to a partition and to an account as incident to that right." We do not see why a manager of a joint family should not be protected in his possession by proceedings under section 145, Criminal Procedure Code. We therefore hold that the Magistrate had jurisdiction to act under that section, and this Court has no jurisdiction to interfere. We dismiss the petition.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Miller.

RAJAH VENKATA NARASIMHA APPA RAO BAHADUR (DEFENDANT), APPELLANT,

1908. February 13, 14, 26.

v.

RAJAH SURENANI VENKATA PURUSHOTHAMA JAGANNADHA GOPALA ROW BAHADUR AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Hindu Law—Bandhus, preference among—Male Bandhus entitled to preference over female Bandhus, though nearer in degree—Accretions, what are—Accretions pass with estate—Adverse possession, title acquired by—Party holding under a deed or will which is invalid cannot set up a higher right than that claimable under the deed or will.

It is settled law in this Presidency that a male Bandhu is entitled to preference over a female Bandhu even though the latter is nearer in degree.

Where additions are made to an estate by a limited owner with the intention that they should form part of the estate such additions pass with the estate and not to the heirs of such owner, though made with funds over which such owner has absolute powers of disposal.

Where a female, having the limited interest of a daughter or widow in an estate, spends the income which is her absolute property in the erection of buildings on lands belonging to the estate, it must be presumed that she intended the buildings to be an accretion to the estate and to devolve, as such, on the persons who would be entitled to succeed to the estate.

A person holding land under a deed or will, which, however, does not operate in law to pass the land in question, cannot, by such possession for more than twelve years, acquire an interest in the property different from that which he would have taken if the deed or will had been valid and operative.

Dalton v. *Fitzgerald*, [(L.R., (1897), 2 Ch.D., 86 at p. 93)], referred to.

A, who was entitled to an estate and to the management of a temple as hereditary trustee or dharmakarta, gave his widow, B, by will, the estate 'because according to the law (Dharma Sastra) the kartaship (heirship) vests in my wife,' and he further directed her to conduct the dharmakartaship of the temple. B, gave, by deed, both the estate and dharmakartaship to her daughter C 'as according to Hindu Law, you are the *chief heir* after me':

* Appeal No. 157 of 1905, presented against the decree of M.R.Ry. I. L. Narayana Row Naidu, Subordinate Judge of Kistna at Masulipatam, in Original Suit No. 30 of 1903, dated 25th April 1905.

Held, that B, under the terms of the will of A, and C, under the terms of the deed of B, took no more than a woman's limited estate under the Hindu Law both in the estate and in the dharmakartaship; and that neither B nor C could acquire by possession an interest in the property higher than that which they would have taken if the property had passed by deed or will.

SUIT to recover possession of properties and the dharmakartaship of a certain temple.

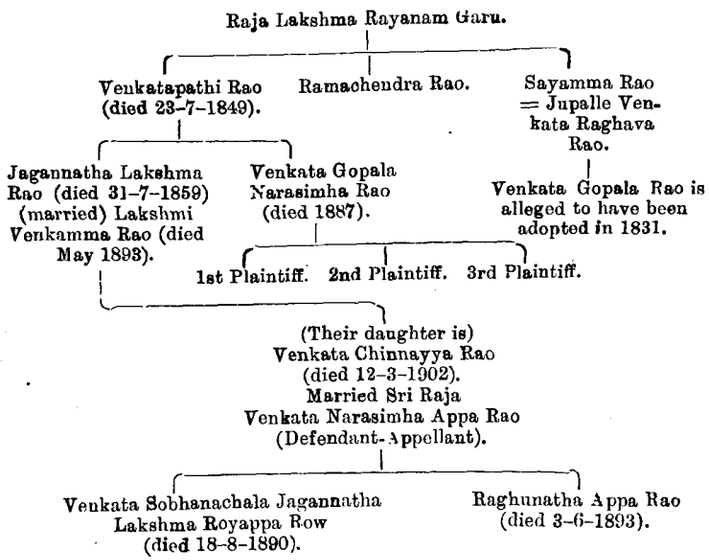
The parties to this suit were the same as those in Original Suit No. 1 of 1903 on the file of the Subordinate Judge's Court of Kistna, the decision in which was upheld by the High Court in Appeal Suit No. 98 of 1904 (reported 31 Mad., 310). Both these suits were brought in respect of properties belonging to the same person. The facts necessary for the purposes of this report are set out in the judgment in this case and in the report of Appeal Suit No. 98 of 1904.

T. V. Seshagiri Ayyar, *P. Nagabhushanam* and *T. V. Muthukrishna Ayyar* for appellant.

Sir *V. Bhashyam Ayyangar*, the Hon. Mr. *V. Krishnaswami Ayyar* and *C. R. Tiruvenkatachariar* for respondents.

JUDGMENT.—In this case the plaintiffs sued to recover possession of certain moveable property which was in the possession of Venkata Chinnayya Rao at the time of her death in 1902, and also of a house built by her and of the darmakartaship of a certain temple which was under her management at the time of her death, and which then passed into the possession of her husband, who is the defendant. The Subordinate Judge dismissed the suit as regards the moveable property, which he held was Chinnayya Rao's absolute property, and which therefore passed to her husband on her death. The other property he decreed to the plaintiffs. Against that decree the defendant appeals. The plaintiffs filed a Memorandum of Objections as regards the moveable property, but it was not moved before us.

The relationship of the parties and of various members of their family is shown below :—



Jagannatha Lakshma Rao and his brother Venkatagopala Narasimha Rao, who is the father of the plaintiffs, lived as joint members of a Hindu family under the Mitakshara law until 1855, when they divided all their property. Jagannatha under the partition obtained 1¼ share of the Mailavaram estate and also the darmakartaship of the Dwaraka Tirumala temple which is in dispute. In 1859 he made a will (exhibit A) in which, *inter alia*, he directed that his wife should "conduct the dharmakartaship" of the temple. He died in the same year, and, as he had no sons, his property passed to his widow Venkamma Rao. In 1877 she executed a deed of gift (exhibit I) in favour of her only child, Venkata Chinnayya Rao, the wife of the defendant, whereby she gave her, at once, the 1¼ share in the Mailavaram estate and also the darmakartaship of the temple, but retained one village of the estate for her own maintenance and also the house in which she lived, and gave these to her daughter after her death. She died in 1893, and her daughter Chinnayya Rao died in 1902. It will be observed from the genealogical tree that Chinnayya Rao had two sons, but both of them died many years before her. On her death her husband, the present defendant, took possession of the dharmakartaship and the house with its site and grounds. The present plaintiffs, it

will be observed from the family tree, are the sons of Venkatagopala Narasimha Rao, the brother who divided from Jagannatha Lakshma Rao in 1855. They got possession of the 1¼ share of the Mailavaram estate on the death of Chinnayya Rao and the defendant's suit to recover it founded on Jagannatha's will of 1859 has been dismissed by our judgment in Appeal No. 98 of 1904 delivered to-day. The present suit is brought by the plaintiffs as the reversioners of Jagannatha Lakshma Rao, to recover the house above referred to and the dharmakartaship. For the reasons stated in our judgment in Appeal No. 98 of 1904 the defendant cannot resist the plaintiffs' claim by virtue of any title conferred by the will, but he also resists on other grounds. One of these is that Venkata Gopal Narasimha Rao, the father of the plaintiffs, had been adopted in 1831 by Jupalle Venkataraghava Rao who was married to Sayamma Rao, the sister of Venkatapathi Rao, who was the father of Jagannatha Lakshmana Rao and of the plaintiffs' father, and that the plaintiffs had thus passed into another family and could only claim as bandhus through their grandmother Sayamma, and that Chinnayya Rao had daughters living who are reversioners nearer in degree than the plaintiffs and who therefore take the property in preference to them. We do not think that the question of the adoption affects the plaintiffs' right to the property in dispute. If the property is property that will pass to the reversioners of Jagannatha Rao, in other words if the property was not the stridhanam or absolute property of Chinnayya Rao, then the plaintiffs being male or "regular" bandhus are entitled to it by virtue of their sex in preference to any female reversioners, even though the latter may be nearer in degree, and the plaintiffs are bandhus even if their father was adopted. In that case they are bandhus as the sons of the (adopted) son of the sister of the father of the deceased Jagannatha Lakshma Rao. This has long been the settled law in this Presidency. [See Mayne's 'Hindu Law,' para. 593 (7th edition), and the cases there quoted by him.] The question then is, whether the property was the stridhanam or absolute property of Chinnayya Rao? The defendant claims the house as such because it was built by Chinnayya Rao out of the income of the Mailavaram estate, and there is no question but that the income belonged absolutely to Chinnayya whether she was the full owner of the estate or had only a woman's limited estate therein. The plaintiffs claim the

house as an accretion or addition to the Mailavaram estate. We think that the Subordinate Judge was right in finding the plaintiff's claim proved. It is highly significant of Chinnayya's intention that this house should be a palace or residence for the zamindar (*i.e.*, for herself during her life, and thereafter for her son who was then alive) that she intended to build it on the home-farm (kamatam) land of the estate and did actually spend Rs. 7,000 on the construction of a large house on this site, but abandoned it as she considered the death of her son, which took place at this time, was an evil omen. She however considered that her dignity as zamindarni of the larger part of the estate required her to have a suitable palace, and the more so as the plaintiffs who owned the smaller part of the estate had built themselves a fine upstair house. She therefore spent no less than Rs. 40,000 on her palace, and we find that the site and grounds were largely land which undoubtedly belonged to the estate. Part of this land we find, from the evidence of the Peshkar, belonged to Jagannatha himself: part was acquired by Venkamma in exchange for an abandoned site which belonged to the estate; and parts were lands relinquished to Venkamma and Chinnayya as owners of the estate. In the deed of gift of 1877 already referred to, Venkamma left to Chinnayya after her death "the vacant site and houses in Mailavaram" and directs that they shall vest in Chinnayya "along with the estate," *i.e.*, as part and parcel of the estate. This shows plainly that this part of the site of the buildings in dispute belonged to the estate and was not part of the private property of Chinnayya. Lastly the pay lists of the coolies employed (exhibit S Series) in building the palace show that they were "doing the work of constructing the upstairs of the palace appertaining to the 1¼ estate of Mailavaram." We think it is clear from all the evidence that the buildings in dispute were constructed as a palace or residence for the zamindar for the time being, and were intended to go with the estate as part of it, and not to be kept as the private property of Chinnayya's heirs if they should be dissociated from the estate. Moreover the buildings being, to large part, on land belonging to the estate, would go with the estate, apart from any intention of Chinnayya to treat them as part of the estate. We think, however, the intention is sufficiently clear and the very character of the buildings indicates that the intention was as we have said. That being so, though

RAJAH VENKATA NARASIMHA APPA RAO v. RAJAH SURENANI VENKATA PURUSHOTHAMA JAGANNADHA GOPALA ROW.

the funds out of which the buildings were constructed, were the absolute property of Chinnayya, yet the buildings must devolve as part of the estate in accordance with the intention of Chinnayya to treat them as such (*Subramanian Chetti* v. *Arunachelam Chetti*(1) and *Akkanna* v. *Venkayya*(2)).

With regard to the dharmakartaship it is necessary to see what is its history. It was originally not a part of the Mailavaram estate, but was part of the Chintalapudi estate. In 1823 the Chintalapudi estate was mortgaged with possession to Venkatapathi Rao (the father of Jagannatha Lakshma Rao) and he took possession of the dharmakartaship at the same time and held it till his death in 1849. It then passed to Jagannatha and his brother (the father of the plaintiffs) until they divided in 1855 when it was given to Jagannatha along with his $1\frac{1}{4}$ share in the Mailavaram estate. This dharmakartaship originally descended hereditarily when it appertained to Chintalapudi estate, and in the deed of 1855 it is also expressly stated that it is to descend in the family of Jagannatha "from generation to generation." In the will of 1859 Jagannatha directs that his wife Venkamma is to conduct the dharmakartaship, and in 1877, Venkamma, as already stated, gave the possession of the estate and of the dharmakartaship to Chinnayya Rao. It is evident that this property has always passed as an hereditary estate just as did Jagannatha's share of the Mailavaram zamindari, and it would therefore, *primâ facie*, pass to the plaintiffs as the reversioners entitled to the hereditary property of Jagannatha Rao. But the defendant attempts to resist the claim by raising an ingenious plea founded on the law of limitation. As we understand the contention, it is that the transfer of the dharmakartaship to Venkatapathi in 1823 was illegal as being against public policy, and that his possession of it was therefore that of a trespasser as was also the possession of Jagannatha, Venkamma and Chinnayya, and consequently adverse to the plaintiffs, and that this adverse possession had given rise to an absolute title in Chinnayya Rao by virtue of section 28 of the Limitation Act, and that the dharmakartaship would therefore pass to her personal heirs instead of going to the plaintiffs as reversioners of Jagannatha Rao. The argument is however fallacious. Venkatapathi prescribed for only the same title to the

(1) I.L.R., 28 Mad., 1. (2) I.L.R., 25 Mad., 351.

RAJAH VENKATA NARASIMHA APPA RAO v. RAJAH SURENANI VENKATA PURUSHOTHAMA JAGANNADHA GOPALA ROW.

dharmakartaship as to the Chintalapudi zamindari, *i.e.*, for an hereditary not an absolute estate. In the deed of 1855 it is distinctly referred to by him as an hereditary estate. In his will he made no attempt to alter the course of succession. He gave his wife the Mailaveram estate because "according to the law (Dharma Shastras) the kartaship (heirship) vests in my wife" and he directed her to conduct the dharmakartaship of the temple. His evident intention was that she should have what the law gave her—neither more nor less—that is a life estate in both the properties. So also Venkamma by her gift to Chinnayya in 1877 did not attempt to alter the succession. She gave her both the estate of Mailavaram and the dharmakartaship "as according to the Hindu Law you are the *chief heir* after me" to the property. Even therefore, if the transfer of the trusteeship to Venkatapathi was invalid, and even if Venkamma had no power to renounce the trusteeship in favour of Chinnayya it could make no difference in the quality of the interest taken by Venkamma and by Chinnayya. Venkamma taking under the will (if it was genuine) could only have the interest which the testator gave her under the will, and Chinnayya, taking under the gift could only have the interest which the gift gave her, that is, in both cases a woman's limited estate under the Hindu Law. Neither Venkamma nor Chinnayya could claim by possession an interest in the property different from what they would have taken if the property had passed by the will or deed, and it is not open to the defendant claiming under them, to claim any higher estate. As observed by Lopes, L.J., in *Dalton* v. *Fitzgerald*(1), "if a man obtains possession of land claiming under a deed or will, he cannot afterwards set up another title to the land against the will or deed though it did not operate to pass the land in question; and if he remain in possession till twelve years have elapsed and the title of the testator's heir is extinguished, he cannot claim by possession an interest in the property different from that which he would have taken if the property had passed by the will or deed."

We find, then, that there is no ground on which the defendant can resist the claim of the plaintiffs as reversioners, and we dismiss the appeal with costs.

The Memorandum of Objections is dismissed with costs.

(1) L.R., (1897), 2 Ch.D., 86 at p. 93.

APPELLATE CIVIL.

Before Mr. Justice Miller.

1907. September 27.

EKAMBARA GRAMANY AND OTHERS (PLAINTIFFS) APPELLANTS,

v.

MUNISWAMY GRAMANY (DEFENDANT), RESPONDENT.*

Land Acquisition Act—Act I of 1894, ss. 25, 27, 54—Appeal lies against an award of costs under s. 25—Section 27 does not allow a pleader's fee to be fixed arbitrarily —Fees to be allowed on the valuation as laid down in the Civil Rules of Practice or according to the rules applicable to the particular Court.

Under section 25 of the Land Acquisition Act an award of costs is a part of the award and is appealable as such under section 54 of the Act.

Section 27 does not authorise the Court to allow any amount for pleader's fee at its discretion. Where the subject-matter is capable of being valued, pleader's fees must be allowed on the scale laid down in the Civil Rules of Practice or on such other scale as may be in force for the particular Court.

CERTAIN lands having been required by Government for a public purpose, the Deputy Collector proceeded to acquire them. The Deputy Collector in his award fixed Rs. 6,000 as the compensation to be paid, and directed that Rs. 2,000 should be paid in satisfaction of a mortgage on the property, and the balance of Rs. 4,000 to *M* who claimed to be the owner. One *E* claimed to be the undivided brother of *M* and, as such, entitled to a moiety of the Rs. 4,000. The Deputy Collector referred the matter to the Court of Small Causes under the provisions of the Land Acquisition Act. The Chief Judge of the Court of Small Causes disallowed the claim of *E* with costs, and in calculating the vakil's fee allowed a sum of Rs. 200 to *M*.

E appealed on the ground that only Rs. 100 should have been allowed.

Mr. *M. A. Tirunarayana Chariar* for appellants.

P. M. Sivagnana Mudaliar for respondent.

JUDGMENT.—The first question raised is whether the appeal lies. The reference, though it is stated to be under section 30 of the Land Acquisition Act, appears, really, to be under section 18 at the

* Appeal No. 169 of 1906, presented against so much portion of the judgment of J. G. Smith, Esq., Chief Judge of the Presidency Small Cause Court of Madras, as related to vakil's fees, in Land Acquisition Case No. 2 of 1905.

instance of a party who has not accepted the award of the Collector, and it has therefore to be dealt with under part II of the Act. By section 25 the award is to state the costs incurred, and by section 54 an appeal lies against any part of the award.

I am unable to say that the award of costs is not part of the award, and I must hold that the appeal lies.

The appeal is only as to the amount of costs, the contention being that the learned Chief Judge has allowed a vakil's fee of Rs. 200, whereas according to the value of the claim (Rs. 2,000) the fee at 5 per cent. should be only Rs. 100. On the other side, it is contended that the rules of this Court and the Mofussil Civil Courts do not apply, and that the fixing of the amount is in the discretion of the learned Chief Judge.

I do not think that this is the effect of section 27 of the Land Acquisition Act, and I think the Civil Rules of Practice should be applied, or else the rules applicable to the Presidency Small Cause Court.

If, however, the rules applicable to the Presidency Small Cause Court apply, the fee would seem to be less than that which the appellant alleges to be the proper fee according to the scale prescribed. I need not therefore consider whether the learned Chief Judge tried this case in virtue of his position as Judge of a Small Cause Court or of a special Court under the Land Acquisition Act.

The claim here is clearly capable of valuation and, according to the scale of fees for suits, the fee payable here under the Civil Rules of Practice will be Rs. 100. If this is not a suit it will be less.

I think Rs. 100 is the most that can ordinarily be allowed under the rule, and no special reason is stated by the learned Chief Judge for awarding more. I therefore allow the appeal with costs.

Against this decision a Letters Patent Appeal No. 71 of 1907 was preferred and dismissed by Benson and Sankaran-Nair, JJ., on 10th March 1908.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Munro.

1908. January 8, 9. March 18.

NAGARURU SAMBAYYA (DEFENDANT), APPELLANT,

v.

TANGATUR SUBBAYYA (PLAINTIFF), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, *s.* 545—*Transfer of Property Act, ss.* 58, 59—*Security bond given under s.* 545, *Civil Procedure Code, mortgaging immoveable property of above Rs.* 100 *in value requires registration under ss.* 58, 59 *of the Transfer of Property Act—Registration Act, s.* 17, *exception* (*i*), *does not apply to the case.*

A security bond given to the Court under section 545 of the Civil Procedure Code was in the following terms :—

Until the disposal of my appeal in the District CourtI pledge my immoveable property which is described in the schedule annexed and which free from all encumbrances, such as mortgage, etc., to others, to the Court, for Rs. 1,382-4-9 which is the amount of the decree due to the plaintiff.

If the result of the appeal be against me I hereby bind myself to allow the plaintiff to recover the whole amount of the said decree which I should pay, by my immoveable property, and, if the said property be insufficient, from me. Until the whole decree amount is discharged I will not sell or make a gift of the said property to others. I thus executed this security bond.

The bond was attested by two witnesses but was not registered.

The order of Court "Security accepted" was endorsed on it :

Held, that the security bond amounted to a mortgage within the meaning of section 58 of the Transfer of Property Act and, not being registered, was invalid under section 59 of the Act as a mortgage and did not affect the property.

The bond was also compulsorily registrable under section 17 of the Indian Registration Act.

The words "Security accepted" hereby show that the Court thought the security sufficient. The bond does not derive its validity from these words, and it cannot therefore be brought within section 17, exception (i) of the Registration Act.

Tokhan Singh v. *Girwar Singh*, (I.L.R., 32 Calc., 494), followed.

THE facts of the case were as follows :—

The plaintiff, in Original Suit No. 802 of 1898 on the file of the District Munsif's Court, Proddatur, obtained a decree against

* Second Appeal No. 378 of 1904, presented against the decree of J. W. Hughes, Esq., District Judge of Cuddapah, in Appeal Suit No. 17 of 1904, presented against the decree of M.R.Ry. K. S. Kothandarama Aiyar, District Munsif of Proddatur, in Original Suit No. 516 of 1903.

one Korapolu Kondayya on the 25th September 1899. On the 3rd January 1900 Kondayya applied to the Munsif's Court for a stay of execution of the decree offering to give security. The District Munsif suspended execution pending the receipt of an order from the District Court staying execution. Kondayya filed Appeal Suit No. 47 of 1900 and obtained from the District Court an order, dated 3rd April 1900, staying execution on his furnishing security. On 18th April 1900 Kondayya executed a security bond in the terms set out in the judgment in this case. The Munsif passed orders on 19th April 1900 accepting the security bond and staying execution of the decree. On 19th March 1901 the appeal was dismissed, and the District Munsif's decree was confirmed. In the meanwhile Kondayya transferred the property which he had given as security to his wife ; and a claim preferred by the wife was dismissed. The wife then brought a suit to enforce her claim. That suit was dismissed. In the meantime, and after the date of the security bond, the defendant Sambayya in this suit filed a suit against Kondayya, Original Suit No. 404 of 1901, and obtained a decree. The property given as security for the plaintiff's decree was sold through Court, and Rs. 914-3-0 was realized. Sambayya claimed rateable distribution of the sum realised in satisfaction of his decree and an order was passed allowing him to such, and in pursuance of this order he obtained from the Court Rs. 429-7-9 on the 8th October 1902. The plaintiff contended that the defendant was not entitled to get anything out of the sale-proceeds of that property until the full satisfaction of the decree for which it was given as security, and that the defendant was liable to refund that money to the plaintiff, and also to pay interest at 9 per cent. per annum. Hence this suit.

The defendant pleaded *inter alia* that the bond not being registered could not affect the property comprised therein.

Both the lower Courts held that the security bond did not require registration and decreed the plaintiff's claim.

The defendant appealed to the High Court.

T. Ethiraja Mudaliar for appellant.

V. V. Srinivasa Ayyangar for respondent.

JUDGMENT.—The question raised in this second appeal is whether a security bond given under section 545 of the Civil Procedure Code whereby immoveable property exceeding Rs. 100

NAGARURU SAMBAYYA v. TANGATUR SUBBAYYA.

in value is pledged to the Court, which is accepted by the Court requires registration in order to make it effective against the property.

We are of opinion that the question must be answered in the affirmative. The terms of the bond are as follows :—"Until the disposal of my appeal in the District Court I pledge my immoveable proporty which is described in the schedule annexed . . . . . to the Court for Rs. 1,382-4-9 which is the amount of the decree due to the plaintiff.

"If the result of the appeal be against me I hereby bind myself to allow the plaintiff to recover the whole amount of the said decree which I should pay by my immoveable property and if the said property be insufficient, from me. Until the whole decree amount is discharged I will not sell or make a gift of the said property to others. I thus executed this security bond."

The document is signed by the obligor and is attested by two witnesses.

In our opinion this document effects a transfer to the Court of an interest in specific inmoveable property to secure a future debt which may become due from the defendant to the plaintiff, and, as such, it is a mortgage as defined in section 58 of the Transfer of Property Act, and it therefore requires registration under section 59 of the Act as amended by section 3 of Act VI of 1904 even though the amount of the mortgage be less than Rs. 100, and also under section 17 of the Indian Registration Act, III of 1877, when the amount is not less than Rs. 100. It is suggested that the order of the Court "security is accepted" which is endorsed on the bond, is what gives the bond validity, and that the document therefore falls within exception (i) to section 17, but we do not think that this is so. The words "Security is accepted" are we take it merely an intimation by the Court that the property given as security is sufficient for the purpose.

The view we have taken is in accordance with the latest decision of the Calcutta High Court in *Tokhan Singh* v. *Girwar Singh*(1), and is not, we think, inconsistent with the case of *Thirumalai* v. *Ramayyar*(2) as explained in *Arunachellam* v. *Arunachellam*(3), or with the decisions of the Privy Council in *Pranal*

(1) I.L.R., 32 Calc., 494. (2) I.L.R., 13 Mad., 1.
(3) I.L.R., 15 Mad., 203.

NAGARURU SAMBAYYA v. TANGATUR

Anni v. *Lakshmi Anni*(1), and *Bindesri Naik* v. *Ganga Saran Sahu*(2), which were cited in the argument before us.

We may add that though the Civil Rules of Practice in force in the Courts subordinate to this Court are silent on the subject, yet the parctice of the Courts is to register such bonds, and Rule 117 of the High Court Rules, Appellate Side (relating to appeals to the Privy Council) provides that "When the security offered consists of immoveable property, the appellant shall file a mortgage bond duly registered together with a specification of the surety's title."

Lastly, we would observe that registration appears to be necessary for the protection of third parties who otherwise might deal with property which had been given as security in ignorance of the incumbrances on it, thus frustrating one of the main objects of the Registration Act.

As the security bond in the case before us was not registered as required by law, it does not affect the mortgaged property, and the plaintiff's suit must be dismissed with costs throughout, the decrees of the Courts below being set aside.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Miller.

PONNUSAMI MUDALIAR AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

SRINIVASA NAICKAN AND OTHERS (DEFENDANTS NOS. 1 TO 5, 9, 12 AND 14 TO 16), RESPONDENTS.*

1908. February 27, 28.

Transfer of Property Act—Act IV of 1882, *s.* 85—*Mortgagee releasing part of mortgaged property cannot enforce entire claim against the other properties—Section* 85 *of the Transfer of Property Act does not necessitate the dismissal of a suit where no relief claimed against persons not joined as parties.*

A mortgagee cannot release a part of the mortgaged land and then seek to enforce his entire claim upon another portion in which third parties have become interested as assignees of the equity of redemption.

(1) I.L.R., 22 Mad., 508. (2) I.L.R., 20 All., 171.

* Appeal No. 39 of 1905, presented against the decree of M.R.Ry. T. T. Ranga Chariar, Subordinate Judge of Kumbakonam, in Original Suit No. 72 of 1903 (*vide* Civil Miscellaneous Petition No. 245 of 1908).

PONNUSAMI MUDALIAR v. SRINIVASA NAICKAN.

A suit is not liable to be dismissed under section 85 of the Transfer of Property Act for nonjoinder of persons interested in portions of mortgaged property when no relief is claimed against them.

The plaintiffs ought, in such cases, to be allowed to recover what is due to them not exceeding the amount rateably due on the property they proceed against.

SUIT to recover money under a registered hypothecation bond. The plaintiffs' case is thus stated in the judgment of the lower Court :—

"The suit is to recover Rs. 8,250 due under a registered hypothecation bond for Rs. 4,000 executed by the first defendant to the late Muthukrishna Mudali on 6th July 1894. Plaintiffs, as Muthukrishna Mudali's joint coparceners, claim the debt exclusively, on his death, by right of survivorship. The second defendant, as a prior mortgagee of item No. 1, is impleaded, while the third to seventeenth defendants are made parties on the allegation that they claim, individually, distinct portions of items Nos. 1 and 2 under rights derived from the first defendant subsequent to the date of the suit mortgage. The hypotheca consists of the plaint items and other properties. In their plaint, plaintiffs state that the latter items have since been sold by the first defendant for the discharge of certain prior encumbrances on the hypotheca and for other purposes; that they admit those sales and have given up the said items in the plaint; and that they will be content with a decree against the plaint mentioned properties alone.

Subsequent to the mortgage some items of the mortgaged property were sold and the mortgagee (predecessor in title of the plaintiffs) had executed release deeds in respect of such items. These items have not been included in the plaint and the parties who purchased these items were not made parties to the suit.

The second defendant contended that such items ought to have been included in the suit and that the non-inclusion of the purchasers as parties was fatal to the suit."

On these points the Subordinate Judge decided as follows in paragraphs 18—20 of his judgment.

"Mr. Rashbehary Ghose in his Law of Mortgage in India (Tagore Law Lectures, 1875–1876, 3rd edn., p. 380) states, "The "general rule deducible from the cases is that rights of persons "who have acquired an interest in the mortgaged estate, since the "mortgage cannot be defeated or impaired by any subsequent "arrangement to which they are not parties. If, therefore, a

PONNUSAMI MUDALIAR v. SRINIVASA NAICKAN.

"mortgagee with notice that the equity of redemption in a part of "the mortgaged property has been conveyed releases any part of "the mortgaged estate, he must abate a proportionate part of the "mortgage debt as against such purchaser."

"In other words a mortgagee cannot release a part of the mort-"gaged land, and then seek to enforce his entire claim upon "another portion in which third parties have become interested as "assignees of the equity of redemption."

Therefore, the principle applicable to such cases seems to be that, while the mortgagee does not voluntarily release any portion of the mortgage property from the liability to satisfy his debt, any subsequent assignee from the mortgagor of the equity of redemption on a portion of the said property or any purchaser in a Court sale of such equity of redemption, cannot compel the mortgagee to proceed against the other portion of the mortgaged property or restrict the mortgagee's right to realize the mortgage debt by sale of the portion of the property which is in his possession, and that where the mortgagee voluntarily releases a portion of the mortgaged property from the liability to satisfy the mortgage debt, he can recover from the other portion of such property subsequently mortgaged or sold to a third person only a rateable share of the mortgage debt.

But the further question arises whether a mortgagee who has relinquished his rights over certain lands mortgaged to him can obtain a decree for recovering from the other mortgaged lands that share of the mortgaged debt which can be rateably apportioned thereon without bringing into the record, under section 85 of the Transfer of Property Act the persons in whose favour he had released his rights as above described. This question can be answered in the affirmative if the rule of law laid down in *Subban* v. *Arunachalam* (I.L.R., 15 Mad., 487) and *Hari Kissen Bhagat* v. *Valiat Hussein* (I.L.R., 30 Calc., 755) can be followed. But I doubt whether in reality, any question of law was discussed, and decided in the latter case. In the former case, it does not, appear whether any subsequent encumbrancer whose interest was affected by the mortgagee's relinquishment of a portion of the mortgaged property was a party. On the other hand, the various other decisions of the Madras High Court reported and unreported, and that of the Allahabad High Court appear to lay down that section 85 of the Transfer of Property Act is imperative and that non-joinder of a necessary party is fatal to the suit. It may be

PONNUSAMI MUDALIAR v. SRINIVASA NAICKAN.

also stated that the non-joinder in the present suit of the persons in whose favour Muthukrishna Mudali, plaintiffs' predecessor in title, had executed release deeds as evidenced by the four documents filed herein as exhibits IV series, and of Veeramuthu Padayachi in whose favour exhibit V was executed by the first defendant, that the non-inclusion in the plaint of the properties alienated to them prevents a proper and effectual decision of the mortgage amount which can be apportioned on the properties subsequently mortgaged to second defendant.

The Subordinate Judge dismissed the suit with reference to these findings.

The plaintiffs appealed to the High Court.

S. Muthia Mudaliar for appellants.

T. Subrahmania Ayyar for first and third respondents.

K. Ramachandra Ayyar for second respondent.

JUDGMENT.—The law is, we think, correctly stated by the Subordinate Judge in paragraphs 18 and 19 of his judgment, *vide* (*Krishna Ayyar* v. *Muthukumarasawmiya Pillai*(1)), but we think that he was wrong in holding that he was bound to dismiss the suit with reference to section 85, Transfer of Property Act. In the state of facts existing in this case that course was not necessary, since no relief is claimed against the persons interested in the portions of the property not included in the suit (*Subban* v. *Arunachalam*(2), *Sheo Tahal Ojha* v. *Sheodan Rai*(3), *Hari Kissen Bhagat* v. *Valiat Hussein*(4)). There is no reason why the plaintiffs should not in the suit, as brought, be allowed to recover what is due to them, not exceeding the amount rateably due on the property they proceed against.

We reverse the decree of the Subordinate Judge and remand the suit for disposal according to law. Costs will abide the result. The plaintiffs and defendants Nos. 1 and 2 have put in a compromise of the suit as between them and the Subordinate Judge will give effect to it in disposing of the suit.

(1) I.L.R., 29 Mad., 217 at p. 224. (2) I.L.R., 15 Mad., 487.
(3) I.L.R., 28 All., 174. (4) I.L.R., 30 Calc., 755.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Sankaran-Nair.

SAMOO PATTER (THIRD DEFENDANT), APPELLANT,

v.

ABDUL SAMMAD SAHEB AND OTHERS (PLAINTIFFS AND DEFENDANTS NOS. 1 AND 2 AND LEGAL REPRESENTATIVES OF THE FIRST AND THIRD PLAINTIFFS), RESPONDENTS.*

1908. January 28.

Transfer of Property Act—Act IV of 1882, ss. 59, 100—Mortgage-deed not attested as required by s. 59 cannot create a charge under s. 100.

An instrument, which is invalid as a mortgage for want of attestation under section 59 of the Transfer of Property Act, cannot operate to create a charge under section 100 of the Act.

Royzuddi Sheik v. *Kali Nath Mukerjee*, (I.L.R., 33 Calc., 985), followed.

THE plaintiffs attached certain properties belonging to defendants Nos. 1 and 2 in execution of a decree obtained against them. The third defendant put in a claim to the effect that he had a hypothecation on the properties to the extent of Rs. 10,000. The claim was allowed to the extent of Rs. 4,000 and odd, and the present suit was brought by the plaintiff for a declaration that the properties were liable to be attached and sold free of any encumbrance in favour of third defendant.

The mortgage deed relied on by third defendant was not attested as required by section 59 of the Transfer of Property Act.

The Subordinate Judge passed a decree in favour of the plaintiff.

The third defendant appealed.

C. V. Anantakrishna Ayyar for appellant.

T. R. Ramachandra Ayyar and *T. R. Krishnaswami Ayyar* for second respondent.

JUDGMENT.—We are unable to agree with the contention of the appellant that an instrument, which cannot operate as a mortgage for want of due attestation as required by section 59 of the Transfer of Property Act, operates as a charge under section

* Appeal No. 62 of 1904, presented against the decree of P. G. Itteyerah, Esq., Subordinate Judge of South Malabar at Palghat, in Original Suit No. 24 of 1903 (Appeal Suit No. 850 of 1903 on the file of the District Court of South Malabar, transferred to the High Court).

SAMOO PATTER v. ABDUL SAMMAD SAHEB.

100 of that Act. In the case of *Neelakantam Iyer* v. *Madasamy Tevan*(1) no one appeared for the respondent, and the passage in *Mithiram Bhat* v. *Somanatha Naickar*(2) is only a dictum. On the other hand the question is fully considered in *Royzuddi Sheik* v. *Kali Nath Mookerjee*(3), with which we agree, and the same view is taken by the Bombay High Court in *Narayan* v. *Lakshmandas*(4). This was the only question argued in the appeal which must be dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Sankaran-Nair.

1908. January 22, 28.

SURAMPALLI BANGARAMMA (PLAINTIFF), APPELLANT,

v.

SURAMPALLI BRAMBAZE (DEFENDANT), RESPONDENT.*

Hindu Law—Maintenance—Right of wife who had lived apart from her husband during his life-time to claim maintenance after his death—Father-in-law having ancestral property bound to maintain under such circumstances.

A wife living apart from her husband without any justifying cause, is not entitled to claim maintenance from him, as in so doing she commits a breach of duty to him.

After his death, however, she is entitled, though she lives apart, to claim maintenance from her father-in-law who has taken her husband's estate as there is no duty on her part to live with him, provided she does not live apart for corrupt purposes.

Per WALLIS, J.—A wife living apart from her husband for no improper purpose, may at any time return and claim to be maintained. Her right is not forfeited but only suspended during the time she commits a breach of duty by living apart and is revived when at his death such duty ceases to exist. The Court may under the circumstances be justified in awarding her maintenance on a less liberal scale than it otherwise would.

Per SANKARAN-NAIR, J.—The father-in-law is under a moral obligation to maintain his daughter-in law, which ripens into a legal obligation against the assets in the hands of his heirs.

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(1) 17 M.L.J., 39.
(2) I.L.R., 24 Mad., 397.
(3) I.L.R., 33 Calc., 985.
(4) 7 Bom. L.R., 934.

* Appeal No. 113 of 1904, presented against the decree of J. H. Munro, Esq., District Judge of Vizagapatam, dated 19th April 1904, in Original Suit No. 22 of 1903.

SURAMPALLI BANGARAMMA v. SURAMPALLI BRAMBAZE.

Renjammal v. *Echammal*, (I.L.R., 22 Mad., 305 at 307), referred to.

The husband is under a moral obligation to support a wife when she is living apart from no corrupt motive; and this moral obligation ripens into a legal obligation on the father-in-law when, on the death of the son, he takes ancestral property.

The rights of a wife and widow respectively to maintenance rest entirely on different grounds. The former is a personal obligation on the husband based on the identity arising from marriage relations and is not dependant on the possession of property.

The right of a widowed daughter-in-law to claim maintenance from her father-in-law is based on the possession of ancestral property by the latter and cannot be defeated by any breach of duty on her part towards her husband which might disentitle her to enforce a distinct claim in respect of a different relation and on account of considerations peculiar to that relation.

SUIT for maintenance by plaintiff against the defendant, her father-in-law. The defendant contended *inter alia*, that the plaintiff was not entitled to any maintenance as she lived apart from her husband till his death without any justifying cause. The judgment of the lower Court on this point was as follows :—

The defendant further contends that he is not liable to maintain the plaintiff by reason of her conduct. It is clearly established that the plaintiff after living with her husband for four or five years, left him, and refused to return to him, and even said he might marry again if he liked. No attempt has been made by the plaintiff to show that she had any justifying cause for leaving her husband. Some time after her final refusal to return, plaintiff's husband married a second wife who lived with him for a year or more until his death. During her husband's life-time plaintiff did not make any demand for separate maintenance. Had she done so, she must, as the evidence stands, have been unsuccessful, for she was living apart from her husband without any sufficient cause —*vide* Mayne's 'Hindu Law,' 6th edition, at p. 592. Thus, up to the moment of her husband's death, plaintiff was not in a position to claim maintenance, and defendant contends that her husband's death cannot place her in any better position. The point is not one touched upon by Mr. Mayne, nor has either side been able to refer me to any authority upon it. I think defendant's contention is reasonable. Plaintiff can only claim maintenance from defendant on the ground that he has taken the property of her deceased's husband. If during the life of her husband she was entitled to be maintained out of his property, she would be entitled to maintenance from defendant who has taken that property. But seeing

SURAMPALLI BANGARAMMA v. SURAMPALLI BRAMBAZE.

that during her husband's life-time she had no claim for maintenance upon his property, I know of no principle upon which it can be held that such a claim will attach upon that property in the hands of defendant. I therefore find that defendant is not bound to maintain the plaintiff.

The District Judge dismissed the suit.

The plaintiff appealed.

P. R. Sundaram Ayyar for appellant.

T. R. Ramachandra Ayyar and *T. Ramachandra Rau* for respondent.

JUDGMENT (WALLIS, J.).—The question we are called upon to decide in this case is whether a wife who without sufficient cause leaves her husband and lives apart from him during his life-time forfeits her right of maintenance against his estate after his death.

It is undoubtedly the duty of a Hindu wife to live with her husband and under his protection; and if, without due cause, she leaves him and lives apart she cannot claim to be maintained by him. There is, however, no authority for saying that after leaving him she has no right to return and live under his protection. Hindu law does not recognise any divorce or dissolution of the marriage tie; and in the absence of clear authority to the contrary I am of opinion that it is her right and also her duty to return to her husband. I am not referring to cases of unchastity which is not alleged here. If she is entitled to be maintained by her husband during his life on her returning to him, it appears to follow that, her right to maintenance is only suspended so long as she goes on committing a breach of her duty by living away from him. After his death it is no longer possible for her to live with him, and she is not committing any breach of duty in failing to do so. Consequently there is nothing to prevent her from enforcing a widow's claim to maintenance. It might not be an unreasonable rule to punish the misconduct of a Hindu wife in leaving her husband without due cause by depriving her of her right to maintenance either during his life or after his death, and if there were any such well established rule we should of course be bound to enforce it. It is not however in my opinion the function of this Court to create such a rule; and that no such rule now exists is clear to my mind from the failure of the respondent's vakil to produce any direct authority in support. It is however

SURAMPALLI BANGARAMMA v. SURAMPALLI BRAMBAZE.

in my opinion open to the Court to have regard to the conduct of the widow in fixing the amount of her maintenance; and I am inclined to think that under the circumstances of this case, it should be fixed at a less liberal rate than would otherwise be awarded. Under the circumstances I think an allowance of Rs. 7 a month will be sufficient. The decree of the lower Court must be set aside and decree given for the plaintiff from the 15th March 1903, the amount to be payable on the 1st of every month, with proportionate costs throughout.

SANKARAN-NAIR, J.—This is an appeal from the decree of the District Judge of Vizagapatam dismissing the plaintiff's suit brought by her to recover arrears of maintenance from the defendant her father-in-law, who is found by the Judge to be in possession of ancestral property, on the ground that, up to the moment of her husband's death, she was not in a position to claim maintenance from him as she was living apart without any sufficient cause and that her husband's death cannot place her in a better position.

It is not alleged that the plaintiff was unchaste or that her conduct was otherwise improper. It is also not contended that she was bound to live with the defendant.

It is true that the plaintiff claims maintenance from her father-in-law on the ground that he has taken the property of her deceased husband. But I am not aware of any rule of Hindu law that a widow is entitled to maintenance out of the property in the possession of a member of her husband's family only if she would have been entitled to claim maintenance from the person whose property is now vested in such member. In that case a widow who had no legal claim to maintenance against the father-in-law, who had no ancestral property, could acquire none against the heir who takes his assets. But it has now been held by all the High Courts that the father-in-law is under a moral obligation which ripens into a legal one against his assets in the hands of his heir to maintain his daughter-in-law. In Madras it has further been held that the rule of non-liability established with reference to the self-acquired property of the father-in-law ought not to be extended to other property which may not be liable to partition at the instance of the husband, as ancestral property, if not self-acquired, for instance property acquired from a maternal grandfather. (See *Rangammal* v.

SURAMPALLI BANGARAMMA v. SURAMPALLI BRAMBAZE.

Echammal and others(1).) The texts collected in *Savitribai* v. *Luximibai and Sadasiv Ganoba*(2) seem to show that the husband is under a moral obligation to maintain his wife though living apart. If so the decisions above referred to, would support her claim.

As the father-in-law is under a moral obligation to maintain a daughter-in-law who lives apart without any sufficient excuse, but without any corrupt motives, and who may have been living apart from her husband, there is no reason why the possession of ancestral estate which converts it into a legal obligation should impose conditions on the exercise of the widow's claim. That such moral obligation at least exists cannot now be denied. (See the cases of *Kamini Dassee* v. *Chandra Pode Mondle*(3), *Devi Persad* v. *Gunwanti Koer*(4) and *Adhibai* v. *Cursandas Nathu*(5).) There is also no doubt that the plaintiff would have inherited any self-acquired property of the husband. The right to maintenance is one accruing from time to time. It depends upon her wants and exigencies. The liability to maintain her arises from various considerations.

The right of a wife to maintenance is a matter of personal obligation. It rests on the identity arising from the marriage relations and is not dependent on the possession of any property by the husband. He is bound to support her though he should have no property at all. Her home is in her husband's house; and if she quits him without any adequate excuse, he is not in law bound to maintain her obviously for the reason that she thereby disqualifies herself from performing her duties to him. There is no reason therefore why the plaintiff should not have been entitled to maintenance from the husband on returning to him or offering to return.

A widow's right rests on different considerations. While it has been held that she is entitled to maintenance from the son even if he is not in possession of ancestral property (*Subbarayana* v. *Subbakka*(6)), a similar right against the father-in-law is not admitted. His legal obligation to maintain her out of ancestral property is not now denied. That obligation became enforceable

(1) I.L.R., 22 Mad., 305 at p. 307.
(2) I.L.R., 2 Bom., 597.
(3) I.L.R., 17 Calc., 373.
(4) I.L.R., 22 Calc, 410.
(5) I.L.R., 11 Bom., 199.
(6) I.L.R., 8 Mad., 236.

SURAMPALLI BANGARAMMA v. SURAMPALLI BRAMBAZE.

on her husband's death. His moral obligation is due to the fact that the plaintiff by her marriage with his son "was born again in his family" in the language of the Hindu lawyers; and his legal liability arises on account of his possession of joint family property. That obligation cannot be discharged and her claim defeated by reason of her conduct towards her husband, which might disentitle her to enforce a distinct claim, arising out of a different relation and on account of considerations peculiar to that relation. She has not ceased to be a member of the family. We are therefore of opinion that her claim to maintenance must be allowed.

As to the rate, I am of opinion that Rs. 7 would be sufficient to provide for her in the style to which she is likely to be accustomed, and that such payment would not be an undue burden on the defendant.

We declare her right to maintenance at that rate, and award her that amount from the 15th March 1903, the date of her registered letter (exhibit III) by which she demanded maintenance. The amount will be payable on the 1st of every month.

She will be entitled to her proportionate costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Munro.

VALLAMKONDU SUBBIAH AND OTHERS (DEFENDANTS NOS. 2, 4, 5 AND 6), APPELLANTS,

v.

MALUPEDDI VENKATARAMIAH (PLAINTIFF), RESPONDENT.*

1908. March 13, 23.

Partners—Right of suit—One partner taking a promissory note from other members in respect of sums advanced to the partnership can sue on the promissory note.

Where one of several partners takes a promissory note from other members in repayment of an advance made by him to the partnership, it is competent to him to bring a suit on the note against the members executing it.

* Second Appeal No. 741 of 1906, presented against the decree of M. Ghose, Esq., District Judge of Cuddapah, in Appeal Suit No. 98 of 1905, presented against the decree of M.R.Ry V. V. S. Avadhani Garu, District Munsif of Proddatur, in Original Suit No. 234 of 1905.

VALLAM-KONDU SUBBIAH v. MALUPEDDI VENKATA-RAMIAH.

It is no answer to such a suit that the general accounts of the partnership were not taken at the time the promissory note was given, and that, if such accounts were taken, it would appear that nothing was due to plaintiff. Such a defence amounts to a set off of an unliquidated amount, which is not allowable.

THE facts necessary for this report appear in the judgment.

L. A. Govindaragava Ayyar and *A. Ramachandra Ayyar* for appellants.

I. V. Ramanuja Rao for respondent.

JUDGMENT.—This is a suit by one partner against two other partners upon a promissory note given by them, and the members of their respective joint families have also been joined as defendants. The District Judge has found that accounts between the partners were settled and a balance found due to the plaintiff; and that the partnership was thereupon dissolved, and the promissory note given to the plaintiff for the amount of the balance. For the appellant it is contended that the evidence for the defence shows clearly that this was not so, and that the promissory note was given in repayment of an advance made by the plaintiff to the partnership with interest, and that at the time it was given the general accounts of the partnership had not been taken. If this be so, then it is contended that, one partner cannot maintain a suit against the other partners upon a promissory note so given. We are unable to agree with this contention. No doubt the proper remedy of one partner against the other members of the firm is, ordinarily, a suit for a dissolution of partnership: and one partner has been held not entitled to maintain a suit, other than a suit for dissolution, against the other members of the firm in respect of the partnership transactions, on the ground that the plaintiff as a member of the firm would be a necessary defendant and that a man cannot maintain a suit against himself (*Rustomji* v. *Sheth Purshotamdas*(1)). This however is not a suit against a firm by one of the members of the firm, but a suit by one member of the firm upon a promissory note given him by two other members of the firm in respect of an advance made by him to the firm and interest thereon. It is not contended that the note is without consideration, or that the consideration has failed, but it is said that when the accounts are taken it may appear that there is nothing due to the plaintiff. If this had been so the defendants

(1) I.L.R., 25 Bom., 606.

VALLAM-KONDU SUBBIAH v. MALUPEDDI VENKATA-RAMIAH.

would hardly have given the note; but, in any case, it only comes to this that the defendants have an unliquidated claim against the plaintiff. They are not entitled in law to set off an unliquidated claim; indeed, they have not pleaded a set off. In our opinion, defendants Nos. 1 and 2, the makers of the note have no answer to the suit. As regards the other defendants, the District Judge states that they are members of the undivided families of one or other of the defendants, and interested in their joint trade; but this appears to be merely a statement of the plaintiff's case, as there is no evidence to show that the joint families were interested in the joint trade, and it is not admitted but denied. Under these circumstances they cannot be made liable either on the note or under Hindu Law as explained in *Krishna Ayyar* v. *Krishnasami Ayyar*(1). As regards them the appeal must be allowed with costs. As against defendant No. 2, this second appeal must be dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Boddam and Mr. Justice Sankaran-Nair.

ACHUTHAYYA (DEFENDANT), APPELLANT,

1908. March 18.

v.

THIMMAYYA AND ANOTHER (PLAINTIFFS NOS. 1 AND 2), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, *s.* 521—*Order setting aside award under s.* 521 *can be questioned on appeal against the final decree.*

Where a Court sets aside an award of arbitrators on application under section 521, Civil Procedure Code, and decides on the merits, the Court of appeal can, on appeal from the final decree, inquire into the propriety or otherwise of the order setting aside the award.

Ganga Prasad v. *Kura*, (I.L.R., 28 All., 408), not followed.

(1) I.L.R., 23 Mad., 597.

* Second Appeals Nos. 662 and 663 of 1905, presented against, and Civil Revision Petitions Nos. 244 and 245 of 1905 under section 622 of the Code of Civil Procedure praying the High Court to revise, the decree of A. M. Slight, Esq., District Judge of Kurnool, in Appeal Suit No. 98 of 1904, presented against the decree of M.R.Ry. V. V. S. Avadhani, District Munsif of Gooty, in Original Suit Nos. 661 and 707 of 1902.

ACHUTHAYYA v. THIMMAYYA.

THE facts necessary for this case are stated in the judgment.

K. Narayana Rao for appellant.

T. V. Seshagiri Ayyar for respondent.

JUDGMENT.—These cases depend upon the same question. The suit was referred to an arbitrator. The arbitrator made his award. The defendant applied under section 521, Civil Procedure Code, to set aside the award. The award was set aside by the Munsif. Afterwards, the suit came on for decision on the merits, and was determined by the Munsif in favour of the defendant. The plaintiff appealed, and the District Judge, on appeal, decided that the Munsif was wrong in setting aside the award; and, without going into the merits, reversed the decree of the Munsif, and entered judgment in accordance with the award in favour of the plaintiff. The defendant now objects that the District Judge had no authority to go behind the decision of the Munsif in setting aside the award, relying upon *Ganga Prasad* v. *Kura*(1) and *Kalyan Das* v. *Pyare Lal*(2).

If these cases are intended to decide, and do decide that, on final appeal a District Judge cannot enquire into, and decide as to, the propriety or otherwise of a decision of the Munsif setting aside an award they are contrary to the decisions in *Abdul Rahman* v. *Yar Muhammad*(3), *Chattar Singh* v. *Lekhraj Singh*(4), *Ambica Dasia* v. *Nadyar Chand Pal*(5), *Mothooranath Tewaree* v. *Brindábun Tewaree*(6), *Shyama Charan Pramanik* v. *Prolhad Durwan*(7), *Damodar* v. *Raghunath*(8), and *George* v. *Vastian Soury*(9).

We prefer to follow these latter decisions which we think are right, and we dismiss these second appeals and revision petitions with costs.

(1) I.L.R., 28 All., 408.
(2) 4 A.L.J., 256.
(3) I.L.R., 3 All., 636.
(4) I.L.R., 5 All., 293.
(5) I.L.R., 11 Calc., 172.
(6) 14 W.R., 327.
(7) 8 C.W.N., 302.
(8) I.L.R., 26 Bom., 551.
(9) I.L.R., 22 Mad., 202.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Munro.

ANNAPURANI AMMAL (SECOND DEFENDANT), APPELLANT,

1908. February 14.

v.

SUBRAMANIAN CHETTIAR AND OTHERS (PLAINTIFF AND DEFENDANTS NOS. 1 AND 3), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 283, suit under—Official Assignee of insolvent judgment-debtor not a necessary party to such suit—Decree in such suit cannot declare property liable to be attached but only that it is the property of the judgment-debtor.

Section 283 of the Code of Civil Procedure gives a statutory right of suit to the unsuccessful party in claim proceedings; and when the property of the insolvent judgment-debtor which was attached in execution had vested in the Official Assignee during the pendency of such claim proceedings, the latter is not a necessary party to such suit.

The decree in such suit should, where property had so vested, only declare the property attached to belong to the judgment-debtor, and ought not to declare it liable to attachment.

A OBTAINED a decree for money against *B*, and, in execution, attached the crops on certain lands belonging to *B*. *C*, the wife of *B*, put in a claim petition stating that *B* had sold the lands to her, and that the crops belonged to her. Under orders of Court she deposited Rs. 125 as the value of the ground-nut crop. Her claim was allowed, and the amount deposited was paid back to her. During the pendency of the proceedings *B* sought the protection of the Insolvency Court and all his property was vested in the Official Assignee.

A brought a suit against *B*, *C*, and the Official Assignee, under section 283 of the Civil Procedure Code, to have it declared that the sale by *B* to *C* was fraudulent and that the crops belonged to *B*. The plaintiff prayed that *C* be directed to pay him the Rs. 125 deposited and returned to *C*. *B* and the Official Assignee remained *ex parte*.

* Second Appeal No. 848 of 1905, presented against the decree of F. D. P. Oldfield, Esq., District Judge of Tanjore, in Appeal Suit No. 842 of 1904, presented against the decree of M.R.Ry. T. S. Thiagaraja Aiyar, District Munsif of Mannargudi, in Original Suit No. 148 of 1903.

ANNAPURANI AMMAL v. SUBRAMANIAN CHETTIAR.

A's suit was dismissed, and he appealed without making the Official Assignee a party. The District Court allowed the appeal and decreed as follows :—

"This Court doth order and decree that the decree of the lower Court be, and the same hereby is reversed, and it is hereby declared that the sale to second defendant of the land specified below is fraudulent and without consideration, and that the ground-nut and paddy crops raised by the first defendant on the said land and attached by the plaintiff belonged to first defendant, and that plaintiff do recover from second defendant Rs. 125 which she had deposited on account of the value of the said crops and of which she has obtained a refund, and this Court doth further order and decree that defendants do pay to plaintiff Rs. 32 for his costs of this appeal and Rs. 34-15-0 for his costs incurred in the lower Court."

C appealed to the High Court.

T. V. Muthukrishna Ayyar for *T. V. Seshagiri Ayyar* for appellant.

The Hon. The Advocate-General for first respondent.

JUDGMENT.—In this case the crops on the land of an insolvent-debtor were attached by the respondent. The appellant put in a claim which was allowed, and the decree-holder sued under section 283 of the Civil Procedure Code making the Official Assignee a party. The suit was dismissed by the District Munsif and the decree-holder alone appeals. The questions raised are whether under the circumstances the decree-holder was entitled to sue and, if so, whether he was entitled to appeal.

In *Sadodin* v. *Spiers*(1) it was held that, after the vesting order, the insolvent could not sue to recover property vested in the Official Assignee. This decision does not apply to the present case. The decree-holder has attached, and the appellant having successfully claimed the property, the decree-holder has a statutory right of suit to establish his right by instituting a suit under section 283, and this has recently been explained by the Privy Council in *Bibi Phul Kumari* v. *Ghamshyam Misra*(2), as a suit to set aside the summary order passed on the claim petition. The Official Assignee is not a necessary party to such a suit, and the questions must be answered in the affirmative. The decree-

(1) I.L.R., 3 Bom., 438. (2) 17 M.L.J., 618.

ANNAPURANI AMMAL v. SUBRAMANIAN CHETTIAR.

holder, however, after the judgment-debtor's insolvency, is not entitled to a decree declaring the property liable to be attached, but he is entitled to a decree declaring that the property is that of the judgment-debtor. This is what the first part of the decree of the lower Appellate Court gives. The rest of the decree which awards him a decree for Rs. 125 against the claimant must be set aside, as the right to this sum is now vested in the Official Assignee. The decree of the lower Appellate Court will be modified accordingly. Each party will bear his own costs throughout.

APPELLATE CIVIL.

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

RAMACHANDRA NAIKER (PLAINTIFF), APPELLANT,

v.

VIJAYARAGAVULU NAIDU AND ANOTHER (DEFENDANTS NOS. 4 AND 5), RESPONDENTS.*

1908. January 8, 17.

Hindu Law—Will, construction of gift to female—Gift for maintenance may be of an absolute estate—Where testator gives a female immoveable property for maintenance and makes several devises of other properties to others and adds a clause declaring the gifts to be absolute, the gift for maintenance will be an absolute gift—Devises in possession of land under an invalid will must be presumed to prescribe for the estate given by the will.

An absolute gift of immoveable property to a widow for maintenance is not unknown to Hindus or repugnant to their ideas of propriety.

In construing a will, every portion of it must be given the full effect which, on a natural and grammatical construction of the will, must be allowed to it, and no portion of it ought to be rejected unless such a construction makes the provisions of the will inconsistent with each other or leads to results which must be repugnant to the testator's ideas of propriety.

Where a Hindu testator by his will gave immoveable property to a widow stating it to be for her maintenance, and, after making various other gifts, added a clause by which he declared that all the gifts under the will should be absolute, there is no such inconsistency or repugnancy in giving the clause its natural and grammatical construction by making it applicable to the gift to the widow, and she will accordingly take an absolute interest in the property.

* Second Appeal No. 1416 of 1904, presented against the decree of F. D. P. Oldfield, Esq., District Judge of Tanjore, in Appeal Suit No. 416 of 1904, presented against the decree of M.R.Ry. C. V. Visvanatha Sastri, District Munsif of Shiyali, in Original Suit No. 125 of 1903.

RAMA-CHANDRA NAIKER v. VIJAYA-RAGAVULU NAIDU.

By so construing the will, the subsequent clause only removes the ambiguity in the case of all the gifts and does not alter any material portion of the will.

The statement by the testator that he gave such property 'out of sympathy' will not affect the absolute nature of the estate given, if there was no legal obligation on him to provide for such widow's maintenance in his will.

Where a person takes possession of property under a will, which cannot legally operate to convey such property, the person so entering on possession must be presumed to prescribe for the interest which the will purports to give him; and the burden of proving that he prescribed for something less will be on the party alleging it.

ONE Lingappa Naiken made his last will and testament on the 8th March 1871. Prior to the execution of his will he had adopted a son,—his only son having died leaving a widow, Thirumalai Ammal. Under his will Lingappa Naiken made various gifts of lands to his divided dayadies and others including his widowed daughter-in-law to whom he devised by his will 5 velis in the following terms :—

"[Land] given to Thirumalai Ammal, widow of Sami Naicken, my son, who died issueless, for her sustenance, etc., as requested by her."

The land is then described and the devise concludes "Total inclusive of nanja and punja, 5 velis.

After the various dispositions referred to, the will stated, "Thus I have given away 20 velis of nanja, punja and other lands to the above persons, as gift, and out of sympathy, so that they may enjoy them as they liked with power of alienation by gift, sale, exchange, etc."

The testator died a few days after making his will ; and Thirumalai Ammal took possession of the lands given to her.

In 1892, Alagiri, the brother of Thirumalai Ammal, and two others, *A* and *B*, took certain lands on lease from the Court of Wards for five years. *A* and *B* mortgaged their landed property as security for the due performance of the conditions of the lease, while Thirumalai Ammal transferred the lands devised to her as security for Alagiri's performance of the conditions of the lease.

The rent payable in respect of the lease having fallen into arrears, the Court of Wards sued the lessees, and Thirumalai, and obtained a decree, in 1900, for Rs. 4,000 and odd, which amount was recovered from *A* and *B*. Thirumalai Ammal died in 1900 shortly after the decree, and Alagiri died in 1901, leaving his sons, defendants Nos. 1 to 3. *A* brought this suit for contribution and

RAMA-CHANDRA NAIKER v. VIJAYA-RAGAVULU NAIDU.

sought to recover against the lands of Thirumalai Ammal. The defendants impeached the will, and contended that, if genuine, it conferred only a life-interest on Thirumalai Ammal and that, apart from the will, Thirumalai Ammal did not acquire an absolute interest by adverse possession. The Munsif passed a decree in favour of the plaintiff. On appeal, the District Judge held that Thirumalai Ammal took only a life estate and exempted the lands from liability.

The plaintiff appealed.

The Hon. Mr. *V. Krishnaswami Ayyar* and *K. Jagannadha Ayyar* for appellant.

The Hon. The Acting Advocate-General for the respondents.

JUDGMENT.—The question in this case is, what is the nature of the estate taken by Tirumalai Ammal under her father-in-law's will ? The will recites the adoption of one Ramachandran by the testator, and then describes all the immoveable property disposed of, the description ending with the words "These I have." Then follows a description of the property devised to different persons.

The first devise commences with the words "given by me out of grace to my divided dayadies, namely," the devisees are then named, and the land is described, the description concluding with "Total nanja, punja and other lands measuring 3 velis 5 mahs of land is given to them." After some other devises, all in substantially the same form as the first, we have that in question "Given to Tirumalai Ammal, widow of my son Sami Naiken who died issueless, for her sustenance and other things as requested by her." The land is then described, and the devise concludes "Total inclusive of nanja and punja, 5 velis. These for the said person." Then, after one further gift of land, we have the important sentence "Thus I have given away 20 velis of nanja, punja and other lands to the above persons, as gift and out of sympathy, so that they may enjoy them as they like with all ownership, rights, with power of alienation by gift, sale, exchange, etc."

The question for decision is, in effect, whether this sentence which we will call the general clause is to be applied to the gift to Tirumalai Ammal. The learned Advocate-General conceded that, if it be so applied, the estate taken is an absolute estate. But he contended that we ought not to apply it. His reasoning is, put even more briefly than he put it, that the first clause stating the gift declares it to be for maintenance and therefore

RAMA-CHANDRA NAIKER v. VIJAYA-RAGAVULU NAIDU.

a gift of a life-estate, and the general clause later on should not be admitted to enlarge the estate. The testator being a Hindu must be deemed to have contemplated the gift of no more than a widow's estate, and by an oversight to have set out the general clause as applicable to all the gifts.

We cannot accept this view. There is no doubt (it is not denied) that, naturally, and grammatically, the general clause ought to be applied to all the gifts preceding it in the instrument. The extent of 20 velis can be made up only by including the gift to Tirumalai Ammal, and to give effect to the Advocate-General's contention, we must assume (for there is no evidence) that, the testator, who correctly totalled up the extent given, forgot that one of the gifts was for Tirumalai Ammal. There is nothing to support any such presumption.

It was not shown to us that an absolute gift of immoveable property to a widow for maintenance is unknown among Hindus, or repugnant to their ideas of propriety, nor is there anything inconsistent or difficult to harmonise in the will, if the general clause is applied to the gift. It was suggested that a gift of an absolute estate for maintenance could not properly be described as given "out of sympathy," but there was no obligation on the testator to provide for the lady's maintenance in his will: it was the duty of his adopted son to maintain her after his death and the phrase "out of sympathy" is not inapplicable to the gift to her. The two sentences stand perfectly well together. The land is given for the maintenance of the devisee at her request, out of sympathy to be held by her as absolute owner: if this had been embodied in a single clause no possible objection could have been raised to its construction as conveying an absolute estate.

No doubt if we were entitled to strike the general clause out of the will, we might have to construe the instrument as conveying absolute estates to all the male devisees and a life estate to Tirumalai Ammal, but, to arrive at that conclusion, we should have in the case of all the gifts to construe the document by the light of presumptions.

The general clause removes the ambiguity in all cases, but it does nothing more: it does not require us to strike out or alter a material word in any one of the special clauses in order to give effect to the several devices.

RAMA-CHANDRA NAIKER v. VIJAYA-RAGAVULU NAIDU.

We are therefore of opinion that by the terms of the will the land in suit was given absolutely to Tirumalai, and she consequently held it as absolute owner if the testator had power to give it to her.

Whether he had such power or not we need not decide, nor is it necessary to decide whether the only person entitled to contest the gift, the testator's adopted son, ratified or confirmed or acquiesced in it. For assuming the gift invalid there is no doubt that Tirumalai entered into possession under the will, and in the absence of evidence to the contrary she must be held to have prescribed for the estate given her by it. The District Judge does not say that there is evidence to the contrary. We do not understand him to mean, and we do not see how he could properly mean, that the circumstances to which he draws attention suggest any positive inference of an intention in Tirumalai Ammal to prescribe for a less estate than that given her by the will. The District Judge says, and it is the most that we can say on the evidence as he describes it, that the course of dealing with the property does not suggest the inference that Tirumalai prescribed for a larger estate than a widow's estate, but this is, on our construction of the will, to throw the onus on the wrong party. Had the District Judge construed the will as we do, we feel little doubt that he would have arrived on the question of prescription at the conclusion at which we have arrived, that Tirumalai Ammal prescribed for the absolute estate given by the will.

The appeal is allowed with costs here and in the lower Appellate Court and the decree of the Court of First Instance is restored.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Munro.

1907. November 18, 19. December 4. 1908. March 12.

ADIPURANAM PILLAI (PLAINTIFF-PETITIONER), APPELLANT IN BOTH,

v.

GOPALASAMI MUDALI AND OTHERS (DEFENDANTS NOS. 1 TO 7 AND SUPPLEMENTAL DEFENDANTS NOS. 8 AND 9), RESPONDENTS IN BOTH.*

Transfer of Property Act—Act IV of 1882, *s.* 88—*Decree for sale—Mortgagor can pay decree amount at any time after decree and before sale completed—Right to make such payment not lost at the expiry of the period limited—Section* 244, *Civil Procedure Code—Court executing may put mortgagor so paying in possession under s.* 244, *Civil Procedure Code—Interest, rate of, to be allowed to mortgagee.*

A decree for sale under section 88 of the Transfer of Property Act is a final decree, and all subsequent proceedings are proceedings in execution of that decree; and the provisions of the Code of Civil Procedure apply to them so far as they are applicable. In the absence of anything to the contrary in the decree, the judgment-debtor is entitled to stop execution by payment of the debt at any time after the decree is passed, and before the sale in execution is complete; and it is not finally complete until he has had an opportunity of obtaining its rescission under section 310 (A) of the Code.

Mallikarjunadu Setti v. *Lingamurti Pantulu*, (I.L.R., 25 Mad., 244), followed. *Bibijan* v. *Sachi Bewah*, (I.L.R., 31 Calc., 863), followed.

The provision in a decree for sale at the suit of a mortgagee for delivery of possession in the event of payment within time, need not, to that extent, be necessarily considered as a decree or order in favour of the mortgagor, with all the incidents of a decree for redemption in a suit brought by the mortgagor himself. The provision may well be regarded as laying down the conditions on which the mortgagee is to receive payment. Even, if regarded as a decree in favour of the defendant-mortgagor, it is a decree forced on him by the mortgagee. It is not easy to see why the mortgagee by forcing this decree on the mortgagor should be enabled to convert his decree for sale into one for foreclosure. The mortgagor as decree-holder may waive the benefit of the decree thus forced on him; his right as judgment-debtor to pay the debt into the execution Court and have satisfaction entered up will remain unaffected.

* Civil Miscellaneous Appeals Nos. 25 and 26 of 1907, presented against the orders of M.R.Ry. V. Subramaniyam Pantulu, Subordinate Judge of Tanjore, dated 10th January 1907 and 22nd November 1906, respectively, in Execution Applications Nos. 2426 to 2429 of 1906, and Execution Petition No. 240 of 1906 in Original Suit No. 58 of 1906.

Vallabha Valiya Rajah v. *Vedupuratti*, (I.L.R., 19 Mad., 40), considered.

The rule of law laid down that a mortgagor who has obtained a decree for redemption cannot apply for execution of the decree after expiry of the time limited, must be confined to decrees for redemption passed at the suit of the mortgagor.

The right of the mortgagor to possession on payment of the decree amount raises a question relating to the satisfaction of the decree within the meaning of section 244 of the Code, and must be determined by the Court executing the decree. He is not bound to bring a separate suit for posession.

The deed of usufructuary mortgage on which the suit was brought provided for redemption in the month of May. The decree contained no restrictions as to the date of payment and the mortgagor paid the money into Court in November and ousted the mortgagee.

In determining the amount to which the mortgagee was entitled as interest:

Held, that the original contract to take the usufruct in lieu of interest was determined when the mortgagee sued for and obtained a decree for sale, and that the mortgagee was not entitled to the melwaram for the whole year but might, in the agreement of the parties, be given a proportionate share for the six months after May.

The parties not agreeing, the Court on further consideration awarded interest at the Court rate of 6 per cent. after the period fixed for redemption.

THESE miscellaneous appeals arose out of proceedings in execution of the decree in Original Suit No. 58 of 1906 in the Court of the Subordinate Judge of Tanjore.

The facts of the case and the contentions urged by the parties are set out in the judgment of the lower Court, the material portions of which are as follows:—

The plaintiff is a mortgagee with possession entitled to enjoy the usufruct of the mortgage property in lieu of interest, and by virtue of a covenant to pay, he has filed a suit to recover the principal sum by the sale of the mortgage property and obtained a decree. The decree as usual provided that the defendant should pay the suit sum within six months from the date of the decree, and that if he did so, plaintiff should deliver possession of the property to defendant, and, in default, that the property should be sold and the sale-proceeds be paid to plaintiff towards the decree, the balance being deposited in Court to the credit of the defendant. The defendant did not pay the decree amount within the time specified, but he having since sold away the mortgaged property to the eighth respondent, the eighth respondent deposited the decree amount in Court and obtained, by a Court warrant, delivery of the property from the plaintiff. This petition is filed by the plaintiff to review the order passed to issue the said warrant, and

ADIPURANAM PILLAI v. GOPALASAMI MUDALI.

to recover possession of the property back from the eighth respondent.

It is contended, in the first place that, the decree having provided for payment and redemption within a specified time, and the payment and redemption not having been made within that time, it could not be allowed to be done afterwards.

By far the main question for determination is as to whether the property could be redeemed after the date specified in the decree. According to section 60 of the Transfer of Property Act, the property could be redeemed at any time after the mortgage money has become payable, provided that the right conferred by the section is not extinguished by the act of the parties, or, by order of the Court.

According to section 89, if payment be not paid within the time specified by the decree, the plaintiff might obtain an order for sale, and then the right of redemption as well as the security are extinguished; and it has been held in *Bibijan Bibi* v. *Sachi Bewah* (I.L.R., 31 Calc., 863) that this consequence would follow only on the actual sale, and not on the mere passing of the order for sale.

It seems to me, therefore, that, even according to the ordinary construction of the sections of the Transfer of Property Act which apply to the circumstances of the case, the right of redemption would subsist until the actual sale of the mortgage property.

It is no doubt true that in a Full Bench case reported in *Vallabha Valiya Rajah* v. *Vedapuratti* (19 Mad., 46) it was held that the plaintiff, the mortgagor, was not entitled to apply for execution of the decree after the time limited in the decree. It was however a decree for a redemption, and it is doubtful if it applies to mere decrees for sale which are construed to be more or less decrees for money.

It was also observed that even after the said order was passed, there still remained to the mortgagor, the right which under the provisions of the Civil Procedure Code, every judgment-debtor had to prevent the sale by paying money into Court.

It has been held in *Ganja Prasad* v. *Kura* (28 All., 28) that the person holding the equity of redemption need not wait until the property was put up to sale, and that it is open to him to pay the amount under section 291 of Civil Procedure Code at any time before sale.

ADIPURANAM PILLAI v. GOPALASAMI MUDALI.

It is thus clear that even after the date fixed in the decree for payment was past, it is open to the judgment-debtor to pay the money into Court and discharge the decree and stop the sale.

We have next to see, whether in so doing, the defendant might also obtain possession of the mortgage property from the plaintiff in execution when the decree is discharged and the sale is stopped. It seems to me that the plaintiff should give up the mortgage property and allow the defendant to resume the same.

I am therefore of opinion that, though it was not expressly provided for by the Code, it is a matter which relates to "the execution, discharge, or satisfaction of the decree," and could be dealt with effectively under clause (*e*) of section 244 of Civil Procedure Code.

I am therefore of opinion that the delivery of the mortgage lands could be ordered, and the order could be executed against the plaintiff when the decree amount is deposited in Court.

For all the foregoing reasons, I am of opinion that the delivery of the mortgage property made to eighth the respondent, must be confirmed, and hereby doing so, I resolve to dismiss the review petition and the other three connected petitions.

The plaintiff appealed to the High Court.

The Hon. The Advocate-General for appellant.

The Hon. Mr. *V. Krishnaswami Ayyar*, *A. Nilakanta Ayyar*, *T. V. Gopalasamy Mudaliar* and *S. Muthia Mudaliar* for respondents.

JUDGMENT.—The plaintiff holding an usufructuary mortgage, dated the 27th August 1901, containing a covenant to pay, sued for sale on his mortgage, and on the 16th December 1905 obtained a decree in the usual form fixing a term of six months for payment of the money due and directing a sale in default of payment.

The mortgagors did not pay on the date fixed for payment, the 16th June 1906, but some months later, on the 22nd of November 1906, paid the principal money into Court with an application in the form of an application for execution of a decree and obtained delivery of possession of the mortgaged property. Till then the mortgagee remained in possession but had not, when he was ousted, applied for an order for sale under section 89 of the Transfer of Property Act.

He refused to receive the money, and now contends that the Court had no power in execution proceedings, to permit the

ADIPURANAM PILLAI v. GOPALASAMI MUDALI.

mortgagors to pay it into Court, and to direct delivery of possession to him, they not having paid on or before the 16th of June 1906.

Now according to the view taken by the majority of the full Bench of this Court in *Mallikarjunadu Setti* v. *Lingamurti Pantulu*(1), a decree for sale under section 88 of the Transfer of Property Act is a final decree, and all subsequent proceedings are proceedings in execution of that decree, and to them the provisions of the Code of Civil Procedure, are, so far as they may be applicable, to be applied. Unless then there is something in the decree to debar him from so doing, the judgment-debtor is entitled to stop execution by payment of the debt at any time after the decree has been passed, and before the execution sale is complete, and it is not finally complete until he has had his opportunity of obtaining its rescission under section 310-A of the Code.

As was pointed out by Geidt, J., in *Bibijan Bibi* v. *Sachi Bewah*(2), the decree for sale does not debar the mortgagor of any right in default of payment, the only penalty affixed to the default is the liability to have the property sold. In this view the mortgagor was entitled to pay the money, and the fact that his application took the form of an execution petition should not make any difference in the result. The learned Advocate-General however contended, if we understood him aright, that that provision of the decree which directs that in the event of payment in due time the property be reconveyed and delivered to the defendant, is a decree or order in the defendant's favour, and the defendant is therefore to that extent a decree-holder within the meaning of section 2 of the Code of Civil Procedure. The decree or order which he holds is a decree or order for redemption, and his application for delivery on payment is an application for execution of that decree or order, and his case is therefore governed by the decision of the Full Bench of this Court in *Vallabha Valiya Rajah* v. *Vedapuratti*(3), where it was held that a mortgagor who has obtained a decree for redemption cannot apply for the execution of the decree after the time limited. The time limit fixed in the decree is, in a suit for sale primarily, and principally, a restriction

(1) I.L.R., 25 Mad., 244. (2) I.L.R., 31 Calc., 863.
(3) I.L.R., 19 Mad., 40.

ADIPURANAM PILLAI v. GOPALASAMI MUDALI.

on the plaintiff. He is to stay his hand for six months and may then execute, as if he held a simple decree for money, by sale of certain property of the defendant. The provision for delivery of possession in the event of payment in time, may well be regarded as merely laying down the condition on which he is to receive payment, and not as a decree or an order in favour of the defendant, but, if it is to be regarded as a decree or order, what follows? On failure to pay on the day fixed the defendant has lost his right to redeem his property in execution of the decree or order in his favour. But it has to be remembered that he is a decree-holder in spite of himself, an involuntary decree-holder, and it is not easy to see why the plaintiff who has chosen to obtain this decree for him, should be enabled, by doing so, not only practically to foreclose his right of redemption, but also to deprive him of the right which the law gives him as judgment-debtor. He did not seek for the decree, and he does not want the decree, and so he does not execute the decree. He thereby loses the privileges of a decree-holder which his creditor has thrust upon him, but he does not thereby lose his rights as judgment-debtor to pay the debt into the execution Court and require satisfaction to be entered up.

To place the defendant in a suit for sale in the same position as regards default in payment as the plaintiff in a suit for redemption in which the decree directs a sale in default of redemption within the time limited, involves, it seems to us, an anomaly, unless we can apply to his case all the provisions of section 93 of the Transfer of Property Act. The defendant in a suit for sale though forced to redeem against his will has not, unless that section can be extended to him, the right to ask the Court to postpone the day fixed for payment, though that right is given by section 93 to the successful plaintiff in a suit for redemption, who in most cases may choose his own time for instituting his suit. It has been suggested by Sir Bhashyam Ayyangar, J., in *Mallikarjunadu Setti* v. *Lingamurti Pantulu*(1), that the Transfer of Property Act ought to have provided for an application for postponement by a defendant in a suit for sale, in order to meet the case in which payment is not made by the defendant within the time limited, and the mortgagee does not choose to apply for an order for sale under

(1) I.L.R., 25 Mad., 244 at p. 282.

ADIPURANAM PILLAI v. GOPALASAMI MUDALI.

section 89. But it seems to us unnecessary to hold that the Legislature which was careful to provide for postponement in cases of suits for foreclosure, and for redemption, failed to perceive that a similar provision might be desirable in suits for sale. It is easier we think to take the view that such a provision was found to be unnecessary in a suit for sale, the reason being that once the decree is passed the defendant can pay at any time before the sale is completed. There is no necessity to give him in this respect any advantage which is not given to judgment-debtors in suits for money. He is in fact in one way better off as he is, for as judgment-debtor he can come in at any time before sale without showing good cause before his payment is permitted.

In his judgment in *Vallabha Valiya Rajah* v. *Vedapuratti*(1), Shephard, J., notices the hardship which may ensue if the rules laid down in that case are to be applied in suits for foreclosure, and declines to express an opinion whether they ought or ought not to be applied in those cases. We think therefore that we are justified in confining the operation of that case to suits to which it actually applies, that is to say, to cases in which the mortgagor is the successful plaintiff in a suit for redemption, and the more so, perhaps, in that the reasoning on which is based the decision of the Full Bench in *Vedapuratti* v. *Vallabha Valiya Rajah*(2) renders it at least doubtful whether a suit for redemption could be maintained by a mortgagor who has failed as defendant in a suit for sale on the same mortgage. If this cannot be done by the mortgagor then the mortgagee may, in many cases, convert at his option his decree for sale into a decree for foreclosure, a course which is not contemplated by the Transfer of Property Act. Sale may, under sections 88 and 92, be ordered in lieu of foreclosure in a suit for foreclosure or redemption, but there is no provision for the conversion of a decree for sale into a decree for foreclosure.

But even if *Vallabha Valiya Rajah* v. *Vedapuratti*(1) be applied to the case of a defendant in a suit for sale, it can only be applied to him *qua* decree-holder and his rights as judgment-debtor are not as we have shown affected by it. The mortgagor, then, was entitled to pay the money into the Court executing the decree when he did, in satisfaction of the decree, and he was clearly not bound to sue for possession in a separate suit.

(1) I.L.R., 19 Mad., 40. (2) I.L.R., 25 Mad., 300.

ADIPURANAM PILLAI v. GOPALASAMI MUDALI.

His claim to enforce his right to possession raised a question relating to the satisfaction of the decree, and raised it between the parties to the suit, and by section 244, Code of Civil Procedure, the Court executing the decree was the proper Court to determine it. It is not contended that it has been wrongly determined.

There remains the question of interest. By the mortgage the plaintiff was to take the usufruct, that is to say, the annual kelwaram for his interest, and if paragraph 3 (*d*) of the plaint correctly sets out the conditions of the deed in this regard, the mortgagors were entitled to redeem only in May of each year, by which month the harvest would be over and the melvaram ascertained and collected. The plaintiff however put an end to the contract by suing and obtaining his decree, and the learned Advocate-General did not make it clear on what principle his client could, in those circumstances, claim the whole melvaram for the year whereof he held possession for only a part. The decree does not direct the mortgagor to redeem only in the month of May.

The learned Advocate-General laid stress on the fact that the crops were grown by his client, but the affidavit on which he relies shows that that only means that the mortgagee had made advances to the ryots, and these, it is to be presumed, he can recover out of the kudivaram. There is certainly no reason why they should be repaid to him out of the melvaram.

It will be just in the circumstances of the case to allow him the melvaram as from June to November inclusive, or half the melvaram of the year as interest for the period until the money was paid. According to the affidavit of Natesa Pillai, dated the 5th December 1906, the amount payable to the plaintiff would then be Rs. 2,150, one moiety of Rs. 4,300, as the kist would we imagine fall to be paid after November by the mortgagor. The amount of Rs. 4,300 is between 14 and 15 per cent. on Rs. 30,000, very heavy interest considering the nature of the security. We must therefore, unless the parties agree to adopt this or some other figure, direct an enquiry and finding as to the amount and value of the melvaram realized for the agricultural year 1905–1906.

These appeals were again posted to be spoken to on Wednesday the 11th December 1907 when the Court delivered the following

ADIPURANAM PILLAI v. GOPALASAMI MUDALI.

JUDGMENT.—The parties have not arrived at an agreement and we have heard arguments again as to the amount to be awarded as interest. We think on consideration that the usual Court rate of 6 per cent. should be allowed as interest on the principal from the date fixed for payment in the decree, viz., the 16th June 1906, to the date of payment into Court, viz., the 17th November 1906, and 6 per cent. on that sum from the 17th November to the date of payment. Parties will pay and receive proportionate costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Munro.

1908. February 19.

BABUBALENDRUNI GURUVARAJU (PETITIONER), APPELLANT,

v.

CHANDRASEKARARAJU, MINOR BY HIS GUARDIAN, GOPINATHA TRIPATI (COUNTER-PETITIONER), RESPONDENT.*

Succession Certificate Act—Act VII of 1889, *s.* 19—*Section* 3 *of Act XXIV of* 1839 *and rule X of rules framed thereunder—General Clauses Act of* 1868, *s.* 2 (12)—*Agent to the Governor, Vizagapatam, is a District Judge within s.* 19 *of Succession Certificate Act and an appeal lies to the High Court against his order—Scope of inquiry in proceedings under Succession Certificate Act.*

Section 2 (12) of the General Clauses Act of 1868 defines a District Judge as the Judge of a Principal Civil Court of Original Jurisdiction.

Under section 3 of Act XXIV of 1839 and rule X of the rules framed thereunder, the Agent is the Judge of the Principal Court of Civil Jurisdiction within the Agency. The Agent is therefore a District Judge within the definition in section 2 (12) of the General Clauses Act of 1868.

The General Clauses Act of 1868 was in force in 1889, when the Succession Certificate Act was passed, and the Agent to the Governor, Vizagapatam, is a District Judge and the Court presided over by him is a District Court as defined in section 3 of the Succession Certificate Act.

An appeal therefore lies to the High Court under section 19 of the Succession Certificate Act from the order of the Agent as from an order of the District Court.

Chakrapani v. *Varahalamma*, (I.L.R., 18 Mad., 227), not followed.

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* Civil Miscellaneous Appeal No. 192 of 1907, presented against the order of R. H. Campbell, Esq., Agent to the Governor at Vizagapatam, in Civil Miscellaneous Petition No. 2 of 1906.

BABU-BALENDRUNI GURUVARAJU v. CHANDRA-SEKARARAJU.

In inquiries under the Succession Certificate Act, the Court may decline to decide points which will involve a lengthy and complicated inquiry.

THE petitioner in this case applied to the Court of the Agent to the Governor, Vizagapatam, for a certificate under section 6 of Act VII of 1889 to enable him to collect debts due to one A, deceased. He claimed as the nearest sapinda of the deceased. The counter-petitioner denied that the petitioner was a sapinda, and claimed the grant to himself on the ground that he was adopted by A.

The Agent passed the following order:—

"I am not disposed to grant a certificate in this case. The petitioner should establish his claim by a regular suit in a Civil Court."

The petitioner appealed to the High Court on the following grounds:—

1. The order of the lower Court is against law.
2. The Agent to the Governor erred in not granting the certificate to the appellant.
3. The Agent to the Governor erred in not holding any enquiry as to the appellant's right to the certificate.
4. No reasons are given by the lower Court to refuse the grant of the certificate to the appellants.
5. The lower Court ought to have held that the appellant has the best *primâ facie* title to the certificate.

V. N. Kuppu Rau for appellant.

C. R. Tiruvenkatachariar for respondent.

JUDGMENT.—It is urged that there is no appeal in this case under section 19 of the Succession Certificate Act from the order of the Agent to the Governor, Vizagapatam, as it is contended that the Agent is not a District Court and the decision in *Chakrapani* v. *Varahalamma*(1) is referred to. Mr. Tiruvenkatachariar has, however, very properly called our attention to the definition of District Judge in the General Clauses Act, 1868, which was in force in 1889 when the Succession Certificate Act was passed.

In section 2 (12) District Judge is defined as the Judge of a Principal Civil Court of Original Jurisdiction.

We think, under section 3 of the Act XXIV of 1839 and rule X, clause 4 of the rules framed pursuant to that Act, the Agent

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(1) I.L.R., 18 Mad., 227.

BABU-BALENDRUNI GURUVARAJU v. CHANDRA-SEKARARAJU.

is the Judge of the Principal Civil Court of Original Jurisdiction in the Agency. In section 3 of the Succession Certificate Act, District Court is defined as a Court presided over by a District Judge.

Consequently under section 19, Succession Certificate Act, an appeal lies from the Agent's order as from an order of a District Court.

In *Chakrapani* v. *Varahalamma*(1) this provision of the General Clauses Act appears to have been overlooked, and we are unable to follow it. The objection must be overruled.

As to the merits, in order to ascertain the title of the petitioner, it would have been necessary for the Agent to go into the pedigree filed by the petitioner as supplemental to his petition in accordance with the Agent's directions. This would have involved a lengthy and complicated inquiry, and we think, under these circumstances, the Agent was justified in not going into the pedigree and dismissing the petition.

The appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Munro.

1908. March 18.

THE EAST INDIAN AND ANGLO-INDIAN DEPOSIT AND LOAN SOCIETY (LIMITED) BY ITS SECRETARY AND TREASURER MR. E. C. D'SENA (PLAINTIFFS),

v.

DR. T. M. NAIR AND ANOTHER (DEFENDANTS).*

Presidency Small Cause Courts Act—Act XV of 1882, *s.* 69—*Negotiable Instruments Act, s.* 84 (2)—*Question whether cheque was presented within reasonable time is a question of fact and cannot be referred to the High Court by Presidency Court of Small Causes.*

The Presidency Court of Small Causes referred to the High Court, under section 69 of the Presidency Small Cause Courts Act, the question whether a cheque was presented within a reasonable time:

(1) I.L.R., 18 Mad., 227.

* Case referred No. 18 of 1907, stated under section 69 of Act XV of 1882 and rule 428 of the Rules of Procedure of the Madras Small Cause Courts by James H. Bakewell, Esq., Chief Judge of the Madras Small Cause Court in Suit No. 8599 of 1907.

MR. E. C. D'SENA v. DR. T. M. NAIR.

Held, that, under section 84 (2) of the Negotiable Instruments Act, the question must be determined with regard to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case.

The question is one of fact and not of law, and is not one which can be referred to the High Court under section 69 of the Presidency Small Cause Courts Act.

THIS was a reference to the High Court by the Chief Judge of the Small Cause Court, Madras, under section 69 of the Presidency Small Cause Courts Act.

The question for decision was whether a cheque had been presented for payment within a reasonable time.

Mr. *T. Richmond* for the plaintiffs.

J. L. Rosario and *M. Kunjunni Nair* for first defendant.

ORDER.—The question whether a cheque has been presented within a reasonable time has to be determined with regard to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case (section 84 (2), Negotiable Instruments Act, 1881).

This is the same rule as is laid down in section 74 (2) of the English Bills of Exchange Act, 1882. The question is in our opinion, clearly, a question of fact, not of law. In England it is held that it is a question of fact for the jury to determine, (*Serle* v. *Norton*(1), and *Wheeler* v. *Young*(2).

As the question is one of fact, it is not a question which the Small Cause Court can refer for the opinion of the High Court under section 69 of the Act. We must, therefore, decline to decide the question. Costs will be provided for by the lower Court's order.

Attorney for the plaintiffs—*A. E. Rencontre.*

(1) 2 M. & R., 401. (2) 13 T.L.R., 468.

APPELLATE CIVIL—FULL BENCH.

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

1907. December 5. 1908. February 3. March 12. April 30.

RANGAPPA NAIK (FIFTH DEFENDANT), APPELLANT IN SECOND APPEAL No. 1158 OF 1904,

v.

KAMTI NAIK AND OTHERS (PLAINTIFFS NOS. 1 AND 2 AND DEFENDANTS NOS. 8, 9, 10, 2, 4 AND 6), RESPONDENTS IN THE ABOVE.

AVUDAYAMMAL AND OTHERS (DEFENDANTS NOS. 7 TO 11), APPELLANTS IN SECOND APPEAL No. 1250 OF 1904,

v.

ELLAPPA NAIK AND OTHERS (PLAINTIFFS AND DEFENDANTS NOS. 13, 14, AND 15), RESPONDENTS IN THE ABOVE. *

Hindu Law—Reversioner—Consent given bonâ fide *and for valuable consideration by the nearest reversioner to an alienation by a widow binds actual reversioner claiming through him.*

Where the widow and the nearest reversioners execute a document by which such reversioners, *bonâ fide*, and, in consideration of the widow conveying to them a portion of the property inherited by her from her husband, give up all their right to the remaining properties, and consent to the widow dealing with such properties as she chooses, the actual reversioners after the widow's death who claim through such nearest reversioners are bound by such consent, and are estopped from questioning alienations made by the widow subsequent to such agreement.

Bajrangi Singh v. *Manokarnika Bakhsh Singh*, (12 C.W.N., 74), followed.

Per Sir ARNOLD WHITE, C.J., and SANKARAN-NAIR, J.—A surrender by a widow in favour of the next reversioner of her interest in the estate inherited from her husband is not valid unless the widow's whole estate is extinguished. The same is the law in regard to alienations made with the consent of nearest reversioners.

Per Sir ARNOLD WHITE, C.J.—The document in this case cannot be construed as extinguishng the widow's estate. The reversioners cannot by a general release of their reversionary right prospectively enable the widow to give an absolute title to property inherited from her husband.

Per WALLIS, J.—The document in the present case is a conveyance by way of release by the reversioners and cannot operate to vest the property in the widow.

* Second Appeals Nos. 1158 and 1260 of 1904, presented against the decrees of M.R.Ry. B. Cammaran Nair, Subordinate Judge of Tuticorin, in Appeal Suit Nos. 234 and 240 of 1903, presented against the decrees of M.R.Ry. T. Krishnaswamy Naidu, District Munsif at Sattur, in Original Suit Nos. 212 and 206 of 1902, respectively.

Next reversioners cannot confer an unrestricted prospective power of alienation on the widow. The power of accelerating the reversioner's estate cannot be used by the widow as a means of enlarging her own estate or effecting alienations to strangers as it will be an abuse of the limited power vested in her. The reversioner's right to validate alienations is not derived from the power to surrender. The former is analogous to the power of Sapindas to consent to an adoption; the latter is based upon the application of the English doctrine of merger. Partial alienations made by the widow will be valid if made with the consent of the next reversioners.

Per SANKARAN-NAIR, J.—The document in this case must be construed as extinguishing the whole life estate of the widow. It amounts to a surrender of the whole to the reversioners and a reconveyance of part to the widow. A widow may alienate for necessary or for religious or charitable purposes, and in such cases, where reversioners consent, the consent is only evidence of necessity or fairness of the transaction, and it is not the consent but the existence of facts evidenced by such consent that validates the transaction. In cases not justifiable on the above grounds, an alienation made with the consent of reversioners is valid. In the last case it is the consent which validates. As however in such cases, the alienations are upheld as a logical consequence of the recognition of the widow's right of surrender, they can be upheld only where a surrender will be valid (*i.e.*), where it extinguishes the life estate. The assent of sapindas necessary to validate an alienation which does not extinguish the whole life estate of the widow, must be such consent as will suffice to validate an adoption made by the widow (*i.e.*), consent which will raise the presumption that the transaction was a fair one, justified by Hindu Law. Such consent, however, must have reference to the particular alienations sought to be impeached.

THE facts necessary for this report are sufficiently set out by (Benson and Munro, JJ.), in the order of reference to the Full Bench which was as follows:—

ORDER OF REFERENCE.—One Sankarappa Naick died in 1849 leaving two widows. In 1850 the three brothers of Sankarappa Naick, who were the whole body of persons constituting the next reversion, executed a document (exhibit IV), by which they said that they had nothing to do with the estate of the widows inherited from their husband and consented to their leaving it to any one they liked. The widows having died, these suits have been brought by the actual reversioners to recover portions of the estate. It is contended that, by reason of the release contained in exhibit IV, the plaintiffs cannot maintain the suits, and reliance is placed upon the latest decision of the Privy Council reported in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh*(1). According to that decision,

(1) 12 C.W.N., 74.

RANGAPPA NAIK v. KAMTI NAIK.

ordinarily, the consent of the whole body of persons constituting the next reversion is sufficient to validate an alienation by a widow. This being so, it is difficult on principle to see how, if the whole body of persons constituting the next reversion consents to a widow doing what she likes with the property inherited from her husband, the actual reversioners at the death of the widow can lay any claim to the property.

We therefore refer to the Full Bench the question whether, in the face of exhibit IV, the plaintiffs can maintain their suits. We make this reference because the case is not, so far as we are aware, governed by any clear authority and because the matter involved is one of great general importance.

[Exhibit IV referred to above is as follows :—

Exhibit IV.

"Agreement executed on 7th Vaigasi of Andu 1025 by us, three persons, viz., Naranappa Naicker, son of Soorappa Naicker, his younger brother Achaiya Naicker and his younger brother Pothi Naicker to Rengammal Parpathammal, wife of our elder brother Sankarappa Naicker. As the house, etc., of Kadukarai belong to our elder brother's wife according to the razinamah in Suit No. 208 of 1848 on the file of the Thukkudi Munsif's Court of Naduvamangalam and as we who are the reversioners of the said Sankarappa Naicker's wife have also given away in writing your foster son Sankarappa Naicker shall enjoy for ever all the properties with the exception of Patta punja No. 55 to 66 punja chain $\frac{5}{8}$ also punja No. 99 in 3 chain $\frac{3}{8}$ also in the field called Naduvapatti chains $1\frac{5}{16}$ for which the patta stands in our father's name and both of us shall divide it into two equal shares and get pattas issued from Fasli 60. We have nothing to do with the said estate. We consent to your leaving it after your lifetime to any one whom you like. To this effect have we executed agreement."]

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

Mr. *B. Dorasami Ayyangar* for *A. K. Sundaram Ayyar* for appellant in Second Appeal No. 1158 of 1904.

Mr. *Joseph Satya Nadar* for appellant in Second Appeal No. 1250 of 1904.

RANGAPPA NAIK v. KAMTI NAIK.

T. T. Thiruvengada Chariar for *V. Krishnaswami Ayyangar* for third and fourth respondents in Second Appeal No. 1158 of 1904.

First and second respondents in Second Appeal No. 1250 of 1904 and other respondents in both not appearing in person or by counsel.

The Court expressed the following

OPINION (Sir ARNOLD WHITE, C.J.).—The Order of Reference is in these terms

"One Sankarappa Naick died in 1849 leaving two widows. In 1850 the three brothers of Sankarappa Naick, who were the whole body of persons constituting the next reversion, executed a document (exhibit IV), by which they said that they had nothing to do with the estate of the widows inherited from their husband and consented to their leaving it to any one they liked. The widows having died, these suits have been brought by the actual reversioners to recover portions of the estate. It is contended that, by reason of the release contained in exhibit IV, the plaintiffs cannot maintain the suits and reliance is placed upon the latest decision of the Privy Council reported in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh*(1). According to that decision ordinarily the consent of the whole body of persons constituting the next reversion is sufficient to validate an alienation by a widow. This being so, it is difficult on principle to see how, if the whole body of persons constituting the next reversion consents to a widow doing what she likes with the property inherited from her husband, the actual reversioners at the death of the widow can lay any claim to the property. We therefore refer to the Full Bench the question whether, in the face of exhibit IV, the plaintiffs can maintain their suits. We make this reference because the case is not so far as we are aware governed by any clear authority and because the matter involved is one of great general importance."

The document is not altogether easy to construe, but I read it as a release to the widow by the reversioners of their reversionary interest in consideration of the widow conveying to them her interest in a portion of the property. I do not think the document can be construed as extinguishing the whole of the widow's estate and, unless the whole of the estate is extinguished, the surrender in my view of the law is not effective. This was

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(1) 12 C.W.N., 74.

RANGAPPA NAIK v. KAMTI NAIK.

expressly decided by the Privy Council in *Behari Lal* v. *Madho Lal Ahir Gayawal*(1), and I do not think this decision is affected by the judgment of the Privy Council in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh*(2). In *Marudamuthu Nadan* v. *Srinivasa Pillai*(3) the principle of the decision of the Privy Council in *Behari Lal* v. *Madho Lal Ahir Gayawal*(1) was applied by a Full Bench of this Court in a case where the widow had alienated a portion of her estate to a third party with the consent of the nearest reversioner for the time being. The decision of this Court in *Marudamuthu Nadan* v. *Srinivasa Pillai*(3) was recently considered by the Privy Council in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh*(2), and was cited with approval, and although the question before their Lordships of the Privy Council was the general question of the right of a Hindu widow in the absence of legal necessity to alienate property with the consent of the next reversioners, I can find nothing in their judgment to indicate that they were of opinion that the right was free from the qualifications or restrictions that the whole limited estate must be withdrawn. Although in the Privy Council case, to which I have referred, the facts are not quite clear, and although the alienations were no doubt made piece-meal, I think it must be taken that, at the time it was sought to impeach the alienations by the widow, the whole of the widow's estate had been alienated with the consent of the reversioners. Both in the case of an alienation to a third party with the consent of the reversioners, and in the case of surrender to the reversioners, it seems to me as the law now stands—in this Presidency at any rate—the surrender or the alienation to be effective must comprise the whole of the limited estate. It might no doubt be reasonably contended that the rule laid down by the Privy Council in *Behari Lal* v. *Madho Lal Ahir Gayawal*(1) would be satisfied if the widow, with the consent of the reversioners, surrendered absolutely her entire interest in a particular part of the inheritance but this contention was urged before the Full Bench in *Marudamuthu Nadan* v. *Srinivasa Pillai*(3), and the Court declined to accede to it. See the judgment of Shephard, J., on page 132.

(1) I.L.R., 19 Calc., 236 at p. 241. (2) 12 C.W.N., 74.
(3) I.L.R., 21 Mad., 128.

RANGAPPA NAIK v. KAMTI NAIK.

Further, I do not think that the Privy Council in their recent judgment to which I have referred (*Bajrangi Singh* v. *Manokarnika Bakhsh Singh*(1) intended to hold that the reversioners could, with a view to enable the widow to give an absolute title to property inherited from her husband, give the widow a general release of their reversionary right. I do not think the decision of this Court in *Manickam Pillai* v. *Ramalinga Pillai*(2) which followed the Privy Council decision in *Bahadur Singh* v. *Mohar Singh*(3), and in *Narasimham* v. *Madhavarayudu*(4) which was decided in accordance with the view taken by the Calcutta High Court in *Hem Chunder Sanyal* v. *Sarnamoyi Debi*(5) is affected by the judgment of the Privy Council in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh*(1).

This being my view with regard to the effect of a general release by reversioners of the reversionary rights with a view to prospective alienations by the widow, and with regard to a surrender by a widow to reversioners, or an alienation to third parties with the consent of the reversioners which does not comprise the whole of the widow's limited estate, my answer to the question which has been referred to us would apart from any question of estoppel, be in the affirmative. But as regards this question of estoppel we are, I think, bound by the judgment of the Privy Council in *Bajrangi Singh* v. *Manokarnika Baksh Singh*(1). In the last sentence of this judgment their Lordships observe that the appellants (*i.e.*, the reversioners who sought to have the widow's alienations set aside) who claimed through the reversioners who consented must be held bound by the consent of their fathers. There may be a difficulty in reconciling this statement of the law by the Privy Council on the question of estoppel with the judgment of the Privy Council in *Bahadur Singh* v. *Mohar Singh*(3) (see *Bhagwanta* v. *Sukhi*(6), *Govinda Pillai* v. *Thayammal*(7), but as the last pronouncement of the Privy Council upon the question I think it is our duty to follow it. As regards this question of estoppel, I do not think the present case can be distinguished on the facts from *Bajrangi Singh* v.

(1) 12 C.W.N., 74. (2) I.L.R., 29 Mad., 120.
(3) L.R., 29 I.A., 1; I.L.R., 24 All., 94. (4) 13 M.L.J., 323.
(5) I.L.R., 22 Calc., 354. (6) I.L.R., 22 All., 33.
(7) I.L.R., 28 Mad., 57.

RANGAPPA NAIK v. KAMTI NAIK.

Manokarnika Bakhsh Singh(1). It seems to me the estoppel must be held to be good in a case where the consent is given *bonâ fide* and for good consideration with respect to future alienations.

I would therefore answer the question which has been referred to us in the negative.

WALLIS, J.—Two questions appear to me to be involved in this reference, first, whether if the next reversioners execute a deed such as exhibit IV, by which, in consideration of a grant of a certain portion of the estate to them, they renounce all interest in the remainder of the estate and consent that the widow may dispose of it in any manner she pleases after her death, this transaction has the effect of validating alienations of such estate subsequently made by her to third parties, and, secondly, if it has not, whether the heirs of the reversioners who were parties to the deed and received consideration for executing it are estopped from questioning it.

The first question must in my opinion be answered in the negative. Exhibit IV appears to me to be a conveyance by way of release to the widow of the reversion by the next reversioners. It has been held by Benson and Bhashyam Ayyangar, JJ., in *Narasimham* v. *Madhavarayudu*(2), that reversioners cannot surrender their reversionary interest to the widow so as to vest the estate, and there is a decision to the same effect in *Hem Chunder Sanyal* v. *Sarnamoyi Debi*(3). If exhibit IV is something less than a conveyance by way of release to the widow the case appears to me to be even stronger. I know of no authority at all in favour of the view that the next reversioners can confer an unrestricted prospective power of alienation on the widow. Even the observation of Garth, C.J., in *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy*(4) that "if it is once established in law that a widow may relinquish her husband's estate in favour of her husband's heir for the time being it seems impossible to prevent any alienation which the widow and the next heir may agree to make" does not go so far as to authorise alienations made without the consent or knowledge of the next reversioner pursuant to

(1) 12 C.W.N., 74.
(2) 13 M.L.J., 323.
(3) I.L.R., 22 Calc., 354.
(4) I.L.R., 10 Calc., 1102.

RANGAPPA NAIK v. KAMTI NAIK.

a general consent given previously. Nor does Mitter, J., go any further when he says that, "if a widow is competent to relinquish her estate to the next male heir of her husband it follows as a logical consequence that she can alienate merely with his consent without a legal necessity." The objections to the view of these learned Judges by which the reversioner's power to validate alienations by the widow is derived from the widow's power to accelerate the reversioner's succession by extinguishing her own estate in his favour have been forcibly pointed out in *Hem Chunder Sanyal* v. *Sarnamoyi Debi*(1). (See also Mayne's note on this case). In this last case the Court treated two deeds, by one of which the widow transferred her entire interest in the estate to the reversioner, while, by the other the reversioner, in turn, conveyed a portion of the estate to her in full ownership, as a mere 'contrivance' to convert the qualified estate of the widow into an absolute estate to be enjoyed by her free from all restraint on alienation, and held the contrivance void. To allow a widow to use the power of accelerating the reversioner's estate as a means of enlarging her own estate or effecting alienations to third parties would, in my opinion, be opposed to well-known equitable principles which seem to me to be as applicable in India as in England. It is well established that the donee of a limited power "must exercise it *bonâ fide* for the end designed, otherwise the execution is corrupt and void." *Aleyn* v. *Belchier*(2), and *Farwell* on *Powers*, 403 (II edition). Consequently the exercise of a power for the purpose of obtaining a personal advantage for the donee of the power or effecting any other indirect object has always been held bad. The decision of this Court in *Narasimham* v. *Madhavarayadu*(3), and of the Calcutta High Court in *Hem Chunder Sanyal* v. *Sarnamoyi Debi*(1) may, I think, be regarded as applications of this doctrine, as may also it seems to me, the decision of their Lordships of the Privy Council in *Behari Lal* v. *Madho Lal Ahir Gayawal*(4) that the widow's power of acceleration to be validly exercised must relate to the whole estate without any reservation in her own favour. Whatever difficulty there may sometimes be in preventing the improper exercise of the power of acceleration, it surely cannot be

(1) I.L.R., 22 Calc., 354.
(2) 2 W. & T.L.C., 313 (7th edition).
(3) 13 M.L.J., 323.
(4) I.L.R., 19 Calc., 236.

RANGAPPA NAIK v. KAMTI NAIK.

satisfactory to make the possibility of the improper exercise of this power by the widow the foundation on which the power of the reversioner to validate the widow's alienations to third parties must rest. The Bombay High Court has constantly refused to treat the reversioner's power to validate as derived from the widow's power to accelerate; the former has the authority of Hindu texts and is analogous to the power of sapindas to consent to an adoption, the latter would appear to be based upon an application of the English doctrine of merger. The Full Bench decision of this Court in *Marudamuthu Nadan* v. *Srinivasa Pillai*(1) does not, I think, support the view that the widow's power of acceleration is sufficient to cover any contrivance which the widow and the next reversioner may enter into to the prejudice of remoter reversioners, as it was held that they could not validate the alienation by the widow of a portion only of her estate. Further in so far as, following *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy*(2), the Full Bench derive the reversioner's power to validate from the widow's power to accelerate, this view is not in my opinion supported by the decisions of the Privy Council, while the actual decision of the Full Bench that a reversioner cannot validate the alienation by the widow of a part of the estate appears to be opposed to the recent decision of their Lordships in *Bajrangi Singh* v. *Manokarmika Bakhsh Singh*(3). So far as I can see, their Lordships appear to treat the widow's power of acceleration and the reversioner's power of validating the widow's alienation as distinct and independent powers.

In *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah*(4), it is said to be established that "an alienation not otherwise legitimate may become so if made with the consent of her husband's kindred." Neither here nor in the similar observations in *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry*(5), do their Lordships make any reference to the widow's power of accelerating the reversion as having any bearing on the reversioner's power of validating an alienation. On the other hand, when dealing with the widow's power of accelerating the reversion,

(1) I.L.R., 21 Mad., 128.
(2) I.L.R., 10 Calc., 1102.
(3) 17 M.L.J., 605.
(4) 8 M.I.A., 500 at p. 551.
(5) 13 M.I.A., 209 at p. 228.

RANGAPPA NAIK v. KAMTI NAIK.

in *Behari Lal* v. *Madho Lal Ahir Gayawal*(1), their Lordships make no reference to the reversioner's power of validating alienations, and their Lordships' decision does not appear to affect the latter power except in so far as it shows that the widow's power of acceleration must be exercised *bonâ fide* and for the end designed. In the Full Bench case in *Marudamuthu Nadan* v. *Srinivasa Pillai*(2), Shephard, J., who delivered the judgment of the Court on this part of the case, when holding that the reversioner's power of validation must be derived from the widow's power of acceleration, and must be regarded as subject to the same condition as the widow's power of acceleration had been subjected to in *Behari Lal* v. *Madho Lal Ahir Gayawal*(1), was obliged to put aside, as mere *dicta*, the observations, referred to above, of their Lordships in *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah*(3), and *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry*(4), in which there is no suggestion that the power of validation is derived from the power of acceleration and no suggestion that the power of validation can only be exercised by the reversioner in cases where the whole estate has been alienated. These observations which, in my opinion, clearly contemplate the validation by the reversioner of partial alienations are again taken by their Lordships in the recent case in *Bajrangi Singh* v. *Manokarmika Bakhsh Singh*(5), as their starting point in dealing with the reversioner's power to validate alienations, and, on the other hand, the decision of their Lordships in *Behari Lal* v. *Madho Lal Ahir Gayawal*(1), as to acceleration is not referred to as having any bearing on the validation of alienation by the reversioner. The point to which their Lordships' attention appears to have been mainly directed is, whether the consent of the remote as well as of the next reversioners is necessary to validate an alienation, and, as throwing light on this question, they consider whether the consent of the remote reversioners is necessary to support an acceleration in favour of the next reversioners as held in Allahabad, or is unnecessary as held in Calcutta and Madras. When citing the observations of Subramania Aiyar, J., in *Marudamuthu Nadan* v.

(1) I.L.R., 19 Calc., 236.
(2) I.L.R., 21 Mad., 128.
(3) 8 M.I.A., 500 at p. 551.
(4) 13 M.I.A., 209 at p. 228.
(5) 17 M.L.J., 605.

RANGAPPA NAIK v. KAMT NAIK.

Srinivasa Pillai(1), to show that in Madras the consent of the remote reversioners is unnecessary to support an acceleration in favour of the next reversioners, and that all that is necessary is that the whole estate should be surrendered by the widow, their Lordships omit the concluding words of the passage in which the learned Judge laid down that, in case of an alienation with the consent of the next reversioners it was equally necessary that the whole estate should be alienated by the widow and that a partial alienation would be invalid. In the case before their Lordships the widow had made five successive alienations of portions of her husband's estate and had afterwards procured the consent of the next reversioners to those alienations. These five alienations comprised the whole of the estate, but their Lordships nowhere refer to this fact as having any bearing on the question of the validity of these alienations. On the contrary, their Lordships appear to hold that these five successive deeds of partial alienation were respectively validated by the subsequent ratification of the next reversioners.

If, therefore, it were necessary to decide the point, I should be disposed to hold that the effect of the recent decision is to overrule the Full Bench decision in *Marudamuthu Nadan* v. *Srinivasa Pillai*(1), and to lay down that even partial alienations by a widow are valid when made with the consent of the next reversioners. It is however enough for me to say that this and the previous decisions of the Privy Council appear to be opposed to the view that the reversioner's power to validate any alienation is derived from the widow's power to accelerate the succession in his favour, and also opposed to the view that because the widow can accelerate the estate of the next reversioner by extinguishing her own, therefore any contrivance which the widow and the next reversioners may enter into to defeat remoter reversioners will be supported. Unless the latter proposition can be supported, there is, in my opinion, no ground for holding that a renunciation such as to be found in Exhibit IV by the next reversioners of their interest in the reversion coupled with a statement that the widow can leave the estate to any one she likes after her death, can have the effect of validating alienations of the estate subsequently made

(1) I.L.R., 21 Mad., 128.

RANGAPPA NAIK v. KAMTI NAIK.

by the widow to third parties without the express consent, and even apparently without the knowledge of the next reversioners. I would therefore answer the first of the two questions referred to at the beginning of this judgment in the negative. The remaining question appears to me to be concluded by the recent ruling of their Lordships. It had there been found that the next reversioners had received consideration for ratifying the alienations previously made by the widow, and had in fact been paid to execute the deeds of ratification. Under these circumstances their Lordships held that the appellants who claimed through two of the next reversioners who executed the deeds of ratification must be held bound by the consent of their fathers. The fact that the fathers in that case gave their assent for consideration to alienations already effected while in the present case the fathers gave their consent for consideration to future alienations does not appear to make any difference so far as the present point is concerned.

I am, therefore, of opinion for this reason, that the question referred to us must be answered in the negative.

SANKARAN-NAIR, J.—The facts are stated in the Order of Reference which is stated above.

Their Lordships of the Privy Council observe in *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah*(1), "For religious or charitable purposes or those which are supposed to conduce to the spiritual welfare of her husband she has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the last, she must show necessity. On the other hand it may be taken as established that an alienation by her which would not otherwise be legitimate, may become so if made with the consent of her husband's kindred."

Thus a widow may dispose of her inheritance for necessity. The consent of the reversioners may be evidence in such cases of the necessity of the alienation. But the alienation itself does not derive its validity from such consent. Except as evidence the consent of the kindred is immaterial. Where the alienation is for a religious or charitable purpose, the alienee might rely upon the consent of the kindred to show that the alienation was fair and justified by Hindu law.

(1) 8 M.I.A., 529 at p. 551.

On the other hand "an alienation which would *not otherwise be legitimate* may become so, if made with the consent of the husband's kindred." Or, in other words, an alienation not for necessity or for religious or charitable purposes may be valid in certain cases if made with the consent of the husband's kindred. The consent by itself makes the alienation, not otherwise legitimate, valid. Is it sufficient then to secure the assent of the presumptive reversioner? The validity of an alienation by a widow with the consent of the next reversioner was considered by the Calcutta High Court in *Nobo Kishore Sarma Roy* v. *Hari Nath Sarma Roy*(1).

The learned Chief Justice was of opinion that as a widow might if she had so pleased disclaim her estate when her husband died, there would seem nothing wrong or objectionable in her relinquishing her estate at any time in favour of her husband's heir, after she had once accepted it. He also pointed out that if she died a natural death, or if she were to become a byragi or otherwise die a civil death that heir would succeed. And he further held "if it is once established as a matter of law that a widow may relinquish her estate in favour of her husband's heir for the time being, it seems impossible to prevent any alienation which the widow and the next heir may agree to make," though it not unfrequently happened according to the Chief Justice, that the widow arranged with the next heir of her husband for the time being, to alienate the estate to some third person for their mutual benefit. In the same case Mitter, J., observed "If the widow is competent to relinquish her estate to the next male heir of her husband, it follows as a logical consequence that she can alienate it merely with his consent without any legal necessity."

In the case of *Behari Lal* v. *Madho Lal Ahir Gayawal*(2), the Judicial Committee considered that "it may beaccepted that, according to Hindu Law, the widow can accelerate the estate of the heir by conveying absolutely and destroying her life estate." They added, however "it was essentially necessary to withdraw her own life estate, so that the whole estate should get vested at once in the grantee."

This decision was, by this Court, considered to have settled that a widow may effect a valid surrender of her entire estate to the

(1) I.L.R., 10 Calc., 1102.

(2) I.L.R., 19 Calc., 236 at p. 241.

next presumptive reversioner, Subramania Aiyar, J., observing that though there has been no course of decisions on the point in this Presidency as in Bengal, there is nothing in the doctrine itself to make it less suited to the community in Madras and that the Calcutta rulings have been, in practice, followed.

The Judges of the Allahabad High Court are of opinion that the rights of all the reversioners are upon the same legal footing *inter se*, and no distinction can therefore be drawn between the rights of the nearer and more remote reversioners; and the decisions of the Calcutta High Court that a grant by a Hindu widow with the concurrence of the next reversioner creates a title which cannot be impeached on the death of the widow by the actual reversioner is opposed to the Hindu law and the decisions of the Privy Council. See *Ramphal Rai* v. *Tula Kuari*(1). In the case of *Bajrangi Singh* v. *Manokarnika Baksh Singh*(2), their Lordships of the Privy Council after referring to and apparently approving the opinions of Garth, C. J., Mitter, J., and Subramania Aiyar, J., and referring also to a decision in *Vinayak* v. *Govind* (3), and *Ramphal Rai* v. *Tula Kuari*(1), observe "The High Court of Allahabad indeed does not recognise the validity of the surrenders in favour or alienations with the consent of presumptive reversioners so as to defeat the title of the actual reversioner at the time of the widow's death. But this restriction is at variance with the principle itself, and is not in accordance with the practice in other parts of India in which the Mitakshara law prevails."

It must now be taken therefore to be settled law that surrender by a widow in favour of presumptive reversioners of her whole life estate and alienations with their consent are valid. Their Lordships also decide that when a number of persons constitute the next reversion, the consent of all of them must ordinarily be obtained.

This was scarcely disputed before us, but it was argued that the widow cannot make a partial alienation, and that the alienation in question is therefore invalid. With reference to the validity of an alienation of a portion of the widow's estate, there is a conflict

(1) I.L.R., 6 All., 116.

(2) 12 C.W.N., 74.

(3) I.L.R., 25, Bom., 129.

RANGAPPA NAIK v. KAMTI NAIK.

of opinion in Calcutta. Such an alienation was held to be invalid in *Radha Shyam Sircar* v. *Joy Ram Senapati*(1), while in a later case in *Hem Chunder Sanyal* v. *Sarnamoyi Debi*(2), it was decided that a widow may alienate with the consent of the next reversioner the whole or any portion of the estate. This Court differing from the later Calcutta decision held that the widow must surrender or alienate the whole inheritance, *Marudamuthu Nadan* v. *Srinivasa Pillai*(3). Looking to the reason of the rule, this appears to me to be the sounder view. The consent of the next presumptive reversioner is effective to validate an alienation by the widow because if the widow relinquishes her estate to him, it would be open to him to transfer the estate to the alienee. And as the question is therefore one of conveyance only, there is no reason why a transfer by the widow herself to the alienee with such reversioner's consent should not be held valid instead of driving the parties to adopt a circuitous method. But for this purpose it is necessary that the widow's estate must be entirely extinguished as a reversioner cannot succeed to a portion of her husband's estate only. Where the facts do not raise that presumption of extinguishment the rule does not apply. I do not think the Privy Council intended to decide otherwise in *Bajrangi Singh* v. *Manokarnika Baksh Singh*(4). They cite, apparently with approval, the decision in *Marudamuthu Nadan* v. *Srinivasa Pillai*(3), and they do not refer to their own earlier decision in *Behari Lal* v. *Madho Lal Ahir Gayawal*(5) in which they held "it was essentially necessary to withdraw her own life estate so that the whole estate should get vested at once in the grantee." Though in the case in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh*(4) the alienations were of portions of the estate the consent was only given after all the alienations and the validity was rested not only on the consent of the immediate reversioner but also on other grounds to be presently referred to. But in the case before us an arrangement appears to have been come to in 1850 between the two widows and the whole body of persons constituting the next reversion, the effect of which was that the reversioners should obtain a portion

(1) I.L.R., 17 Calc., 896.
(2) I.L.R., 22 Calc., 355.
(3) I.L.R., 21, Mad., 128.
(4) 12 C.W.N., 74.
(5) I.L.R., 19 Calc., 236.

RANGAPPA NAIK v. KAMTI NAIK.

of the estate, while the widows should take the rest absolutely. I think Exhibit IV must be treated as having the same effect, as a transfer by the widow to the reversioners of her entire estate, and a second transfer by the reversioners of a portion of the property so conveyed to the widows. It is not therefore an alienation of a portion of the widow's estate, leaving the rest in the possession of the widow to be inherited by the actual reversioner at the time of the widow's death. There was on the other hand an entire destruction of the widow's estate. The property taken by the reversioners was to be enjoyed by them as if they had inherited it on the widow's death. What passed by the agreement to the widows was to be enjoyed by them not as widow's estate, subject to all its restrictions, but as their own absolutely with power to alienate or devise. The widow's estate was completely extinguished: nor do I see anything unreasonable or opposed to any rule of Hindu law in this arrangement. The reason for restraining a widow from absolutely disposing of the estate is that the estate should be kept in the family from which it came to her. And if they are willing to accept in lieu to what would ultimately come to them, another estate *in presenti* which with its profits might in the case of a young widow equal or exceed in value at the time of her death the property they might then get—for it must be remembered that she has absolute power over the income, and a discretion to alienate the property for certain purposes—there seems to be nothing in principle to prevent them from doing so. When the principle is admitted it is not for the Courts to determine whether the reversioners acted wisely or not in consenting to any particular transaction, and if the result of such a transaction is to give a woman the absolute estate as opposed to a widow's estate, I see no reason for setting it aside. Further it must be remembered that the rule is applicable not only to a widow, but to other females who inherit property from males. Yet those female heirs of a different Gotra, or who, upon their marriage, become of a different Gotra from the last male owner, as a daughter, sister, or niece, take absolutely in the Bombay Presidency. In this Presidency also property inherited by a maiden daughter is her absolute estate. It is therefore difficult to say that it is against Hindu law to allow a woman inheriting property from a male to possess anything other than what is called a woman's estate

RANGAPPA NAIK v. KAMTI NAIK.

therein. In *Nobo Kishore Sarma Roy* v. *Hari Nath Sarma Roy*(1), the learned Chief Justice, in recognising their validity, referred to the practice of alienations by the widows in collusion with the next reversioners for their mutual benefit as pointed out by Mr. Justice Sheppard in *Marudamuthu Nadan* v. *Srinivasa Pillai*(2).

The Privy Council had probably this case (*Behari Lal* v. *Madho Lal Gayawal*(3)) in view in upholding the surrender of a widow's estate. Any other conclusion would only compel the widow to enter into collusive transactions with the next reversioner for their mutual benefit. For this reason I am of opinion that the alienations made by the widows are valid in the case before us and the plaintiffs cannot maintain the suit. If the alienation cannot be supported on this ground the consent of the kindred will justify it only "if there should be such a concurrence of the members of the family as suffices to raise a presumption that the transaction was a fair one and one justified by Hindu law" (*Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry*(4)). "In order to raise such a presumption the consent of the deceased's kindred to his widow's or daughter's alienation must be shown to be given with a knowledge of the effect of what they were doing and an intelligent intention to consent to such effect" (*Sham Sundar Lal* v. *Achhan Kunwar*(5)). The Bombay High Court uphold the validity of the widow's alienations on this ground. They were not inclined to accept the theory of the extinction of the widow's interest, possibly for the reason that in Bombay the doctrine, that the estate of a woman succeeding to a male is only an interposition between the estates of two males is not accepted in its entirety, as in Bengal and Madras. In considering the nature of the consent necessary to validate an adoption by a widow to her deceased husband the Privy Council observed in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh*(6) "that ordinarily the consent of the whole body of persons constituting the next reversion should be obtained, though there may be cases in which special circumstances may render the strict enforcement of this rule impossible." This is more fully explained by Bhashyam Ayyangar, J., who observed "The presumptive

(1) I.L.R., 10 Calc., 1102.
(2) I.L.R., 21 Mad., 128.
(3) I.L.R., 19 Calc., 236.
(4) 13 M.I.A., 209 at p. 228.
(5) I.L.R., 21 All., 71 at p. 80.
(6) 12 C.W.N., 74.

RANGAPPA NAIK v. KAMTI NAIK.

reversionary heir or heirs are the nearest of kin to the deceased husband, and, as such, the natural advisers of the widow, and if his or their assent be obtained and the same be given *bonâ fide*, and not from any corrupt motive, that would be sufficient authority on which she could act, and it would not be necessary that she should seek the assent of remoter reversionary heirs. The two cases (*Parasara Bhattar* v. *Ranga Raja Bhattar*(1)), and *Venkatakrishnamma* v. *Annapurnamma*(2), proceed on this view, though it does not appear from the report whether or not there were remoter reversionary heirs in existence. If the presumptive reversionary heir or heirs withhold his or their assent from improper motives, the widow may validly act upon the assent given *bonâ fide* by remoter reversionary heirs." *Subrahmanyam* v. *Venkamma*(3), I think this is the correct view. If therefore such consent is efficacious for the purpose of adoption which would entirely defeat the claim, there is no reason why it should not be held to be valid to validate alienations as well. In the case of *Vinyak* v. *Govind*(4), the consent of the immediate reversioner was not obtained, but the transaction there was of a nature that her assent could not be regarded as raising any presumption that the alienation was a justifiable one and therefore the assent of the next and the only other reversioner was considered sufficient. In the case before us, the presumptive reversioners have consented. But there has been no assent to the particular alienations under which the defendants claim which were made by the widows only years after. Judged by the test in *Sham Sundar Lal* v. *Achhan Kunwar*(5), the assent is not therefore sufficient to validate the alienations.

There is also another ground on which the widow's alienations are supported when made with the reversioner's consent. In the case before the Privy Council the actual reversioners at the time of the widow's death were the descendants of those who gave their consent, for consideration, to the alienations impeached, and their Lordships held that "the appellants who claim through Matadin Singh and Bajnath Singh must be held bound by the consent of their fathers." As observed by their Lordships in *Bahadur Singh*

(1) I.L.R., 2 Mad., 202.
(2) I.L.R., 23 Mad., 486.
(3) I.L.R., 26 Mad., 635.
(4) I.L.R., 25 Bom., 129.
(5) I.L.R., 21 All., 80.

v. *Mohar Singh*(1), those who gave their consent were but expectant heirs with a *spes successionis*. The actual reversioner who contested the alienation claimed in his own right as the heir of the last male owner and he was not bound by a contract made by every person through whom he traced his descent. The contract referred to by their Lordships is not one of which the actual reversioner or his family had the benefit. If he or his family enjoyed the benefit, he could not repudiate the transaction. In *Nobo Kishore Sarma Roy* v. *Hari Nath Sarma Roy*(2), the learned Chief Justice stated that the consent of the reversioner "would of course bind the person so consenting to it and all persons so claiming under him." It is not clear whether the consent was given for consideration, but that was probably the case. In *Subrahmanyam* v. *Venkamma*(3), Bhashyam Ayyangar, J., observed with reference to the reversioner's assent to an adoption by a widow that "in an undivided family no doubt, the senior in age having the status of managing member of the family, it may be that his assent alone, if given *bonâ fide*, will be sufficient and equivalent to the assent of the family." The question was fully discussed by Mr. Justice Ranade in *Vinayak* v. *Govind*(4), and he took the view that the reversioner was bound by his father's assent if given for consideration. If the actual claimant has enjoyed the benefit of the possession by his family of the property which was given to his father by the widow as the price of his assent to the alienation by her, I fail to see how he can participate in that benefit and at the same time impeach the transaction. Where there was an agreement without any consideration the actual reversioner may not be bound as held in *Bahadur Singh* v. *Mohar Singh*(1), Mr. Seshagiri Aiyar indeed broadly contended in a case raising the same question which was argued after this case, that, so far as Madras is concerned, it must now be taken that the immediate reversioner represents the others, *Chiruvolu Punnamma* v. *Chiruvolu Perrazu*(5), but however that may be, I entertain no doubt that the father represents the family in transactions which he entered into for the benefit of the family, and that transaction cannot be impeached by any member of the

(1) I.L.R., 24 All., 107.
(2) I.L.R., 10 Calc., 1109.
(3) I.L.R., 26 Mad., 634.
(4) I.L.R., 25 Bom., 141.
(5) I.L.R., 29 Mad., 390 at p. 401.

family when the members had the benefit of the transaction. In the case before us the plaintiff's father had received a portion of the property as a consideration (see exhibit IV).

For the reasons above given I am of opinion that the suit cannot be maintained. I would therefore answer the question referred to us in the negative.

The case came for final hearing before (Benson and Munro, JJ.) when the Court delivered the following

JUDGMENT.—In accordance with the decision of the Full Bench the second appeal is allowed, the decree of the lower Appellate Court is set aside, and the decree of the District Munsif restored.

The plaintiffs will pay the costs in this and the lower Appellate Court. The memorandum of objections is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Wallis.

MASILAMANIA PILLAI (PLAINTIFF), APPELLANT,

v.

THIRUVENGADAM PILLAI AND OTHERS (DEFENDANTS NOS. 1, 2, 5 AND 9), RESPONDENTS.*

1908. January 29. February 18, 28.

Civil Procedure Code, Act XIV of 1882, *s.* 13, *Expl. II and s.* 42—Res judicata —*Person claiming property as heir of another might and ought to set up all the kinds of relationship in one suit.*

On the question whether a person who sued to recover property as the reversionary heir of the deceased on an alleged relationship to the deceased, is, when such suit is dismissed, debarred by section 13, Explanation II of the Civil Procedure Code, from bringing another suit for the same property as reversionary heir under a different kind of relationship :

Held by Wallis and Miller, JJ. (The Chief Justice, dissenting) that such subsequent suit was barred.

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* Second Appeal No. 982 of 1904, presented against the decree of W. W. Phillips, Esq., District Judge of Tinnevelly, in Appeal Suit No. 157 of 1903, presented against the decree of M.R.Ry. M. R. Narayanaswami Aiyar, District Munsif of Ambasamudram, in Original Suit No. 511 of 1902.

MASILAMANIA PILLAI v. THIRUVENGADAM PILLAI.

Per Sir ARNOLD WHITE, C.J.—The question whether a matter "ought" to have been made a ground of attack within the meaning of section 13, Explanation II of the Civil Procedure Code, will depend on the facts of each case.

Where the two different kinds of heirship under which a person claims property cannot co-exist, he is not bound, in a suit based on one kind of heirship, to join the other in the alternative, when the former if proved will necessarily negative the latter.

It cannot be said that a party "might and ought" to have claimed alternatively in the view that the ground of title set up was false or that he would be unable to prove it.

Per WALLIS, J.—The question of what "ought" to be made ground of attack under section 13, Explanation II, must be determined by the provisions of section 42, Civil Procedure Code.

The first question to be considered in such cases is whether the provisions of section 42 required the plaintiff to join in the former suit the ground of attack in the subsequent suit. Where a person claims as heir, the "matter" within the meaning of section 42 is his heirship, and he is bound to include in one suit all the different grounds on which he bases his heirship "as far as practicable." It will not be practicable to join in one suit the different grounds only when the evidence in support of one ground will be destructive of the other. *Ramaswami Ayyar* v. *Vythinatha Ayyar*, (I.L.R., 26 Mad., 760), followed.

MILLER, J.—The construction of the word "ought" in section 13, Explanation II of the Code of Civil Procedure, must, to a great extent, depend on considerations of hardship and inconvenience caused to the parties.

There is no hardship or inconvenience in requiring a plaintiff suing as heir to state all the facts on which he bases his heirship, even though it may result in the presentation of an alternative case, while great inconvenience and hardship may be caused to the defendant by allowing the plaintiff to keep a ground in reserve. *Muthumadeva Naik* v. *Sivattamuthumadeva Naik*, (7 M.H.C.R., 160) approved.

SUIT to recover immoveable property.

The plaintiff sued in Original Suit No. 46 of 1897 on the file of the Ambasamudram Court to recover the plaint properties, alleging that his father had been adopted by one Arunachalam, brother of Masilamani, to whom the plaint properties originally belonged. That suit having been dismissed both on appeal, and in second appeal, the plaintiff brought this suit claiming, as the sister's son's son of Masilamani, and as such the nearest bandhu, to be entitled to succeed to the properties which belonged Masilamani.

The Court of First Instance and the lower Appellate Court dismissed the suit as barred by *res judicata*.

The plaintiff appealed to the High Court.

The second appeal first came on for hearing before (Sir ARNOLD WHITE, C.J., and MILLER, J.) when the Court delivered the following

MASILAMANIA PILLAI v. THIRUVENGADAM PILLAI.

JUDGMENTS (Sir ARNOLD WHITE, C.J.).—The question for consideration in this appeal is whether the plaintiff's claim in the present suit is *res judicata* by reason of the judgment in a suit brought by him in 1897? He now sues for the same land for which he sued in the earlier suit. He claims as the heir of one Masilamani. In the earlier suit he based his claim on an allegation that his father had been adopted by Masilamani's brother. His suit was dismissed on the ground, as I understand the case, that he had not proved that his father had been adopted by Masilamani's brother. On appeal, and on second appeal, in the earlier suit he asked to be allowed to set up a claim as heir as the grandson of Masilamani's sister. The Court refused to allow him to set up this claim. He now seeks to establish his title as heir through Masilamani's sister. The Courts below have held the present suit to be *res judicata*. I do not take this view. The words "which might and ought to have been made ground of defence or attack" in Explanation II of section 13 of the Code, have given rise to a mass of litigation; but looking to the words of the explanation apart from the authorities, I do not see any principle on which the plaintiff in a suit in which he claimed as Masilamani's heir on the strength of the fact of the adoption of his father by Masilamani's brother, "might and ought" also to have claimed as heir through Masilamani's sister. He "might" have done so, but the question is, "might" he and "ought" he? If his case was an honest one why should he anticipate a finding that his case was false and claim in the alternative through a different line of descent? It may be that if his claim through either the male line or the female line was a pure question of law he "might and ought" to have set up both claims in the earlier suit. But here his claim through the male line, as I understand the case, depended on his being able to establish the fact that his father had been legally adopted by Masilamani's brother. I do not think it can be said that he "might and ought" to have claimed alternatively in the view that his case based on the adoption was untrue or that he would be unable to prove it. I do not think the authorities preclude me from taking this view. In *Muthumadeva Naik* v. *Sevattamuthumadeva Naik*(1), the suit was held to be barred on the ground that to hold otherwise would be "to set up a ground

(1) 7 M.H.C.R., 160.

of claim which the litigant had in the previous case expressly withdrawn by his admission from the cognizance of the Court." There is no doubt a dictum in the judgment in *Muthumadeva Naik* v. *Sevattamuthumadeva Naik*(1) which supports the view that the present suit is barred. The dictum is as follows :—

"The better opinion probably is that he would be barred whether this ground of being heir was brought forward or not. The 'caussa' in the first suit was 'being heir,' and Paulus does not say that a new suit for the same object matter may be brought because a new basis in fact of the same 'caussa' is adduced, but where there is a different 'caussa.' The present case seems to fall within his words '*mutatam actionem opinio petitoris non facit.*'" But with all deference the dictum appears to me to be too general in its terms to afford us much assistance, and I doubt whether it is reconcilable with the decisions in some of the later cases in which the question has been very fully and elaborately discussed.

On principle I do not think the present case is distinguishable from *Ramaswamy Ayyar* v. *Vythinatha Ayyar*(2), a decision to the effect that a plaintiff who seeks to redeem a specific mortgage or to eject on a specific lease, and fails in his suit because the mortgage or lease is not proved, is not precluded from seeking to redeem the same property on another specific mortgage or to eject the person in possession on the strength of his title. I do not suggest that the view I take can be reconciled with the judgment of the Bombay High Court in *Guddappa* v. *Tirkappa*(3). But in *Ramaswamy Ayyar* v. *Vythinatha Ayyar*(2) the learned Judges expressly dissent from this Bombay decision.

Their Lordships say with reference to the Bombay case, "there can hardly be any doubt that if the former suit had been brought on the alleged right of survivorship during the lifetime of the widow, it would not have operated as a bar to the subsequent suit brought after the death of the widow. Can it make any difference that the former suit was, as appears from the report of the case, also brought after the death of the widow? The cause of action which accrues to one by right of survivorship in an undivided family is quite distinct from the cause of action which would accrue to him only as reversionary heir on the death of

(1) 7 M.H.C.R., 160. (2) I.L.R., 26 Mad., 760 at p. 779.
(3) I.L.R., 25 Bom., 189.

the deceased's widow." So here it seems to me that, for the purposes of the question we have to decide, in the earlier suit it was not the heirship to Masilamani which should be regarded as the cause of action, but the claim to inherit by reason of the adoption, and in the present suit it is not the heirship but the claim to inherit by descent from Masilamani's sister. I think the observation of the Judges in *Ramaswamy Ayyar* v. *Vythinatha Ayyar*(1) is applicable to the present case. "Unless the rule of law were that a plaintiff is bound to unite in the same suit his causes of action in the alteranative, as he might have done in the Bombay case, it is impossible to hold that explanation II to section 13 operates as a bar to the subsequent suit." In *Veerana Pillai* v. *Muthukumara Asary*(2), *Ramaswamy Ayyar* v. *Vythinatha Ayyar*(1) was followed, whilst it was expressly approved in the Full Bench decision in *Thrikaikat Madathil Raman* v. *Thiruthiyil Krishnen Nayar*(3) where the case of *Rangasami Pillai* v. *Krishna Pillai*(4) was overruled. In the present case the claim on which the plaintiff based his right of inheritance in the earlier suit would, if established, have negatived his right and the right of any other person to succeed through the female line. The two claims could not co-exist. This was not so in *Muthumadeva Naik* v. *Sevattamuthumadeva Naik*(5) where the plaintiff might well have been both the son of the Pattaba Stri and the eldest son of his father. It was not so in the Privy Council case *Woomatara Debia* v. *Unnopoorna Dassee*(6), which is perhaps the strongest case in support of the view that the present suit is barred, where an adjudication in the plaintiff's favour on his claim of title by prescription, would not, as it seems to me, necessarily have put him out of Court on his claim that the original boundary between the estates was wrongly drawn. These the Court could have decided in the plaintiff's favour on the question on the boundary without deciding the question of his rights by prescription. In the present case if the two claims had been joined the Court could not have decided in the plaintiff's favour on his claim through the female line without first adjudicating against him on his claim through the male line by virtue of the adoption.

(1) I.L.R., 26 Mad., 760 at p. 779. (2) I.L.R., 27 Mad., 102.
(3) I.L.R., 29 Mad., 153. (4) I.L.R., 22 Mad., 259.
(5) 7 M.H.C.R., 160. (6) 11 B.L.R., 158.

MASILAMANIA PILLAI v. THIRUVENGADAM PILLAI.

As pointed out by the Privy Council in *Kameswar Pershad* v. *Rajkumari Ruttan Koer*(1) what "ought" to have been made a ground of attack depends upon the particular facts of each case. As in the present case the "matter" could only become a ground of attack in the event of the plaintiff failing to establish the claim on which he based his right of inheritance, I am of opinion that it is not a matter which "ought" to have been made a ground of attack within the meaning of the explanation. I would allow this appeal.

MILLER, J.—The plaintiff sued for the possession of land, claiming to be the heir of one Masilamani, and basing that claim on the allegation that his father was taken in adoption as a son by Masilamani's brother. His claim was unsuccessful in the Court of First Appeal, and in Second Appeal to this Court, he asked to be allowed to allege a different claim as heir to Masilamani on another ground, that is to say as being the grandson of his sister. The Court refused to permit him to prove this ground of title in that suit, and he now seeks to do so in a separate suit. Both the Courts below have held that his suit is barred on the ground that the question of his title as heir of Masilamani is *res judicata* and in my opinion they are right.

To my mind this case is on all fours with *Muthumadeva Naik* v. *Sevattamuthumadeva Naik*(2). There the plaintiff relied on his title as heir of his father and having failed to establish a right of heirship as son of his father's Pattaba Stri or wife of the highest rank, asked, but failed to obtain leave to prove a title as eldest son of his father. He then sued in a separate suit on the latter ground of title, and it was held by Morgan, C.J., and Holloway, J., that his suit was barred. It is suggested that the learned Judges did not decide the question of *res judicata* in that part of their judgment in which they explain why "the better opinion probably is that he would be barred, whether this ground of being heir was brought forward or not," but assuming that exposition of the law to be obiter it expresses the views of the learned Judges on the law. It was quoted in *Ramaswami Ayyar* v. *Vythinatha Ayyar*(3) along with passages from the earlier judgments of Scotland, C.J., and

(1) I.L.R., 20 Calc., 79. (2) 7 M.H.C.R., 160.
(3) I.L.R., 26 Mad., 760.

MASILAMANIA PILLAI v. THIRUVENGADAM PILLAI.

Holloway, J., in *Chinniya Mudali* v. *Venkatachella Pillai*(1), as an instructive explanation of the law (*vide* p. 767 of the Report in *Ramaswami Ayyar* v. *Vythinatha Ayyar*(2), and I know of no reason why it should not be accepted as good law. It is entirely in accord with my own opinion and even if we are not bound by it, I would follow it. I cannot accept the distinction suggested on behalf of the appellant, that in that case the claims of the plaintiff were both preferred in his capacity as son of his father: that, it seems to me, is merely an incidental difference. Here, the plaintiff claims as heir of Masilamani in both suits and though he does not base his claim on two kinds of sonship he bases them on two kinds of relationship. The decision of the Privy Council in *Woomatara Debia* v. *Unnopoorna Dassee*(3) is also in my opinion in point.

I am unable to see any hardship or injustice in requiring a plaintiff suing to recover possession of land on the ground of heirship to state all the facts on which he bases that claim even though that may amount to the presentation of an alternative case. I agree with the remark of Jackson, J., in *Denobundhoo Chowdry* v. *Kristomonee Dossee*(4) that "the balance of public convenience is very much in this country at least in favour of a stringent rule." Holloway, J., also in *Chinniya Mudali* v. *Venkatachella Pillai*(1) expresses the opinion that "it is most desirable and very commendable for a Court to compel the bringing forward of every ground of relief and, by deciding upon it, to put a check upon constant litigation." I am inclined to think the ends of convenience and justice will be found best served by a rule which requires a plaintiff if he sues for possession of land, relying on a title as owner, to put forward all the grounds available to him and within his knowledge at the date of his plaint, on which he can honestly support that title, even though some of them may have to be stated as alternative to others. But it is not necessary of course to go so far as that in order to uphold the decree of the lower Appellate Court in the present case, nor do I say that such a rule would be in accord with the law as settled by authority. Clearly there could, in the present case, be no inconvenience or injustice in requiring the plaintiff to assert his title as

(1) 3 M.H.C.R., 320. (2) I.L.R., 26 Mad., 760.
(3) 11 B.L.R., 158. (4) I.L.R., 2 Calc., 152.

sister's grandson of Masilamani as a sound basis for a claim to the possession of his estate, if the available evidence be insufficient to enable him to prove a title by adoption into Masilamani's family. If the Court cannot conveniently try all the claims together, it can always try and decide on one first, and it may well be that the defendant might find himself obliged to admit one ground of title, in which case much time and expense might be saved.

In the first case put by Garth, C.J., in *Denobundhoo Chowdry* v. *Kristomonee Dossee*(1), it is extremely difficult (as Jackson, J., seems to suggest at p. 176) to see how A would be inconvenienced if he were obliged to say in his plaint "my father in his will styled me his illegitimate son, but I believe and can prove that I am really his legitimate son: should however the evidence which I am able to produce be insufficient to convince the Court on this point, I base on my father's will a claim to recover half the property." I fail to see why it should be more inconvenient to try those questions in one suit than in two, assuming both to be honest claims.

In the second case, suggested on the same page of the report, it would of course be a hardship on the plaintiff to be debarred from setting up in a second suit a claim which was not within his knowledge at the date of the first, but it could hardly be held under explanation II to section 13 of the present Code that he "might" or "ought to have" advanced such a claim in the earlier suit. I have dwelt at some length on this question of hardship and inconvenience because it is to a great extent upon such considerations that we have to interpret the word "ought" in that explanation, and I have no doubt that the most liberal interpretation which can reasonably be put upon this word will be found to be that which will involve the least inconvenience and the least injustice and the least hardship, when the interests of both parties to the dispute are fairly considered together. I can see much injustice to a defendant in a rule which allows a plaintiff to keep a ground of title, to use a colloquialism, "up his sleeve," but none to a plaintiff in a rule which requires him to state all the grounds of his title to possession if he relies on a title.

(1) I.L.R., 2 Calc., 162.

In the case before us, I have no doubt at all that the plaintiff "ought" to have advanced in his former suit (and not for the first time in second appeal) the ground of title which he now advances, and as this view of the case is, as I think, fully supported by the decision in *Muthumadeva Naik* v. *Sevattamuthumadeva Naik*(1), I should without hesitation dismiss this appeal with costs.

Under section 575 of the Code of Civil Procedure we refer this appeal to a third Judge.

The case again came on for hearing in due course before a Bench constituted as above in pursuance of an order of reference to a third Judge.

T. Natesa Ayyar for *R. Sivarama Ayyar* for appellant.

R. Kuppuswami Ayyar for third respondent.

When the Court delivered the following

JUDGMENT (WALLIS, J.).—In a former suit the present plaintiff sued to recover the estate of one Masilamani Pillai on the death of the latter's daughter as being at the date of such death the next reversioner to Masilamani Pillai. In setting forth his title he stated that his father had been adopted by Masilamani's divided brother and relied on this fact in proof of his reversionary right. It was found that the adoption was not proved, and he then applied in second appeal to have the case sent back for a finding as to whether he was not entitled to succeed in his claim as next reversioner independently of the adoption as the grandson of Masilamani's sister. The High Court refused his application and he then instituted the present suit on that basis. The learned Judges before whom the case came on second appeal have differed as to whether under the above circumstances the present suit is barred, by explanation II to section 13, Civil Procedure Code, and the appeal has been referred to me under section 575, Civil Procedure Code.

A great many cases were cited by the learned Judges, and in argument before me, and I have perused them, but I shall not find it necessary to refer to more than one of these in stating the conclusion at which I have arrived. The scope of explanation II to section 13 and the authorities regarding it were exhaustively considered in the judgment of this Court in *Ramaswami Ayyar* v.

(1) 7 M.H.C.R., 160.

MASILAMANIA PILLAI v. THIRUVENGADAM PILLAI.

Vythinatha Ayyar(1), and a Full Bench was so satisfied of the soundness of the decision and the reasons given for it that they followed this case, and overruled the cases to the contrary in *Thrikaikat Madathil Raman* v. *Thiruthiyil Krishnen Nair*(2) without thinking it necessary to give any separate reasons of their own. Under these circumstances I think I am justified in taking this decision as a starting point, and considering whether the present question cannot be decided in the light of the principles there laid down without going back to the earlier cases.

In *Ramaswami Ayyar* v. *Vythinatha Ayyar*(1), the question was whether a plaintiff who had brought a suit on a mortgage of certain land and failed was precluded from afterwards suing the same defendant on another mortgage of the same land on the ground that he might and ought to have made the other mortgage one of his grounds of claim or grounds of attack as they are styled in the explanation. In dealing with this question the first question considered by the Court was whether the plaintiff was required by the provisions of section 42, Civil Procedure Code, to include a claim on the other mortgage in the former suit, as, if so, he ought of course to have done so, and so would be precluded under the terms of the explanation from instituting another suit on this mortgage. It was therefore necessary to examine the scope of section 42 with the result that it was found not to apply to that case, but the result of the discussion was, in my opinion, to show that it would apply to a case such as the present in which in the former suit the plaintiff sued as reversioner and failed to put forward his descent from Masilamani Pillai's sister as one of his grounds of claim or attack. If section 42 applies it follows that the present suit is barred. Section 42 provides that "every suit shall, so far as practicable, be so framed as to afford ground for a final decision upon the subjects in dispute, and so to prevent further litigation concerning them." What then was the subject in dispute in the former suit? Adopting the construction put upon the section in the judgment referred to, it was, I think, the plaintiff's claim to succeed on the death of Masilamani Pillai's daughter as next reversioner to his estate, and the suit should have been so framed —if practicable—as to afford ground for a final decision on this

(1) I.L.R., 26 Mad., 760. (2) I.L.R., 29 Mad., 153.

MASILAMANIA PILLAI v. THIRUVENGADAM PILLAI.

claim and so to prevent further litigation concerning it. At page 763 after pointing out that the words "subjects in dispute" do not signify the corpus or property sought to be recovered so as to oblige a plaintiff to join all the causes of action he may have in respect of such corpus or property, the learned Judges observe "In our opinion the expression 'subjects in dispute' signifies the jural relation between the parties to the suit, for the determination of which the suit is brought. In other words the object of section 42 is to require the plaintiff to bring forward his whole case as to the matter of litigation on the question of right involved in the suit." Then at page 766 the learned Judges say "It is clear that the expression 'subjects in dispute' means the cause of action or subject-matter of litigation, that is, the right which one party claims as against the other and demands the judgment of the Court upon." Here the right which the plaintiff claimed and asked the Court to adjudicate upon was the right of a next reversioner at the death of Masilamani Pillai's daughter. Failure to frame the suit in such a manner as to afford ground for a final decision upon the subjects in dispute is punished, it is pointed out, by explanation II to section 13 which is explained as meaning that every ground which could and ought to have been urged in support of the claim actually made in the suit shall be deemed to have been adjudicated upon therein whether it was actually urged or not. Then after pointing out that the cause of action in a suit on a mortgage is different from the cause of action in a suit upon the plaintiff's title against the same defendant as trespasser, and that the cause of action in a suit upon one mortgage is different from the cause of action in a suit upon another mortgage, the learned Judges made the following observations which bear upon the present case. "If the transaction of mortgage on which the subsequent suit is based is really the same as the transaction on which the former suit was based, which (latter) failed because the document by which the mortgage was sought to be established was fabricated, that will, of course, be a bar to the subsequent suit though the plaintiff seeks in it to establish the mortgage by producing the genuine mortgage deed or by proving that the mortgage was effected orally." The same result it seems to me must follow where the plaintiff failed to establish his claim as next reversioner in the former suit because the adoption on which he relied was not proved, and then comes forward with another suit

MASILAMANIA PILLAI v. THIRUVENGADAM PILLAI.

to establish it independently of the adoption by virtue of his descent from the sister of the last owner. "The real test, therefore, is whether the cause of action, or transaction on which the two suits are based, is the same, and not whether the transaction is sought to be established in different modes or by different means." Later in the judgment the learned Judges held that in suits on successive mortgages the "subjects in dispute" are not the same, as in the case of each mortgage the jural relation is created by a distinct act of the parties and by a different transaction constituting a separate cause of action. So too they held that a claim by survivorship in an undivided family is quite distinct from a claim as reversioner to the estate of the deceased on the death of his widow, and that consequently in a suit based on the right of survivorship, that plaintiff's claim as reversionary heir is not one of the subjects in dispute in this suit so as to debar him from putting forward his claim as reversioner in a subsequent suit, thus differing from the decision in *Guddappa* v. *Tirkappa*(1). It is it seems to me clear that the learned Judges were of opinion that a plaintiff who sued as reversioner was bound by section 42 to frame his suit in such a manner as to afford ground for a final decision as to his claim as reversioner and to prevent further litigation concerning it. Apart altogether from authority it appears to me that in a suit to establish a claim as reversioner that claim should be held to be the subject in dispute within the meaning of the section. I should not omit to observe that the provisions of section 42 as to the framing of suits are only to be applied "as far as practicable," and if the plaintiff would have been embarrassed in the former suit by relying not only on his alleged adoption by the divided brother of the deceased but also on his descent from the sister of the deceased, it may well be that he would not have been bound to rely on both grounds. This would I think be the case if the evidence in support of one ground might be destructive of the other ground. But there could be nothing of this kind in the present case, and I do not think there is any thing unreasonable in holding that the plaintiff in the former suit ought to have relied upon his descent from the deceased's sister as well as upon the adoption, so that if proof of the adoption failed he might still

(1) I.L.R., 25 Bom., 189.

MASILAMANIA PILLAI v. THIRUVENGADAM PILLAI.

establish his right as reversioner on the ground of this descent and prevent further litigation regarding it. The judgments of the learned Judges who made the reference do not expressly refer to section 42, Civil Procedure Code, and although *Ramaswami Ayyar* v. *Vythinatha Ayyar*(1) is cited, it is I think possible that the attention of the learned Judges was not specially directed to the observations as to the scope of section 42 which are to be found in different parts of a very lengthy judgment. If I had been obliged to form a conclusion upon the earlier authorities, and apart from section 42, I should have found the task one of great difficulty. I am of opinion that the appeal should be dismissed with costs.

Under section 575 of the Civil Procedure Code, this second appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Munro.

MANAGER OF HAMPI SRI VIRUPAKSHA SWAMI TEMPLE (PLAINTIFF), APPELLANT,

1908. March 9, 23.

v.

LAMBANI GOLYA (DEFENDANT), RESPONDENT.*

Treasure Trove Act—Act VI of 1878, s. 3—Property not hidden is not treasure trove and belongs to the owner of the land on which it is found.

Section 3 of the Indian Treasure Trove Act defines treasure trove as anything of value hidden in the soil or in anything affixed thereto. Property not hidden is not treasure trove and is not governed by the provisions of the Act.

Unclaimed articles not found hidden are the property of the person on whose land they are found unless they are found in a public place, in which case they belong to the finder.

Under the English law the possession of land carries with it possession of everything which is attached to or under that land and in the absence of a better title the right to possess it also, except in the case of articles found in a public place. This is also the law in India.

(1) I.L.R., 26 Mad., 760.

* Second Appeal No. 1131 of 1905, presented against the decree of A. T. Forbes, Esq., District Judge of Bellary, in Appeal Suit No. 49 of 1904, presented against the decree of M.R.Ry. M. Deva Row, District Munsif of Hospet, in Original Suit No. 13 of 1904.

MANAGER OF HAMPI SRI VIRUPAKSHA SWAMI TEMPLE v. LAMBANI GOLYA.

In England where the article is hidden, the fact of its being so hidden is taken to show that the owner did not intend to abandon it, and when it is subsequently found hidden, and the owner is not forthcoming, the law gives it as *bonum vacuum* to the Crown.

THE plaintiff as manager of a temple sued for a declaration of his right as such manager to a golden girdle found by the defendant in a certain field belonging to the temple.

The girdle was produced before the Tahsildar who after some inquiry referred the matter to the Collector. The Collector sent a notice to the plaintiff and finally issued orders that the girdle would be given to plaintiff on his establishing his right thereto in a Civil Court. Hence this suit.

The District Munsif held that the plaintiff's ownership of the land did not carry with it the right to anything found on the land and dismissed the suit.

His judgment was confirmed on appeal.

The plaintiff appealed to the High Court.

R. Kuppuswami Ayyar for appellant.

The respondent was not represented.

JUDGMENT.—The plaint alleges that the defendant, whilst weeding in a field belonging to the temple of which the plaintiff is manager, found a gold waistcord and claims that the plaintiff is entitled to it as owner of the land. In his written statement the defendant admits finding the girdle as alleged in the plaint. Issues were framed as to whether the girdle belonged to the plaintiff, and as to whether the plaintiff or the defendant had the preferential right to it. The District Munsif dismissed the suit on the ground that the plaintiff had not proved any right to the treasure trove found in his land, and the District Judge confirmed his decree on the ground that the plaintiff's right to the soil did not apply to everything found therein. For the appellant it is contended that, both by English law, and by Indian statute law, an article found under the circumstances of this case is not treasure trove as, to come within the description of treasure trove, the property must have been hidden. The fact of its being found hidden is taken to show that the owner did not intend to abandon it, and under these circumstances when it is subsequently found hidden and the real owner is not forthcoming the law gives it as *bonum vacuum* to the Crown. This is undoubtedly the rule of English law, Blackstone

MANAGER OF HAMPI SRI VIRUPAKSHA SWAMI TEMPLE v. LAMBANI GOLYA.

'Commentaries,' vol. I, p. 295. In India, as pointed out by Lord Brougham in *Mayor of Lyons* v. *East India Company*(1), the assumption of sovereignty by the Crown would not necessarily introduce this branch of the prerogative, but it appears from the proclamation of the Governor-General in Council of 3rd October 1777 printed in Colebrook's 'Bengal Regulations,' vol. 3, p. 346, that "the right which Government possesses to hidden treasure wherever it may be discovered" had been asserted before that time, and Government subsequently proceeded to deal with the disposal of hidden treasure by regulations which have now been superseded by the Indian Treasure Trove Act, VI of 1878. This Act, as well as the preceding regulations, deal only with hidden treasure, thus following English law, and section 3 of the Act defines treasure as "anything of value hidden in the soil or in anything affixed thereto." Hindu law also recognized the rights of Government in unclaimed property (Nidhi), apparently, whether it had been hidden or not. In the Mayukha, chap. VII, para. 10, Yajnavalkya is cited as saying "Let the king obtaining unclaimed property (Nidhi) give half to Brahmins, but a learned Brahmin may keep the whole for he is lord of all." "And the king shall receive a sixth part of unclaimed property occupied by any other person." "In case of its being discovered without any information from the finder, he must be made to pay a fine as well." (Stokes' 'Hindu Law Books,' p. 131.)

The British Government however has never asserted any right to unclaimed property other than hidden treasure, and even as to hidden treasure the Act now provides for dividing it between the finder and the owner of the soil.

As regards articles which are not found hidden and so do not come under the description of hidden treasure it is argued for the plaintiff that they are the property of the person on whose land they are found unless they are found in some public place. In *South Staffordshire Water Company* v. *Sharman*(2), it was held that two rings found at the bottom of a pond belonged to the landowner. In coming to this conclusion Lord Russell of Killowen, C.J., relied on Pollock and Wright on 'Possession,' p. 41, where it is stated that "The possession of land carries with it in general, by our law, possession of everything which is attached to or under that land,

(1) 1 M.P.C., 176. (2) (1896), 2 Q.B., 44.

MANAGER OF HAMPI SRI VIRUPAKSHA SWAMI TEMPLE v. LAMBANI GOLYA.

and in the absence of a better title, the right to possess it also. And it makes no difference that the possessor is not aware of the thing's existence . . . the legal possession rests on a real *de facto* possession constituted by the occupier's general power and intent to exclude unauthorized interference." Blackstone's statement that the thing belongs to the finder is explained in the same judgment as referring to a case "in which the thing was cast into a public place or into the sea—into a place in fact of which it could not be said that any one had a real *de facto* possession or a general power and intent to exclude unauthorized interference." . . . We see no reason why these principles should not be applied to the decision of the present case, and we may observe that in *Rani Kattama Nachiar* v. *Muhammad Mira Ravuthan*(1) the claim put forward by the Rani of Sivaganga to idols found on her land was rejected solely on the ground that the circumstances under which the idols were found showed that they had been hidden, and consequently, that they came within the regulation which has now been superseded by the Indian Treasure Trove Act VI of 1878. There is no allegation in the present case that the waist-cord was hidden. Consequently the plaintiff as land owner is entitled to recover it and the decrees of the lower Courts must be set aside and judgment given for the plaintiff with costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sankaran-Nair.

1908. March 12, 13, 31.

PACHAIPERUMAL CHETTIAR (PLAINTIFF), APPELLANT,

v.

DASI THANGAM (DEFENDANT), RESPONDENT.*

Defamation—Privilege—An accused person is privileged in respect of questions put in good faith for the purpose of defending himself—Publication.

The rule of English Law "that no action of libel or slander lies whether against Judge, counsel, witnesses, or parties for words written or spoken in the ordinary course of any proceeding before any Court, or tribunal, recognised by law" will also apply to an accused person in respect of questions put by him in good faith for the purpose of defending himself.

A party receiving a notice is entitled to reply to the notice and state his reasons, and such reply is privileged so long as it is confined to the matter in hand and is relevant, provided the reply is not published by the person making it. Where such reply is a mere acknowledgment that the party had made the imputations complained of in the notice, relief can be claimed only in respect of the original imputations.

(1) 7 M.H.C.R., 150.

* Second Appeal No. 250 of 1906, presented against the decree of M.R.Ry. T. Varada Rao, Subordinate Judge of Tuticorin, in Appeal Suit No. 233 of 1905, presented against the decree of M.R.Ry. S. Mahadeva Sastri, District Munsif of Tuticorin, in Original Suit No. 431 of 1904.

SUIT to recover damages for defamation.

The plaintiff's agent lodged a criminal complaint against the defendant and others. In the course of the proceedings following upon such complaint the agent was asked, at the instance of the defendant, a dasi, whether such complaint had not been launched against her, in consequence of a refusal by her to accede to improper overtures made to her by the agent on behalf of the plaintiff. In reply to a notice sent by the plaintiff, the defendant repeated those statements. The plaintiff sued for damages in respect of the statements and the reply sent by defendants.

The Munsif decreed for plaintiff.

On appeal, this decree was reversed and the suit dismissed.

The plaintiff appealed to the High Court.

K. Narayana Rao for appellant.

V. C. Seshachariar for respondent.

JUDGMENT.—This is a suit for damages. The circumstances out of which it arose are as follows. The defendent, a dasi, was accused of rioting by a person who is, admittedly, a servant of the plaintiff. When he was being examined as a witness, the defendant instructed her pleader to put certain questions to him which implied that the charge was brought at the instigation of the plaintiff on account of the ill-feeling which he entertained towards her. The defendant repeated these statements in a reply to a notice sent by the plaintiff to her. The defendant claims privilege. She also pleads the truth of her statements.

The rule of English Law that "no action of libel or slander lies whether against Judges, counsel, witnesses or parties for words written or spoken in the ordinary course of any proceeding before any Court or tribunal recognised by law" has been applied in this Presidency to Judges in *Raman Nayar* v. *Subramanya*

PACHAI-PERUMAL CHETTIAR v. DASI THANGAM.

Ayyan(1), to witnesses in many cases (see *In the matter of "Alraja Naidu*(2))" and to counsel in *Sullivan* v. *Norton*(3). The principle on which this rule is based would seem to apply also to an accused person, as it is essential to the administration of justice that those who are protecting their own interests should be under no apprehension of any proceedings from the opposite party. It has been held in *Trotman* v. *Dunn*(4), that if the words were used for the purpose of defence then a person is justified in using them. In this case the Judge has found that the questions were put in good faith.

We are therefore of opinion that the defendant is not liable for the imputations made in the questions put to the witness. It is further argued that the defendant is not entitled to claim privilege for the statements in her reply as they were not made in the course of any judicial proceeding. But the defendent is entitled to reply to the notice sent to her and to state her reasons, such reply it has been held is privileged so long as it is confined to the matter in hand and is relevant. The defendant in the present case did no more than acknowledge having made these imputations before. The plaintiff can therefore only rely upon the words previously spoken and use this reply to prove that the imputations were made. It is true that, if the defendant had published this reply, she could not claim any privilege, and the appellant contends that it is admitted by one of the defendant's witnesses that one Neelakanta Iyer was aware of this reply. But we cannot allow the plaintiff to rely upon this fact as any such publication by the defendant was never alleged. On this point also we agree with the lower Appellate Court.

We therefore dismiss the second appeal with costs.

(1) I.L.R., 17 Mad., 87.
(2) I.L.R., 30 Mad., 222.
(3) I.L.R., 10 Mad., 28 at p. 35.
(4) 4 Cample, 211.

APPELLATE CIVIL.

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

VENKATRAMANA BHATTA (DEFENDANT), APPELLANT,

v.

GUNDARAYA AND ANOTHER, (PLAINTIFFS) RESPONDENTS.*

1908. April 28.

Landlord and tenant—Forfeiture—Landlord not showing intention before suit to determine lease on the ground of forfeiture is not entitled to maintain suit for possession.

A landlord is not entitled to maintain a suit for possession of the lands leased to a tenant on the ground of forfeiture under the terms of the lease when he does not allege or prove that, prior to bringing the suit, he did any act to show that he intended to avail himself of the forfeiture and determine the lease.

Anandamoyee v. *Lakhi Chandra Mitra*, (I.L.R., 33 Calc., 339), followed.

SUIT for possession of land held by the defendant under a mulgeni lease executed by the defendant's ancestors in 1866, with rent for four years as provided by the lease, and damages for non-payment at the periods specified.

The mulgeni lease contained *inter alia* the following clause:—

"If the rent is allowed to fall in arrears without payment on the due dates, I shall pay the whole of the rent of rice and cocoanuts by the end of July of the respective year and take a receipt. On failure to pay at the said time, the mulgeni condition shall be void and I shall surrender the property without stating the objection of improvements. Such is the mulgeni chit."

The plaintiff alleged that the rent for 1899 was not paid on the due dates, or before the end of July 1900, and that the lease had consequently determined. The plaint did not contain any allegation that subsequent to July 1900, the plaintiff did any thing to show his intention to forfeit the lease under the forfeiture clause contained in the lease deed.

The District Munsif passed a decree for the arrears of rent claimed and directed that, in default of payment by the defendant

* Second Appeal No. 894 of 1905, presented against the decree of H. O. D. Harding, Esq., District Judge of South Canara, in Appeal Suit No. 306 of 1904, presented against the decree of M.R.Ry. A.C. Kannan Nambiar, District Munsif of Mangalore, in Original Suit No. 636 of 1903.

VENKATRAMANA BHATTA v. GUNDARAYA.

within three months, the plaintiff should be entitled to recover possession.

On appeal the District Judge held that, as the lease itself provided a period of grace within which the defendant should pay the rent, no further period ought to be allowed and he accordingly passed a decree for possession and mesne profits.

The defendant appealed to the High Court.

B. Sitarama Rao for appellant.

Mr. *K. R. Shenai* and *K. P. Madhava Rao* for respondents.

JUDGMENT.—In this case the plaintiff has neither proved nor alleged that before bringing his suit he did any act showing his intention to avail himself of the forfeiture and determine the lease. This being so we are of opinion that the plaintiff is not entitled to rely on the forfeiture. On this question we agree with the decision of the Calcutta High Court in *Anandamoyee* v. *Lakhi Chandra Mitra*(1).

As regards the construction of the lease we agree with the lower Appellate Court. We think the rent was payable in kind.

The decree for possession must be set aside. In other respects the decree is affirmed. The parties must pay their own costs throughout.

(1) I.L.R., 33 Calc., 339.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Wallis.

GUTTA SARAMMA (FIRST DEFENDANT), APPELLANT,

1908. April 10. May 4.

v.

MAGANTI RAMINEDU AND OTHERS (PLAINTIFFS NOS. 2 TO 8), RESPONDENTS.*

Civil Procedure Code, Act XIV of 1882, s. 43—Suit for land, no bar to subsequent suit for mesne profits.

A suit for possession of land is no bar under section 43 of the Civil Procedure Code to a subsequent suit for mesne profits of such land accruing prior to the institution of the former suit.

Tirupati v. *Narasimha*, (I.L.R., 11 Mad., 210), followed.

Venkoba v. *Subbanna*, (I.L.R., 11 Mad., 151), not followed.

THE facts of this case are sufficiently set out in the judgment.

V. Ramesam for appellant.

Mr. *T. Prakasam* for fifth to seventh respondents.

R. Kuppuswami Aiyar for first to seventh respondents.

JUDGMENT.—The plaintiffs on the 4th December 1899 filed Original Suit No. 777 of 1899 to recover certain property as heir of the last owner, and on the 5th December 1899, the next day, he filed the present suit for mesne profits. The question considered by the lower Courts, and argued before us, is whether under these circumstances the suit is barred by the provisions of section 43 of the Civil Procedure Code. In *Venkoba* v. *Subbanna*(1), it was held that a plaintiff who had brought a suit for possession was barred under section 43, Civil Procedure Code, from bringing a fresh suit for mesne profits accruing prior to the institution of the former suit. On the other hand, it was held by the same learned Judges, in *Tirupati* v. *Narasimha*(2), that a suit for mesne

* Second Appeal No. 614 of 1905, presented against the decree of M.R.Ry. T. Varada Rao, Additional Subordinate Judge of Godavari at Rajamundry, in Appeal Suit No. 309 of 1902, presented against the decree of M.R.Ry. P. C. Tiruvenkatachariar, District Munsif of Rajahmundry and Ellore, in Original Suit No. 766 of 1899. Ellore (Original Suit No. 452 of 1901 additional Court).

(1) I.L.R., 11 Mad., 151. (2) I.L.R., 11 Mad., 210.

GUTTA SARAMMA v. MAGANTI RAMINEDU.

profits in respect of lands held over by a tenant after the expiration of his lease was no bar to a subsequent suit for possession. It is not easy to see why section 43 should operate as a bar in the one case and not in the other, and we are unable to reconcile the two decisions. The later case follows *Manohur Lall* v. *Gouri Sunkur*(1), which was not cited in *Venkoba* v. *Subbanna*(2), and is in accordance with *Lalessor Babui* v. *Janki Bibi*(3), and we think the District Munsif was right in following it rather than *Venkoba* v. *Subbanna*(1). The appeal must therefore be dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Wallis.

1908. April 10. May 4.

PRAYAGA DOSS JEE VARU, MAHANT (DEFENDANT), APPELLANT,

v.

TIRUMALA ANANDAM PILLAI, PURISA SRIRANGACHARYULU VARU AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Privy Council, final decree of, directing lower Court to frame rules, s. 244; *Civil Procedure Code—Lower Court in framing such rules acts in execution and its order is appealable under s.* 244 *of the Code of Civil Procedure.*

An Order in Council discharged the decrees of the High Court and District Court and referred it to the latter to frame rules for carrying out a scheme of management directed by the said Order in Council:

Held, that the Order in Council disposed of the case finally, and it was not intended to make a reference to the District Court under section 17 of the Privy Council Act, 3 and 4 Will. IV, Cap. 41. If such a reference was contemplated, the referee would have to report and the case would have been adjourned pending the receipts of such report. The judgment and order clearly did not contemplate such a report but disposed of the case finally.

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(1) I.L.R., 9 Calc., 283. (2) I.L.R., 11 Mad., 151.
(3) I.L.R., 19 Calc., 615.

* Civil Miscellaneous Appeal No. 259 of 1907, presented against the order of K. C. Manavedan Raja, Esq., District Judge of North Arcot, framing rules under paragraph 2 of the order of His Majesty's Privy Council, in Privy Council Appeal No. 6 of 1906 against the decree of the High Court in Appeal Suits Nos. 236 of 1901 and 38 of 1902.

PRAYAGA DOSS JEE VARU v. TIRUMALA, PURISA SRIRANGACHARYULU.

The District Judge, in framing the rules, did not act as referee but in execution of the final decree in the case and his order framing the rules was appealable under section 244 of the Code of Civil Procedure.

THE facts of this case are sufficiently set out in the judgment.

[This case is reported only on the question whether an appeal lay against the order of the District Court.]

Sir *V. Bhashyam Ayyangar* and *S. Gopalasami Ayyangar* for appellant.

P. R. Sundara Ayyar and *L. A. Govindaragava Ayyar* for respondents.

JUDGMENT.—This is an appeal from an order of the District Judge of North Arcot framing certain rules pursuant to the directions contained in the order in Council of the 11th February 1907. This order which is the final decree in the case and has been transmitted to the District Court for execution, discharges the decrees of the District Court and of this Court, and substitutes the scheme of management of the plaint Devastanams set forth in the order for the scheme contained in the decree of this Court. Article II of the substituted scheme provides that all funds be in the custody of the Treasurer, and that rules be framed by the District Court to ensure the proper receipt and custody of all offerings, income and funds, and the proper investment of any surplus and to prevent misappropriation and to ensure proper management of any estates or other properties or investments. The Order in Council refers it to the District Court of North Arcot to appoint the Treasurer and to frame such rules as are required by the said scheme to be framed by the said District Court with power to vary the said rules from time to time, and the District Court has accordingly framed rules and embodied them in the order which is the subject of this appeal. A preliminary objection is taken that, in framing the rules, the District Court has not been executing the decree, and that consequently the order is not appealable as one passed under section 244, Civil Procedure Code. We are unable to agree with this contention. In *Ponnambala Thambiran* v. *Sivagnana Desika Gnana Sambandha Pandara Sannadi*(1) it was held that an order made pursuant to an appellate decree by a Subordinate Judge appointing the head of a mutt was an order made in execution and so appealable.

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(1) I.L.R., 17 Mad., 343.

PRAYAGA DOSS JEE VARU v. TIRUMALA, PURISA SRIRANGA-CHARYULU.

The order which the District Court is directed to make in this case appointing the Treasurer must therefore be considered an order made in execution, and we see no reason why the order of the District Court framing the requisite rules should not also be considered an order made in execution. The respondents relied on the language of the Order in Council which following the language of their Lordships' judgment refers it to the District Court to appoint the Treasurer and frame rules, and argued that the District Court was required to act under the reference and not in execution. It is true that their Lordships have statutory authority to make references under section 17 of the Privy Council Act, 3 and 4 Will. IV., Cap. 41, in which case the referee would have to report to their Lordships, and the case would be adjourned pending the receipt of the report as in *Hutchinson* v. *Gillespie*(1), but in the present case it is, we think, clear from the judgment and the order that their Lordships did not intend to make any such reference but disposed of the appeal finally, leaving the directions contained in their judgment to be executed in the usual manner. The objection must therefore be overruled.

APPELLATE CRIMINAL.

Before Mr. Justice Benson and Mr. Justice Munro.

1908. March 19. April 6.

MYLAPORE HINDU PERMANENT FUND (LIMITED) (PLAINTIFF), APPELLANT,

v.

THE CORPORATION OF MADRAS (DEFENDANT), RESPONDENT.*

Municipal Act (Madras), Act III of 1904, *s.* 176, *and sch. V—The word "capital" does not mean nominal capital but only paid-up capital—Construction of statutes —Reference under s.* 176 *of Act must state all necessary facts.*

On a reference by the Magistrate under section 176 of the Madras Municipal Act III of 1904 as to the meaning of the word "capital" in schedule V of the Act:

(1) 2 M.P.C., 244.

* Case Referred No. 20 of 1907 stated under section 176 of Act III of 1904 by F. D. Bird, Esq., Chief Presidency Magistrate, and Mir Sultan Mohi-ud-din Sahib, Fourth Presidency Magistrate, Egmore, in Application No. 8974 of 1907.

MYLAPORE HINDU PERMANENT FUND (LIMITED) v. THE CORPORATION OF MADRAS.

Held that, in the absence of any statutory definition of the word applicable in construing the Act, the word must be taken to be used in its ordinary and popular meaning, and so construed, it means the amount of money actually used in the business, *i.e.*, the paid-up capital.

The fact that the word, in the Indian Companies Act, is used in the sense of nominal capital is no argument for so construing it in the Municipal Act, as the two Acts are not *in pari materia*.

The underlying principal of schedule V of the Act is that taxation should be roughly proportionate to the professional incomes of individuals.

The word "capital" is used in the same sense in schedule V of Act III of 1904 and in schedule A of Act I of 1884.

In construing fiscal Acts, the construction most beneficial to the subject ought to be adopted.

Maxwell on the 'Interpretation of Statutes,' 4 ed., pp. 2, 56, 430, referred to.

Venkatarama Chetti v. Emperor, (I.L.R., 28 Mad., 17), referred to.

In making references under section 176, the Magistrate ought to state all the facts necessary for the decision of the particular case.

UNDER section 176 of the Madras City Municipal Act III of 1900, the following reference was made to the High Court:—

"Does the word 'capital' used in schedule V of the Municipal Act III of 1904 mean, exclusively, nominal capital, or does it also include paid-up capital; and, if so, should it be taken to mean paid-up capital exclusively?"

The circumstances which have given rise to this reference are as follows:—

The Mylapore Hindu Permanent Fund has hitherto been classed for payment of profession tax in accordance with its paid-up capital, but this year it has been taxed on its nominal capital. It is explained by the Corporation that this was due to an oversight, and that other Companies have always been taxed on their nominal capital. An appeal has been presented to us and we have heard arguments on it. The point for decision is summed up in the question, *supra*.

For the appellants it is urged that the word "capital" in schedule V must have one meaning for all Companies. There are Companies with no declared capital. They are taxed on the amount they deal with as shown in their books. This is not denied. Reference is made to the words "gross income" in the *proviso* to Class 1 of schedule V as indicating that actual living sums should be taken as the basis of calculation. All Acts should be construed in favour of the subject and more especially fiscal Acts. Inasmuch as "capital" is not defined in the Municipal

MYLAPORE HINDU PERMANENT FUND (LIMITED) v. THE CORPORATION OF MADRAS.

Act its popular meaning should be taken. Under explanation 1, section 13 of the Indian Companies Act, VI of 1882, the word "capital" includes paid-up capital. Cases quoted by the appellants are 11 Madras, pages 171, 238 and 256; 2 Madras, pages 382–3; 28 Madras, page 18.

For the Corporation, attention is invited to the words "of which" in schedule V, Class 1 (A), which indicate that the word "capital" used therein applies to "other Companies" as well as to the Joint-Stock Companies and is, therefore, not restricted to the kinds of capital mentioned in the Companies Act VI of 1882. The meaning of "capital" should be sought from outside interpretations, *e.g.*, Buckley at page 238, &c. Cases quoted by the respondents are 11 Madras, page 238, and 2 Madras, page 362.

It is urged on one side that if "capital" was meant to exclude paid-up "capital" it would have been so stated; and on the other, that if it was to include it there is equal reason for that having been explained.

We venture to think that as far as possible an Act should be considered to be self-explanatory; and that when it contains indications of the general basis of its provisions, it should be adopted in explanation of points of doubt, such as that now raised, without going outside the Act for meanings of similar expressions used in the general circumstances or in specified cases. The provisions of the Municipal Act relating to the profession tax appear to aim at a tax on *actuals*; the word "gross income" already quoted indicate this (*vide* proviso to Class 1 of schedule V). The considerable scope of the various items under the different classes is for convenience of taxation and is not intended to cover what we may call "unearned increments." The words "his aggregate income" in section 123 support this view. The following question was put by us to the learned vakil for the Corporation :—

"How would you tax an individual on an incremental salary of Rs. 400–40–600, whose actual pay is Rs. 480?"

The reply was, on his actual income, viz., Rs. 480 under Class VI, and not under Class V on the maximum, viz., Rs. 600, that he might some day attain.

The Mylapore Hindu Permanent Fund is a Mutual Benefit Society. It consists of a certain number of shares worth Rs. 84

MYLAPORE HINDU PERMANENT FUND (LIMITED) v. THE CORPORATION OF MADRAS.

each which are purchased by monthly instalments of Re. 1, covering a period of seven years. The Society has no power to call up subscriptions in advance, that is to say, it cannot raise its paid-up capital to the full value of the shares taken up by calling on the subscribers to pay up in advance more than one rupee a month per share. The amount, therefore, that the fund has to operate with is the amount of its paid-up capital and that is the net result of the exercise of its profession. That amount varies from year to year, but no difficulty has been experienced hitherto by the Corporation in accepting the regularly printed and published statement of the affairs of the Fund as indicating what its paid-up capital is and on that it has been taxed. It is pertinent to ask whether money to which a fund may eventually become entitled can be considered to be part of "its fund" in anticipation. Applying the incremental problem quoted above we have :—Paid-up capital—subscriptions as they become due—full value of shares subscribed for. Even the last item falls far short of the "nominal capital on which the fund is taxed for that could be attained only at the end of seven years if the Society had all its shares taken up."

L. A. Govindaragava Ayyar for appellant.

T. V. Seshagiri Ayyar for respondent.

JUDGMENT.—The question referred for our decision is : "Does the word capital used in schedule V of the Municipal Act III of 1904 mean exclusively nominal capital or does it also include paid-up capital and, if so, should it be taken to mean paid-up capital exclusively."

The law (see 176, Madras City Municipal Act, 1904) hardly contemplates a reference in such general and abstract terms. It only enables the Magistrates to state a case on any appeal before them, and refer the same for the decision of the High Court : this is, to state all the matters necessary for the decision of the particular case before them on appeal and to refer the case so stated for decision. The facts are however fully stated in the reference and we proceed to deal with them.

The case arises out of a dispute between the Madras Municipality and the Mylapore Hindu Permanent Fund (Limited), as to the basis on which the fund should be charged with profession tax. The municipality claims to tax the fund under Class I (A)

MYLAPORE HINDU PERMANENT FUND (LIMITED) v. THE CORPORATION OF MADRAS.

of schedule V on its nominal capital. The fund contends that it should be taxed under Class I (B) of the schedule on its paid-up capital.

Under class I (A) Joint Stock Companies and other Companies carrying on any trade or business having gain for its object, or as benefit societies, and the capital of which exceeds 20 lakhs of rupees are liable to a tax of Rs. 500. Under Class I (B) the same Companies are liable to a tax of Rs. 350 if their capital exceeds 10 lakhs, but does not exceed 20 lakhs of rupees.

The fund is registered under the Indian Companies Act and has a declared nominal capital of Rs. 29,99,976 divided into 35,714 shares of Rs. 84 each. These shares cannot be acquired at once by a lump payment, but are subscribed for by payments of one rupee per mensem extending over a period of seven years, which payments cannot be demanded in advance.

It is admitted for the purpose of the present reference that the amount actually subscribed, or the paid-up capital, is about 12 lakhs of rupees.

It will be observed that in schedule V the word "Capital" is used without any qualification. No definition of the word is given in the Act. For the municipality it is contended that the meaning of the word will vary according to the nature of the Company which is being taxed. It is pointed out that the fund is a Company limited by shares such as is contemplated by sections 8 and 45 of the Indian Companies Act VI of 1882 and that in those sections capital is used in the sense of nominal capital. It is therefore argued that the word "Capital" in schedule V used in regard to Companies such as the Fund must mean nominal capital. The Indian Companies Act cannot, however, be properly resorted to to determine the meaning of words in the Municipal Act for the two Acts are not *in pari materia*—Maxwell, 'Interpretation of Statutes,' 4th edition, page 56.

The word "Capital" used by itself may signify many different things. In the absence of definition in Municipal Act the presumption is that the word is used in that Act in its ordinary and popular meaning—Maxwell, 'Interpretation of Statutes,' 4th edition, page 2, and *Venkatrama Chetti* v. *Emperor*(1). The

(1) I.L.R., 28 Mad., 17.

MYLAPORE HINDU PERMANENT FUND (LIMITED) v. THE CORPORATION OF MADRAS.

ordinary and popular meaning of the word is undoubtedly money actually contributed for employment in business. It is defined in Wharton's 'Law Lexicon' as the sum of money which a merchant, banker, or trader adventures in any undertaking, or which he contributes to the common stock of a partnership and also as the fund of a trading Company or Corporation. The ordinary and popular meaning seems to express the real intention of the Legislature. When schedule V is read as a whole the underlying principle seems to be that taxation should be roughly proportionate to the professional incomes of individuals and the profits of Companies. Section 123 of the Act which lays down that a person who exercises more than one profession, etc., shall be chargeable under the class appropriate to his aggregate income, supports this view. Other things being equal, the profits of a Company will ordinarily vary with the amount of money actually employed in its business, and this amount will be limited by the amount actually contributed for employment in the business,—in other words, by the paid-up capital. Schedule V of the present Municipal Act is in everything material to our present purpose, the same as schedule A of the Madras City Municipal Act I of 1884. *Madras Equitable Assurance Company* v. *The President, Municipal Commission, Madras*(1) and *Jennings* v. *The President, Municipal Commission, Madras*(2) are cases under the latter Act. In the former case it was laid down that, in the case of Benefit Societies, the aggregate of the sums contributed would constitute the capital of the society; the word "Capital" in the Act being used in its general sense. In the other case it was remarked that the clauses (A) to (D) of Class I of schedule A were framed to provide a sliding scale of taxes with reference to the amount of the capital employed in the business carried on by the Companies described in Class I (A). The fact that neither of the Companies dealt with in the above cases had a declared nominal capital can make no difference in principle. Finally the subject is not to be taxed unless the language of the statute clearly imposes the obligation, and in case of reasonable doubt the construction most beneficial to the subject is to be adopted. Maxwell, 'Interpretation of Statutes,' 4th edition, page 430.

(1) I.L.R., 11 Mad., 238. (2) I.L.R., 11 Mad., 253.

MYLAPORE HINDU PERMANENT FUND (LIMITED) v. THE CORPORATION OF MADRAS.

Our decision, therefore, is that, with reference to the Mylapore Hindu Permanent Fund (Limited), the word capital in schedule V of the Madras Municipal Act III of 1904 means paid-up capital.

APPELLATE CIVIL.

Before Mr. Justice Miller.

1908. May 7.

BOLLAPRAGADA GARU NARAYANA ROW, BEING MINOR BY HIS MOTHER AND GUARDIAN RAMA LAKSHMAMMA (DEFENDANT), PETITIONER,

v.

BOLLAPRAGADA JANAKI RAMIAH GARU (PLAINTIFF), RESPONDENT.*

Court, jurisdiction of—Has power to review wrong order passed by it—Civil Procedure Code, s. 622—No interference where right result has been reached.

A Court which has dealt with a suit under a wrong section has power to review and set aside its order for sufficient reason.

The High Court will not interfere under section 622, Civil Procedure Code, where the lower Court has, in so setting aside its previous order, arrived at the right result, though it purported to act under a wrong provision of the Code.

IN this case the lower Court, after recording some evidence for the plaintiff, dismissed the suit because the plaintiff did not appear on the following day in obedience to a summons issued to him. In so doing, the Court purported to act under section 177 of the Civil Procedure Code, instead of section 158, which was the section applicable.

The plaintiff applied to have the dismissal order set aside. The Court held that it had acted wrongly in dismissing the suit under section 177, and restored the suit to the file purporting to act under chapter VII of the Code which did not apply to the circumstances.

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* Civil Revision Petition No. 541 of 1907, presented under section 622 of the Code of Civil Procedure, praying the High Court to revise the order of M.R.Ry. K. Sambasiva Rao, District Munsif of Vizianagram, on Miscellaneous Petition No. 783 of 1907 in Original Suit No. 346 of 1906.

BOLI APRAGADA GARU NARAYANA ROW v. BOLLAPRAGADA JANAKI RAMIAH GARU.

Defendant petitioned the High Court under section 622 of the Civil Procedure Code.

K. Subrahmania Sastri for *V. Ramesam* for petitioner.

P. Nagabhushanam for respondent.

JUDGMENT.—The District Munsif had, in my opinion, jurisdiction to review his order, and though the second order which he made purports to be under chapter VII of the Code of Civil Procedure, I ought not to interfere under section 622, if the right result has been reached and that which was irregularly done has been set right (Vide *Narayanasami* v. *Natesa*(1)).

It seems to me that, in the first instance, the District Munsif might perhaps have proceeded under section 158, but he did not, as a matter of fact, decide the suit on the evidence before him, but expressly and wrongly proceeded under section 177. He had jurisdiction to review this wrong order for sufficient reason.

The petition is dismissed with costs.

APPELLATE CIVIL.

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

1904. April 8.

THE SECRETARY OF STATE FOR INDIA (APPELLANT IN SECOND APPEAL No. 1277 of 1900), PETITIONER,

v.

MANJESHWAR KRISHNAYA (RESPONDENT), RESPONDENT IN THE ABOVE SECOND APPEAL.*

Second appeal—Evidence not placed before lower Appellate Court not receivable in second appeal.

A party cannot, on second appeal, let in evidence which was not placed before the lower Appellate Court.

Ramachandra v. *Krishnaji*, (I.L.R., 28 Bom., 4), referred to.

Raru Kutti v. *Mamad*, (I.L.R., 18 Mad., 480), referred to.

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(1) I.L.R., 16 Mad., 424.

* Civil Miscellaneous Petition No. 535 of 1904, praying that, in the circumstances stated therein, the High Court will be pleased to order the production of the select documents filed as additional evidence in Second Appeal No. 1276 of 1900 under Civil Miscellaneous Petition No. 507 of 1902 as additional evidence in Second Appeal No. 1277 of 1900.

THE SECRETARY OF STATE FOR INDIA v. MANJESHWAR KRISHNAYA.

THE facts are set out in the judgment.

The Hon. The Advocate-General for petitioner.

The Hon. Mr. *C. Sankaran-Nair* and *K. P. Madhava Rao* for respondent.

ORDER.—Objection has been taken to the admissibility of fresh evidence in second appeal, and we have been referred to *Ramachandra* v. *Krishnaji*(1) and *Raru Kutti* v. *Mamad*(2). We must uphold the objection and dismiss the petition.

APPELLATE CRIMINAL.

Before Mr. Justice Munro and Mr. Justice Sankaran-Nair.

1908. July 21.

RAGAVA AIYANGAR (SECOND PETITIONER), PETITIONER IN CRIMINAL REVISION CASE No. 9 OF 1908,

KRISHNASAMY AIYAR (FIRST PETITIONER), PETITIONER IN CRIMINAL REVISION CASE No. 10 OF 1908,

v.

KRISHNASAMI AIYAR AND OTHERS (COUNTER-PETITIONERS), RESPONDENTS IN BOTH.*

Criminal Procedure Code, Act V of 1898, s. 145—Mere delivery certificates to purchaser at Court sale without proof of delivery of actual or symbolical possession of property not sufficient to prove possession.

A purchaser at a Court sale of immoveable properties, to whom delivery certificates have been granted, but to whom possession either actual or symbolical was not delivered cannot, on the strength of such certificates alone, be declared to be in possession of such properties in proceedings under section 145 of the Criminal Procedure Code.

Gulraj Marawari v. *Sheik Bhatoo*, (I.L.R., 32 Calc., 796), distinguished.

Kunja Behari Das v. *Khetro Pal Singh Roy*, (6 C.W.N., 38), distinguished.

PETITION under section 145, Criminal Procedure Code.

The facts of the case are thus set out in the judgment of the Magistrate.

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(1) I.L.R., 28 Bom., 4. (2) I.L.R., 18 Mad., 480.

* Criminal Revision Cases Nos. 9 and 10 of 1908, presented under sections 430 and 439 of the Code of Criminal Procedure, praying the High Court to revise the orders of M.R.Ry. T. Seshia, Sub-Divisional Magistrate of Tanjore, in Possession Cases Nos. 3 and 2 of 1907.

RAGAVA AIYANGAR v. KRISHNASAMI AIYAR.

The lands which form the subject of the dispute originally belonged to the family of the counter-petitioners Nos. 1, 2, 5 and 6. A suit was filed against them, Original Suit No. 93 of 1902 on the file of the Sub-Court, Kumbakonam, and decrees were obtained. The lands were brought to sale in execution of the decree and were purchased by the two petitioners and one Somasundra Chettiar whose agent is the second petitioner. They were notified for sale on 4th September 1905. The sale did not take place then. The lands were originally brought to sale on a valuation of Rs. 32,000, but on a second occasion the valuation was fixed at Rs. 10,000. Objection was taken to this sale, but was rejected. An appeal was taken to the High Court in respect of the sale on the valuation. It does not appear from the records how the appeal was disposed of. The sale was however confirmed and sale certificates were issued on 10th and 12th January 1907.

The petitioners claim possession by virtue of the delivery certificates exhibits A, A1 and A2, dated 25th January 1907. The first two counter-petitioners contend that the family lands were divided, that the lands noted in the margin fell to their share, that the lands were leased out to Panchanada Aiyar, ninth counter-petitioner, for ten years by a lease-deed. The fourth counter-petitioner claims as sub-lessee. Panchanada Aiyar put in a claim petition in the Sub-Court, Tanjore. At the time of harvest when there was a possibility of disturbance, he gave information to the Police to the effect that the plaintiffs were unlawfully interfering with the crops in his possession and this has led to the present possession case.

S. Nos. 286, 287, 274, 275, 258, 260, 262, 263, 265, 268, 269, 281, 284.

The sale is not disputed and the only question for consideration is whether there was a delivery of the lands under section 318 of the Civil Procedure Code. The evidence on this point adduced by the petitioner is far from satisfactory.

The evidence as to delivery is most suspicious and unsatisfactory. There is said to be a bazaar in the village and some huts. No man of the village has attested the delivery account.

In these circumstances, I declare that the first two and the fourth counter-petitioners were in enjoyment of the lands claimed by them at the time of commencement of these proceedings and are entitled to possession until evicted in due course of law, and

RAGAVA AIYANGAR v. KRISHNASAMI AIYAR.

forbid the petitioners from disturbing such possession until such eviction.

Second petitioner moved the High Court under section 437, Criminal Procedure Code, and section 15 of the Charter Act.

P. R. Sundara Ayyar and *C. V. Anantha Krishna Ayyar* for petitioners in both the cases.

Dr. *S. Swaminadhan* for first, second and fourth respondents.

V. Krishnaswami Ayyangar for third and seventh respondents.

M. K. Ramaswami Ayyar, attorney, for fifth and eighth respondents.

JUDGMENT.—In *Gulraj Marvari* v. *Sheik Bhatoo*(1) there was delivery of possession to the petitioner in that case. In *Kunja Behari Das* v. *Khetro Pal Singh Roy*(2) also "possession though it may be called symbolical was delivered" to the applicant therein. In the case before us we take the finding of the Magistrate to be that there was no delivery of possession whatever actual or symbolical to the petitioners before us and that the respondents therefore continued in possession.

We see no reason therefore to interfere with his order and dismiss these petitions.

(1) I.L.R., 32 Calc., 796.

(2) 6 C.W.N., p. 38.

APPELLATE CIVIL—FULL BENCH.

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

KOMMINERI APPAYYA (THIRD DEFENDANT), APPELLANT,

v.

MANGALA RANGAYYA AND OTHERS (PLAINTIFFS, AND SECOND AND FOURTH DEFENDANTS), RESPONDENTS.*

1907. September 10. 1908. February 3, 17. April 16.

Transfer of Property Act, Act IV of 1882, *ss.* 56, 67, 81, 88—*Marshalling—Purchaser of portion of mortgaged property has no right to marshal.*

A *bonâ fide* purchaser, who purchases for value a portion of a mortgaged property without notice of such mortgage, has no right, in a suit by the mortgagee to enforce his mortgage, to insist that the portion not sold to him must be proceeded against first and the portion purchased by him must be sold only for the balance, if any, due.

Under sections 67 and 68 of the Transfer of Property Act, the mortgagee is entitled to an order that the mortgaged property or a sufficient part thereof should be sold on default of payment.

The purchaser cannot claim such a right under section 81 or 56 of the Transfer of Property, as the former applies only to second mortgagees, and the latter confers such right only "as against the seller."

Krishna Ayyar v. *Muthukumarasawmiya Pillai*, (I.L.R., 29 Mad., 217), referred to and explained.

It is competent to the Court under section 88 of the Transfer of Property Act to order a *sufficient portion* of the mortgaged property to be sold; and if the portion not sold by the mortgagor is sufficient, and if the mortgagee will not be prejudiced, the Court may by its decree direct such unsold portion to be sold first; and if the decree directs the sale of the whole property, the Court, in execution, may first bring to sale the portion unsold and if the sale-proceeds be sufficient stop the sale of the portion sold by the mortgagor.

THE facts necessary for this report are sufficiently set out by (Benson and Miller, JJ.), in the order of reference to the Full Bench which was as follows:—

ORDER OF REFERENCE TO A FULL BENCH.—The facts found are as follows: The first and second defendants being the owners of two parcels of land mortgaged them to the plaintiff.

* Second Appeal No. 1603 of 1904, presented against the decree of M. D. Bell, Esq., District Judge of Kistna at Masulipatam, in Appeal Suit No. 290 of 1904, presented against the decree of M.R.Ry. N. Lakshmana Rao, District Munsif of Tenali, in Original Suit No. 263 of 1902.

APPAYYA v. RANGAYYA.

They subsequently sold and delivered possession of parcel No. 1 of the land to the third defendant, who is a *bonâ fide* purchaser for value, without notice of the prior mortgage. The plaintiff now sues to recover the mortgage money by sale of the mortgaged property. The third defendant contends that he is entitled to require that the plaintiff shall proceed against parcel No. 2 of the mortgaged land in the first instance, and that recourse should be had to parcel No. 1 only if parcel No. 2 is found to be insufficient to satisfy the debt due to the plaintiff. The District Munsif found that the third defendant was entitled to have the assets marshalled in the manner claimed by him, and gave a decree in accordance with that finding, but the District Judge modified this by directing that parcel "No. 1 alone be sold if the decree amount is not paid within" the time limited.

The question is whether, upon the above findings, the third defendant is entitled to have the property marshalled, and to require that parcel No. 2 shall be first sold before recourse is had to parcel No. 1.

The principle involved has been fully discussed in a number of decided cases. The case of *Rama Raju* v. *Subbarayudu*(1) is opposed to the third defendant's claim, and the same view is supported by the decisions in *Lala Dilawar Sahai* v. *Dewan Bolakiram*(2), *Bhikhari Das* v. *Dalip Singh*(3) and *Magniram* v. *Mehdi Hossein Khan*(4).

On the other hand, in the recent case of *Krishna Ayyar* v. *Muthukumarasawmiya Pillai*(5), this Court held that, in a case like the present, the Court would not be disposed to rely on the authority of the above decisions, and added "that, in such a case, the purchaser (of a part of the property) may insist upon the mortgagee proceeding in the first instance against the mortgaged property which is in the mortgagor's hands would seem to be consonant alike with sound principle and the weight of authority (Ghose on 'Mortgage,' third edition, page 436)."

We think that this view is correct, and we are supported by the authority of the cases (*Rodh Mal* v. *Ram Harakh*(6) and *Lakhmidas* v. *Jamnadas*(7)).

(1) I.L.R., 5 Mad., 387.
(2) I.L.R., 11 Calc., 258.
(3) I.L.R., 17 All., 435.
(4) I.L.R., 31 Calc., 95 at p. 101.
(5) I.L.R., 29 Mad., 217.
(6) I.L.R., 7 All., 711.
(7) I.L.R., 22 Bom., 304.

APPAYYA v. RANGAYYA.

In this conflict of authority, and having regard to the general importance of the principle involved, we resolve to refer for the decision of the Full Bench the question stated by us above.

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

P. Nagabhushanam for appellant.

C. P. Ramaswami Ayyar for first respondent.

The Court expressed the following

OPINION.—The plaintiff, a mortgagee, sues to recover his money by sale of the properties mortgaged, which consist of two parcels of land, of which item No. 1 is in the possession of the third defendant, a *bonâ fide* purchaser for value without notice of the plaintiff's prior mortgage. The third defendant, appellant, contends that the plaintiff is bound to proceed first against the property, item No. 2, not sold to him and his property No. 1 should be sold only for the balance, if any.

Under section 67 of the Transfer of Property Act the plaintiff is entitled to an order that the properties, mortgaged, be sold, and section 88 of the same Act provides that the Court shall pass a decree that in default of the defendant paying the mortgage amount, the mortgaged property or a sufficient part be sold and the proceeds applied in discharge of the plaintiff's claim.

A second mortgagee of one of the properties mortgaged without notice of the first mortgage is entitled under section 81 of the Transfer of Property Act to have the first mortgage debt paid, so far as it is possible out of the other properties, but not so as to prejudice the rights of the first mortgagee or of any other person having acquired for valuable consideration an interest in either property. It thus appears that the first mortgage is the dominant right to be enforced. The third defendant is not a second mortgagee. It is not therefore a case for marshalling securities and does not fall within this section.

The right of a purchaser is defined by section 56 of the Transfer of Property Act, which gives him a right to have the first mortgage satisfied out of the other property. But this right is given only "as against the seller" and it makes no difference whether or not he had any notice of the mortgage.

If the third defendant is right in his contention, then the words "as against the seller" in the above section, have no effect.

APPAYYA v. RANGAYYA.

On reading the two sections 56 and 81 of the Transfer of Property Act we are of opinion that a purchaser in the position of the third defendant has not the right claimed on his behalf.

Of the authorities cited, there are only two cases bearing on the question which are governed by the Transfer of Property Act. Of these the decision in *Bhikhari Das* v. *Dalip Singh*(1) supports the view indicated by us. In *Krishna Ayyar* v. *Muthukumarasawmiya Pillai*(2) it, no doubt, is broadly stated, quoting from Dr. Ghose on 'Mortgage' "that, in such a case, the purchaser (of a part of the property) may insist upon the mortgagee proceeding in the first instance against the mortgaged property which is in the mortgagor's hands would seem to be consonant alike with sound principle and the weight of authority." We are not prepared to accept this statement without some qualification. According to English authorities the right cannot be exercised so as to prejudice the first mortgagee in any way whatever and we are not aware of any Indian case in which it has been held that it can be so exercised.

According to Story's 'Equity Jurisprudence,' vol. I, section 633, the right is given to the second mortgagee only, "whenever it will not trench upon the rights, or operate to the prejudice, of the party entitled to the double fund" . . . . . "If A has a mortgage upon two different estates for the same debt, and B has a mortgage upon one only of the estates for another debt, B has the right to throw A, in the first instance, for satisfaction upon the security, which he, B, cannot touch; at least, where it will not prejudice A's rights, or improperly control his remedies." . . . . . "No injustice is done to him in point of security or payment."

In White and Tudor's 'Leading Cases,' vol. I, notes to *Aldrige* v. *Cooper*(3), it is stated "But the right of a second mortgagee of one of the estates mortgaged to marshall—that is, to throw the prior charge which exists on both estates, upon that which is not mortgaged to him—is an equity which is *not enforced* against third parties, that is *against any one except the mortgagor* and his legal representatives claiming as volunteers under him."

It is to be observed that the learned Judges in *Krishna Ayyar* v. *Muthukumarasawmiya Pillai*(2) quote with approval, Jones on

(1) I.L.R., 17 All., 435. (2) I.L.R., 29 Mad., 217.
(3) W. & T. Leading cases, Vol. I (notes).

APPAYYA v. RANGAYYA.

'Mortgages,' 6th edition, section 1628, that as a rule "Marshalling cannot be enforced against a prior mortgagee where there is any doubt of the sufficiency of the fund upon which the junior creditor has no claim; or *where the prior creditor is not willing to run the risk of obtaining satisfaction out of that fund*, or where that fund is of a dubious character, or is one which may involve him in litigation to realise." The third defendant can scarcely be said to possess the right claimed when it cannot be exercised against the will of the plaintiff; and considering the difficulties of a judgment-creditor to realise his debt the delay must ordinarily prejudice him. The conclusion of the learned Judges in *Krishna Ayyar* v. *Muthukumarasawmiya Pillai*(1) is that as long as the right of contribution as between the mortgagor and the purchaser is unaffected by any act of the mortgagee "the latter's right to be paid the whole of his debt from whatever portion of the mortgaged properties he wishes to comprise in his suit cannot be questioned." With this we entirely agree.

Read as a whole, the judgment in *Krishna Ayyar* v. *Muthukumarasawmiya Pillai*(1) is not an authority in favour of the third defendant.

We are therefore of opinion that the third defendant is not entitled to have the property marshalled and to insist that parcel No. 2 should be first sold before recourse is had to parcel No. 1.

We may however point out that, under section 88 of the Transfer of Property Act, the Court may order that a *portion* sufficient to discharge the plaintiff's debt be sold, and if parcel No. 2 is sufficient and if the plaintiff cannot possibly be prejudiced by such sale, it may be open to the Court to direct in the decree itself its sale before the other property.

Further in execution of a decree for the sale of both parcels, parcel No. 1 may be sold first and if the sale-proceeds are sufficient to discharge the plaintiff's debt, the sale of No. 2 may be stopped.

Whether the third defendant's claim under section 56 of the Transfer of Property Act may not be enforced in this suit by passing a decree which will enable the third defendant to sell item No. 2 and have the sale-proceeds appropriated by the Court in discharge of the plaintiff's claim, before the expiry of the period for the payment of the plaintiff's debt, after which alone the

(1) I.L.R., 29 Mad., 217.

APPAYYA v. RANGAYYA.

plaintiff could apply for sale, is a question which has not been referred to us or argued before us. The more limited question whether the District Judge was right in passing a decree directing item No. 1, the parcel purchased by the third defendant, to be sold before item No. 2, has also not been referred to us or argued before us.

Our answer to the question referred is in the negative.

The case came on for final hearing before (Benson and Miller, JJ.) when the Court delivered the following

JUDGMENT.—As a result of the decision of the Full Bench, the appellant's claim to have item 2 sold, must be disallowed. He however contends that, as the plaintiff has himself purchased item 2 of the mortgaged property, he cannot be allowed thereby to throw the whole burden of satisfying the mortgage on item 1 which is in the hands of the third defendant, thus depriving the third defendant of his right to contribution rateably in proportion to the value of the two items. We think that this contention is sound (*Krishna Ayyar* v. *Muthukumarasawmiya Pillai*(1)).

The plaintiff can only recover so much of the mortgage debt as bears the same proportion to the whole mortgage, as the value of item 1 bears to the value of the whole property. The value of item 1 is Rs. 24-10-0 and of item 2 is Rs. 145. So the plaintiff can recover from item 1 $\frac{24}{170}$ths of Rs. 161 *plus* interest on Rs. 7-8-0 at 12 per cent per annum from the 19th September 1902 to the 23rd June 1904, and further interest at 6 per cent. until payment. Three months from this date will be allowed for redemption. Each party will pay and receive proportionate costs.

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(1) I.L.R., 29 Mad., 217.

APPELLATE CIVIL.

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

CANGAYAM VENKATARAMANA IYER (PLAINTIFF), APPELLANT,

v.

HENRY JAMES COLLEY GOMPERTZ AND OTHERS (DEFENDANTS Nos. 8, 9 AND 11), RESPONDENTS. *

1908. March 19, 20, April 7.

Mortgagor and mortgagee—Puisne mortgagee, right of, to sell subject to prior mortgage—Decree in suit by puisne mortgagee—Transfer of Property Act, ss. 51, 75, 85, 96—Right of purchaser from first mortgagee to improvements on redemption by puisne mortgagee.

In a suit brought on a mortgage, where all the parties interested are before the Court, it is the duty of the Court, if it can, to make a decree which will deal finally with all the questions raised in the suit and preclude further litigation to enforce rights arising out of the mortgage or mortgages in question in the suit. This is the obvious intention of section 85 of the Transfer of Property Act.

Under section 75 of the Transfer of Property Act the prior mortgagee has the right to require the second mortgagee to redeem him or submit to a sale of whatever interest he has in the property.

In a suit brought by the puisne mortgagee, to which the prior mortgagee who has also become the owner of the equity of redemption is made a party, the decree must direct the redemption by the second mortgagee and then for sale, if the prior mortgagee as owner of the equity of redemption does not redeem the second mortgage. The second mortgagee must show sufficient reason for departing from this rule and is not entitled to a decree for sale subject to the first mortgage, in the absence of special circumstances. The second mortgagee on redeeming is bound to pay the full amount due on the first mortgage, though the first mortgagee had sold his right for a smaller sum.

Section 96 of the Transfer of Property Act does not support the view that the puisne mortgagee is not required to redeem the prior mortgagee when the latter is a party to the suit. Where the prior mortgagee sues for and obtains a decree for sale without making the second mortgagee a party and himself purchases the property in execution, a purchaser of the property from him cannot claim the value of improvements from the second mortgagee under section 51 of the Transfer of Property Act in a suit by the second mortgagee to enforce the rights under his mortgage.

A mortgagee of property has the right to bring to sale all buildings on such property, whether erected before or subsequent to the mortgage.

Rangayya Chettiar v. *Parthasarathi Naicker*, (I.L.R., 20 Mad., 120), followed.

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* Appeal No. 99 of 1905, presented against the decree of M.R.Ry. M. Visvanatha Aiyar, Subordinate Judge of Madura (West), in Original Suit No. 16 of 1903.

VENKATA-RAMANA IYER v. GOMPERTZ.

SUIT to recover money on a mortgage bond. *Y*, the father of the defendants Nos. 1–7, mortgaged item I of the plaint schedule to one *R*, and subsequently mortgaged items 1–3 to the plaintiff. After the date of the mortgage to plaintiff, *Y* mortgaged items I and II to the eighth defendant to pay off the amount due to *R*. The eighth defendant sued on his mortgage without making the plaintiff a party to the suit and obtained a decree for the sale of items I and II. Items 1 and 2 were bought at the sale by the eighth defendant himself. He subsequently sold item I to the ninth defendant, and item II to the tenth defendant. The eleventh defendant claims as a mortgagee of item I from the ninth defendant.

The plaintiff claimed priority over the eighth defendant on the ground that the mortgage to *R* was extinguished and was not kept alive in favour of the eighth defendant.

Buildings were admittedly erected on item I after it was sold to the ninth defendant.

The plaintiff prayed for a decree on the footing of a first mortgage, and in the event of the eighth defendant being found entitled to priority, for a decree for sale subject to the mortgage right of eighth defendant offered, in the alternative, to redeem the eighth defendant.

The Subordinate Judge found that the plaintiff was entitled to a mortgage decree against item I only; that the mortgage right of the eighth defendant had priority over the plaintiff's mortgage and that the proportion of the eighth defendant's mortgage amount chargeable on item I was Rs. 3,833–10–8.

He accordingly decreed as follows:—

"Judgment for the plaintiff for Rs. 7,898–6–0 and interest on Rs. 3,181 at one per cent. per mensem from the date of the plaint up to six months from this date and at 6 per cent. per annum from the latter date to the date of realization and for costs and interests thereon at 6 per cent. per annum from to-day to the date of realization, on condition of the plaintiff's paying into Court Rs. 3,833–10–8 on account of the prior mortgage within the aforesaid six months. If the plaintiff should fail to pay the said amount within the aforesaid time he be absolutely debarred of all right to redeem the said mortgage. If the plaintiff should pay the said amount within the aforesaid period, the defendants Nos. 9 and 11 be at liberty to pay into Court within nine months from this date,

VENKATA-RAMANA IYER v. GOMPERTZ.

for payment to the plaintiff, the amount adjudged to him as also the amount paid by him into the Court with interest on the latter amount at 6 per cent. per annum from the date of the plaintiff's paying it into the Court to the date of payment by the defendants Nos. 9 and 11 and if they fail to pay these amounts within the aforesaid time, item I, as described in the schedule annexed to the plaint, be sold at the plaintiff's instance excluding the new buildings thereon not included in the said schedule for the realization of the amounts adjudged to the plaintiff, and the amount paid by him into the Court, and of interest on the latter amount at 6 per cent. per annum from the date of the deposit into Court to the date of realization."

The plaintiff appealed to the High Court.

T. Subramania Ayyar and *T. M. Krishnaswami Ayyar* for appellant.

J. L. Rosario for third respondent.

T. Rangachariar for first and second respondents.

JUDGMENT.—The principal question in this appeal may be stated as follows:—

Can the second of two successive mortgagees, both of whom hold simple mortgages, insist in a suit to which the prior mortgagee is a party, on obtaining from the Court a decree for sale subject to the prior mortgage?

It is unnecessary in considering this question to decide whether or not the prior mortgagee is a necessary party to the suit in all cases, or whether in this country the second mortgagee can make him a party simply to enable the Court to determine what is due to him. In this case the plaintiff has not stated that this was the only purpose for which the prior mortgagee was made a party; he has in fact offered as an alternative to his first prayer, to accept a decree for redemption of the prior mortgage It is of course the case that the plaintiff could not here avoid making the prior mortgagee a party, for as purchaser in the sale on his mortgage he unites in himself the interests of the mortgagor and mortgagee in the property. That however does not affect the question. All the interested parties being before the Court, it is the duty of the Court, if it can do so, to make a decree which shall deal finally with the question between them and shall preclude the necessity of further litigation for the enforcement of any right arising out of the mortgage or mortgages in question

in the suit. This is the obvious intent of section 85 of the Transfer of Property Act, and is clearly a desirable and proper intent. It may be that there will be found cases in which the Court will be unable finally to close the matter without doing injustice to the prior or puisne mortgagee (see remarks in 'Ghose on Mortgages,' 3rd edition, at page 738), but those cases must be treated as exceptional and will no doubt, having regard to the fact that the second mortgagee before advancing his money knows of the existence and the nature of the burden on the property which must be removed before he can be paid, be very few in comparison with those in which justice can best be done by requiring redemption by the second mortgagee, or directing a sale free of encumbrances.

Moreover it is the right of the prior mortgagee to require the second mortgagee to redeem him or submit to a sale of whatever interest he holds in the property (section 75, Transfer of Property Act), and the decree must give effect to this right, unless by doing so it unnecessarily deprives the second mortgagee of any right of his own.

It is the rule in England that when the prior mortgagee is made a party, the plaintiff must be ready to redeem him (Daniell's 'Chancery Practice,' 7th edition, page 217), and on the Original Side of this Court it appears to be the ordinary practice to require redemption in such suits (*vide* Form No. 52, Original Side Rules).

In America too, the decree in a suit like that before us will ordinarily be for redemption by the second mortgagee and then for sale if the prior mortgagee as purchaser of the equity of redemption does not redeem the second mortgage (Jones on 'Mortgages,' section 1075), and the rule there seems to be that when the prior mortgage is not due at the date of the second mortgagee's suit he can obtain a decree for sale subject to the prior mortgage, but when the prior mortgage is due he may redeem and sell the estate to obtain the redemption money as well as his own claim (Jones on 'Mortgages,' section 1580). This practice not only gives effect to the policy of the law and the rights of the different parties, but also secures for the mortgagor the best chance of obtaining a good price for the property at the sale, and prevents the necessity of further proceedings against the mortgagee; and, if it is not in any particular case to be adopted, it is for the second mortgagee to show sufficient reason for making

an exception to it. In this case the second mortgagee prefers a sale subject to the prior mortgage, but that is not a sufficient reason.

Section 96 of the Transfer of Property Act does not support the view that the puisne mortgagee is not required to redeem the prior mortgagee when the latter is a party to the suit. The prior mortgagee may no doubt consent to a sale free of encumbrances, but it is not impossible that the section was intended to cover cases in which the prior mortgagee is not a party to the suit but intervenes after the decree, and it does not seem to answer the present question even indirectly.

Mr. Subramanya Ayyar relied on *Debendra Narain Roy* v. *Ramtaran Banerjee*(1), but the point decided in that case was that the right of a puisne mortgagee was not affected by the proceedings taken in a suit to which he was not a party. It was not contended that in the absence of a sale in the prior mortgagee's suit the second mortgagee would be entitled to a sale subject to the prior mortgage. Nor does *Ram Shankar Lal* v. *Ganesh Prasad*(2) cover the present case, for it is not there decided what form the decree should take when the prior mortgagee is made a party to the suit.

The decree made by the Subordinate Judge is, we think, substantially correct, but the form of the opening direction "that defendants Nos. 9 and 11 do pay to the plaintiff, etc., etc.," is open to the objection that it may be construed as a decree against those defendants personally. It is better to follow the form sketched in section 86 of the Transfer of Property Act, and commence by declaring the amount due; and the decree in that respect must be altered.

The plaintiff contends next, if we understand Mr. Subramanya Ayyar aright, that the amount payable by him for redemption of the prior mortgage should be calculated not on the mortgage money, but on the amount paid by the eighth defendant to the original first mortgagee for his rights. No authority was cited for this proposition, and we think it is unsound. The eighth defendant bought the rights of the original mortgagee, and the price which he paid for them is no concern of the plaintiff's. This is not a case in which the plaintiff has to compensate the eighth

(1) I.L.R., 30 Calc., 599. (2) I.L.R., 29 All., 385.

VENKATA-RAMANA IYER v. GOMPERTZ.

defendant for a payment made to redeem a mortgage which otherwise the plaintiff would have had to redeem. The mortgage remains and the plaintiff must redeem it.

The next contention is that all the buildings on the land ought to be included in the decree for sale, and this is in our opinion a sound contention. It is clear we think, that the plaintiff intended to describe all the buildings in the schedule to his plaint, and that the ninth and eleventh defendants understood that he had done so and framed their defence accordingly. There is no doubt that the plaintiff is entitled as a matter of law to sell all the buildings and the decree must be modified so as to make it clear that he is at liberty to do so.

For the ninth and eleventh defendants, it is contended that if the plaintiff sells the new buildings they should be compensated under section 51, Transfer of Property Act, as for improvements made by them in the belief that they were the owners of the land; but section 51 does not apply to the facts, and *Rangayya Chettiar* v. *Parthasarathi Naicker*(1) by which we are bound seems to be on all fours with the present case.

The decree subject to the modifications we have stated, ought to be confirmed.

The parties will bear their own costs of the appeal.

Time for redemption will be extended by six (6) months from this date.

(1) I.L.R., 20 Mad., 120.

APPELLATE CIVIL.

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

1908. February 11, 12. March 6. August 10, 18.

DAMARAJU NARASIMHA RAO (PLAINTIFF), APPELLANT,

v.

THADINADA GANGARAJU AND OTHERS (DEFENDANTS NOS. 2 TO 5, AND FIRST DEFENDANT'S LEGAL REPRESENTATIVES), RESPONDENTS.*

Limitation Act, Act XV of 1877, sch. II, arts. 29, 49, 62, 120—Suits to recover proceeds of sale of moveable property wrongfully attached and sold, governed by art. 29 or 49 of sch. II of Limitation Act.

A, B and *C* brought a suit against *D* and on the 10th December 1899 attached before judgment certain paddy. *E* put in a claim petition in respect of the paddy which was dismissed on 8th March 1900. *E* then brought a suit under section 283 of the Code of Civil Procedure, on 26th March 1900, against *A, B* and *C* for a declaration of his title to the attached property, and his title was finally declared on appeal on 7th February 1903. In the meanwhile the attached property was sold, and on 15th May 1900 the proceeds were distributed between *A, B, C* and also *F* who claimed rateable distribution. In a suit brought by *E* on 1st June 1903, against *A, B, C* and *F* for a refund of the sale-proceeds:

Held (SANKARAN-NAIR, J., dissenting), that limitation began to run from the date of the wrongful seizure; that the suit for purposes of limitation fell within article 29 or 49 of schedule II of the Limitation Act, and that it was accordingly barred by limitation.

Per SANKARAN-NAIR, J.—The suit was not barred, as the article which applied was either article 62, or 120 of the second schedule to the Limitation Act. The wrong complained of was the payment to the defendants of the sale-proceeds to which the plaintiff was entitled.

Article 29 did not apply, because so long as the property remained in the custody of the Court, it was not lost and plaintiff could not claim any compensation for its loss. The loss of the property was not a necessary consequence of the attachment, as the Civil Procedure Code contains provisions which enable the party to establish his right and recover the property attached. Article 29 only applied when the loss complained of was directly due to the seizure. Article 49 did not apply as the suit was not for any specific moveable property and the defendants had not wrongfully taken, injured or detained such property.

Per Sir ARNOLD WHITE, C.J.—Article 29 of the second schedule which is specific in its terms applied to the suit and not the general provisions of article 62 or 120.

* Second Appeal No. 480 of 1905, presented against the decree of E. L. Vaughan, Esq., District Judge of Godavari, in Appeal Suit No. 71 of 1904, presented against the decree of M.R.Ry. R. Hanumanta Rau, District Munsif of Ellore, in Original Suit No. 219 of 1903.

NARASIMHA RAO v. GANGARAJU.

Article 29 should not be construed as limited to claims for consequential damages and not applicable to cases where the plaintiff seeks only to recover the value of the property seized or the sale-proceeds, if the property had been sold.

The provision of section 283 of the Code by which a claimant may establish his right to property attached, cannot have the effect of postponing the time when limitation begins to run or of suspending time when limitation has begun to run.

Per PINHEY, J.—The cause of action is the original wrongful seizure and article 29 or 49 applies.

The time spent in proceedings under section 283 of the Code of Civil Procedure cannot be excluded in computing the period of limitation.

THE facts necessary for this report are sufficiently set out in the judgments of Sir Arnold White, C.J., and Sankaran-Nair, J.

Sir ARNOLD WHITE, C.J.—The question for determination in this appeal is whether the plaintiff's suit is barred by limitation. For the purpose of this question the material facts and dates are as follows:—

Defendants Nos. 1 to 3 brought a suit against the fifth defendant and on December 10th, 1899, attached certain paddy before judgment. The plaintiff put in a claim petition with respect to the paddy. On March 8th, 1900, this petition was dismissed. On March 26th, 1900, the plaintiff brought a suit under section 283 of the Code of Civil Procedure to establish his right to the property. On November 18th, 1901, he obtained a declaration as to his right. On February 7th, 1903, this declaration was affirmed on appeal. In the meantime, the property had been sold by the Court, and on May 15th, 1900, the proceeds had been distributed to the defendants, the fourth defendant having received his share as a party entitled to rateable distribution. On June 1st, 1903, the present suit for a refund of the money by the defendants was instituted. The plaintiff contends that time began to run from the date of the distribution of the proceeds of the sale of the attached property. If this is so, and the period of limitation is 3 (three) years—deducting (as it is conceded the plaintiff is entitled to deduct) the time when the Court was closed, the suit is in time.

The Munsif held that time began to run from the date of the attachment (December 10th, 1899), that the article of the second schedule to the Limitation Act which applies was article 49, and that the suit was time-barred. The District Judge held that the question of limitation was governed either by article 49 or article

NARASIMHA RAO v. GANGARAJU.

36 and affirmed the Munsif's decree. The Lower Courts have dealt with the case on the footing that the attached property was moveable property and I deal with the case on the same footing. I am of opinion that the appropriate article is article 29, since this is the only article which refers specifically to wrongful seizure under legal process. This was the view taken by this Court in *Murugesa Mudaliar* v. *Jatharam Davy*(1). I do not think this article should be construed as limited to claims for consequential damages and as not applicable where the plaintiff seeks only to recover the value of property seized, or the sale-proceeds, if the property has been sold. This is obviously not the sense in which the word is used in articles 30 and 31, and I do not see why it should be construed in this restricted sense in article 29. If article 29 applies, the law is express and the time is one year from the date of the seizure. No doubt section 283 of the Code makes provision for a special procedure whereby a claimant to property which has been seized in execution may establish his right, but I fail to see how the provisions of this section can have the effect of postponing the time when limitation begins to run, or suspending the time which has begun to run, when the Limitation Act makes express provision in the matter.

Further, I can see no good ground for holding that time does not run so long as the property remains *in custodia legis*. The damage to the plaintiff is the seizure of his property. True he may eventually succeed in showing the property is his and in the meantime the property is safe, but he is none the less damaged by being deprived of the enjoyment of his own property. The measure of damages is of course a different matter. If he brings his suit after his property has been restored to him, and his suit is in time, he can of course only recover damages on the footing that he has not been permanently deprived of his property. If he has already recovered damages on the footing that he has been permanently deprived of his property, and it is afterwards determined that the property is his, or the plaintiff's suit is ultimately dismissed, a question may arise as to what order the Court ought to make with regard to the disposal of the attached property or the proceeds thereof if it has been sold; but I do

(1) I.L.R., 23 Mad., 621 at p. 624.

NARASIMHA RAO v. GANGARAJU.

not think this is a question which can be taken into consideration in construing the plain language of the enactment.

In *Murugesa Mudaliar* v. *Jatharam Davy*(1), where goods were attached and sold whilst a declaratory suit by a party who claimed to be the owner of the goods was pending, it was held that time began to run from the date of the attachment. If article 29 does not apply, I think the appropriate article is article 49 (see *Ratnachalam Ayyar* v. *Venkatrama Ayyar*(2)), and that time would run from the date when the property was wrongfully taken. In this view also the suit would be time-barred. The case *Ramaswamy Ayyar* v. *Muthusamy Ayyar*(3), where property had been seized by a Magistrate is, I think, distinguishable.

It was contended on behalf of the appellant that either article 62 or article 120 applies. As regards article 62, it is not necessary for me to consider whether if there had been no specific article applicable, the money received by the defendants in this case is money had and received to the plaintiff's use within the meaning of the article. I think article 29 which is specific in its terms applies, and not the general provisions of article 62 or 120. As I read the judgment of West, J., in *Jagjivan Javherdas* v. *Gulam Jilani Chaudhri*(4), I think it supports my view.

As regards the fourth defendant who received a portion of the sale-proceeds by way of rateable distribution, I do not think that, with reference to the question of limitation, any distinction can be drawn between his case and that of the other defendants, since his right to rateable distribution is dependent on the seizure which has been held to be wrongful as against the plaintiff.

I would dismiss the appeal with costs.

SANKARAN-NAIR, J.—The suit was instituted on 1st June 1903 to recover the value of the paddy crops belonging to the plaintiff, attached by the defendants Nos. 1, 2 and 3 before judgment in a suit brought by them against the fifth defendant, and sold on the 10th April 1900 to satisfy the decree obtained in that suit. The proceeds of the sale were distributed among the defendants on the 15th May 1900, and it is, accordingly, argued before us that article 29 applies and the suit is barred as it was not

(1) I.L.R., 23 Mad., 621 at p. 624.
(2) I.L.R., 29 Mad., 46.
(3) I.L.R., 30 Mad., 12.
(4) I.L.R., 8 Bom., 19.

NARASIMHA RAO v. GANGARAJU.

brought within one year from the date of the attachment. The plaintiff presented a claim petition when the property was attached which was dismissed on the 8th March 1900. He sued to declare his title on the 26th March 1900 and he obtained his final decree declaring his title on the 7th February 1903.

A person whose property is attached in a suit between third parties is entitled under the Civil Procedure Code to apply to the Court which attached his property to release the same from attachment, and the attachment will be set aside and the property released if he proves his title. The property if moveable remains in the custody of the Court while under attachment, and it will be restored to him on proof of his title.

If he fails in his application, the Civil Procedure Code allows him to bring a suit to declare his title *within one year from the date of his order*, and if he obtains a decree in his favour, the Court which attached his property and in whose custody it continues to remain is bound to restore it to him on his application. If the property has been sold and the proceeds are in Court, it is bound to deliver to him such proceeds. The loss of the moveable property is not, therefore, in my opinion, a necessary consequence of the wrongful seizure by attachment. The right to sue even after one year from the date of the attachment implies that the property continued in the claimant even after the expiry of the period prescribed by article 29. So long as the property remains in the custody of the Court he cannot be said to have lost it and is not therefore entitled to any compensation for its loss, and article 29 of the Limitation Act does not therefore apply. It might be otherwise where the loss to the plaintiff is directly due to the seizure. A suit, for instance, for damages on account of the deprivation of the use of the goods, for instance, for the hire of furniture under attachment would come within the article. If article 29 applies the result will be curious. If the owner of the moveable property gets his compensation from the plaintiff who attached his crops before judgment, and that plaintiff's suit is dismissed, to whom is the Court to deliver the property? Not to the owner, who has got his compensation. Not to the defendant as whose property it was attached, because it has been declared not to belong to him in the suit which awarded compensation. Not to the plaintiff who failed in his suit and never claimed it to be his property.

NARASIMHA RAO v. GANGARAJU.

The opinion expressed in *Murugesa Mudaliar* v. *Jatharam Davy*(1) that article 29 applies to such case is opposed to the opinion expressed on the same facts in *Murugesa Mudali* v. *Jotharam Daray*(2) and both were *obiter dicta*. From the statement of facts by the Judges of the Small Causes Court it does not clearly appear whether after attachment the property continued in the custody of the Court or in the possession of the defendant.

Nor in my opinion does article 49 apply. The suit is not for any specific moveable property, nor have the defendants wrongfully taken, injured, or detained the property. The wrongful seizure was by the Court, though at the instance of defendants Nos. 1 to 3. If there was any wrongful taking or detention of any property it was only when the money was paid over to the defendants. The article that applies is therefore either article 62 or article 120, and in either case the suit is not barred.

Mr. Ramesam contends that the plaintiff's cause of action arose when the wrong was inflicted on him. This may be so, but the wrong for which he now claims compensation is not the attachment, but the payment to the defendants of the money which belongs to him.

Of the authorities cited, the decision in *Lakshmi Priya Chowdhurani* v. *Rama Kanta Shaha*(3) supports my view. The case of *Jayjivan Javherdas* v. *Gulam Jilani Chaudhri*(4) was strongly relied upon by the respondent's pleader. But a careful consideration of that judgment has satisfied me that it strongly supports my conclusion. Mr. Justice West points out that when the plaintiff wants to recover his property, the proper course to follow is the one I have already indicated. He adds "besides the recovery of the article, the owner may seek compensation for damage to it and for his loss of the use of it, and, *for such a suit article* 29 *prescribes a term of one year.*" I agree. But he also holds that when the recovery of the article may become impossible or undesirable, the owner may seek compensation both for the thing itself and for the damage he has sustained through being deprived of the use. To such a suit then article 29 would apply: "as the double claim of compensation consists of elements of identical character, these, though capable of separate existence, blend by contract in their subject into one." This reasoning will

(1) I.L.R., 23 Mad., 621.
(2) I.L.R., 22 Mad., 478.
(3) I.L.R., 30 Calc., 440.
(4) I.L.R., 8 Bom., 19.

NARASIMHA RAO v. GANGARAJU.

only apply when they blend into one by the plaintiff finding it impossible or undesirable to recover the property, probably on account of its nature by reason of the seizure itself. It obviously cannot apply when the two claims blend into one after the expiry of the period prescribed by article 29. At any rate I do not think that the learned Judge had that case in view. The suit itself was apparently not brought within 3 years after payment to the defendants.

I am therefore of opinion that the plaintiff's claim is not barred and would accordingly reverse the decrees of the Courts below and pass a decree in favour of the plaintiff with costs throughout.

As there is some conflict in the authorities we refer the Appeal under section 575 of the Code of Civil Procedure to a Bench of three Judges.

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

T. V. Seshagiri Ayyar for appellant.

V. Purushothama Ayyar for The Hon. The Advocate-General for fifth to seventh respondents.

V. Ramesam for third respondent.

The Court delivered the following:—

JUDGMENTS—*The Chief Justice.*—I adhere to my former judgment.

Sankaran-Nair, J.—I have nothing to add to my former judgment.

Pinhey, J.—I have no doubt that the present suit is barred. It is urged that the wrong for which the appellant claims compensation is not the attachment of his paddy, but the payment to the defendants of the money realized by its sale.

If the seizure was not wrongful there was nothing wrongful in the payment.

It is conceded that the seizure was wrongful. This is not a continuing wrong. Later manifestations of the original damage done and consequent upon the injury originally sustained do not give rise to a new cause of action.

The cause of action therefore was the original seizure and time began to run from that date. The article of Schedule II of the Limitation Act that governs the case would appear to be either article 29 or article 49.

NARASIMHA RAO v. GANGARAJU.

The property seized was moveable.

There was admittedly a wrongful seizure under legal process.

The suit is for the value of the property seized and for interest from date of decree but not for other damage.

Whether article 29 or article 49 applies depends on the view taken of the scope and meaning of these two articles. The learned Chief Justice takes the view that article 29 is not restricted in its application to cases of consequential damage, but applies also to the case where the value of the property itself is sought to be recovered. He further holds that the distinction between article 29 and article 49 is that the former article applies to a case of wrongful seizure made under *legal process*, whereas, the latter applies when the wrongful seizure is made by a private person.

There is much to be said in support of this view, but it seems to me unnecessary, now, to decide which of the two articles applies, for the suit is admittedly barred whichever article is applied, if the wrongful seizure is taken as the starting point for limitation, and no allowance is made for the time spent in litigating the title under section 283, Code of Civil Procedure.

As regards the time spent in litigating the title I know of no provision of law under which this can be excluded. Nor do I see how the special period of limitation allowed by article 11, schedule II of the Limitation Act for suits under section 283, Code of Civil Procedure, can affect the limitation fixed by other articles of the Limitation Act.

It seems to me the plaintiff in this case mistook his remedy. Section 283, Code of Civil Procedure, and article 11 read together afford the plaintiff one year from the 8th March 1900 to file a suit, but section 283, Code of Civil Procedure, does not purport to lay down what the consequences will be in the event of success. The plaintiff contented himself with filing a suit for declaration of title, but he omitted to get an injunction and so prevent the property which was moveable, from being dealt with by the Court that had attached it. The property was sold soon after the institution of the suit and the sale-proceeds distributed.

There was obviously no use in continuing a suit for cancellation of the order alone or for mere declaration of right to property which was no longer in the custody of the Court.

The plaintiff might have amended his plaint under section 53, Code of Civil Procedure, and brought the fourth defendant on

NARASIMHA RAO v. GANGARAJU.

record, but did not. In the result he obtained an infructuous decree and finds that his remedy as regards the property itself or its value is barred by specific articles of the Limitation Act, which prescribe within what period suits for recovery or compensation must be filed.

I hold that the cause of action arose on the seizure of the property; that article 29 or article 49 of Schedule 11, Limitation Act, governs the case and that the suit is barred.

The appeal must be dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Munro.

CHAMA SWAMI AND ANOTHER (DEFENDANTS NOS. 3 AND 4), APPELLANTS,

1908. March 13. April 8.

v.

PADALA ANANDU AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Lien of purchaser of land paying off mortgage—Purchaser in possession paying off mortgage subrogated to the right of the original mortgagee, when purchase found invalid.

A purchaser of land, who, while in possession of the land purchased, pays off an encumbrance on it, is entitled, when his purchase is found invalid, to stand in the shoes of the mortgagee whom he has paid off.

Syamalarayudu v. *Subbarayudu*, (I.L.R., 21 Mad., 143), followed.

The American Courts, when equity requires it, allow persons, paying off mortgages on properties not belonging to them, to be subrogated to the rights of the original mortgagees; and subrogation is allowed as a matter of right for the benefit of a purchaser who has extinguished an encumbrance on the property purchased. This is the right principle to be applied in India.

Gokaldas Gopaldas v. *Puranmal Bemsukhdas*, (I.L.R., 10 Calc., 1035), referred to.

Dakhina Mohan Roy v. *Saroda Mohan Roy*, (I.L.R., 21 Calc., 142), referred to.

DEFENDANTS Nos. 1 and 2 executed a mortgage in favour of the seventh defendant on 30th September 1897. The plaintiffs bought

* Second Appeal No. 213 of 1906, presented against the decree of M.R.Ry. Y. Janaki Ramayya Sastri, Subordinate Judge of Cocanada, in Appeal Suit No. 37 of 1905, presented against the decree of M.R.Ry. K. Krishnamachariar, District Munsif of Amalapur, in Original Suit No. 462 of 1904.

the mortgaged lands from the first defendant and others on 21st July 1899 and paid off the mortgage of the seventh defendant on 24th August 1899. The father of the defendants Nos. 3 to 6 who claimed to have purchased the lands on 29th July 1899, brought a suit against plaintiffs, in which it was decreed that the purchase in plaintiffs' favour was invalid as against defendants Nos. 3 to 6. The plaintiffs claiming to be entitled to all the rights of the seventh defendant, whom they had paid off brought this suit to recover the amount due on the mortgage of the seventh defendant.

The District Munsif passed a decree in favour of plaintiffs as prayed.

This decree was confirmed on appeal.

Defendants Nos. 3 and 4 appealed to the High Court.

P. Narayanamurthi for appellants.

P. Nagabhushanam for respondents.

JUDGMENT.—The plaintiffs in this case according to the finding of the lower Appellate Court purchased certain lands by a sale-deed, dated the 21st July 1899, which was afterwards registered and on the 24th August 1899 redeemed a mortgage on the property. The plaintiffs' purchase was afterwards held invalid as against defendants Nos. 3 to 6, and under these circumstances the plaintiffs have brought the present suit to recover from defendants Nos. 3 to 6 the money due on the mortgage which they paid off whilst in possession of the property under the sale-deed in their favour. Both the lower Courts have given a decree in the plaintiffs' favour on the authority of *Syamalarayudu* v. *Subbarayudu*(1), the facts in which closely resemble those in the present case. In the argument before us it was not seriously argued that the present case was distinguishable; but it was said that the decision in *Syamalarayudu* v. *Subbarayudu*(1) was wrong. We are unable to agree with this contention. Although no authorities are cited in *Syamalarayudu* v. *Subbarayudu*(1), we think that the learned Judges who decided the case must have had their attention called to the decision of the Privy Council in cases of this kind and have proceeded on the authority of those cases. In the well-known case of *Gokaldas Gopaldas* v. *Puranmal Bemsukhdas*(2), their Lordships of the Judicial Committee pointed out that what we have to look to in India are not the technical rules of

(1) I.L.R., 21 Mad., 143.

(2) I.L.R., 10 Calc., 1035.

English Equity as settled by the authority of decided cases, but only such of those rules as rest upon broad intelligible principles of justice and can be applied as part of the law of justice, equity and good conscience; and accordingly their Lordships refused to apply the ruling in *Toulmin* v. *Steere*(1) to India. In a later case *Dakhina Mohan Roy* v. *Saroda Mohan Roy*(2), Lord Macnaghten delivering the judgment of their Lordships referred to the case of the *Peruvian Guano Company* v. *Dreyfus*(3), in which he had himself criticized the English decisions that parties who have no right to property cannot acquire a lien by expending moneys in connection with it, and observed that after the decision in the *Peruvian Guano Company* v. *Dreyfus*(3) it would be hard to maintain as a proposition admitting of no exceptions that a person who is in wrongful possession is not entitled to recover sums paid on account of outgoings. In that case their Lordships held that the plaintiff was not in wrongful possession at the time he paid the Government revenue which he was seeking to recover as he was at the time in possession under the decree of a competent Court which was afterwards reversed; but at the close of the judgment his Lordship speaks of the claim as being in the nature of salvage and observes that the Indian Statute law recognizes an equity to repayment in the case of a person who not being proprietor pays the Government revenue in good faith to support a claim which afterwards turns out to be unfounded. In *Syamalarayudu* v. *Subbarayudu*(4), the action of the plaintiff in paying off a mortgage on the property was considered to have been made in good faith in spite of the fact that he was claiming under a sale-deed which had been antedated for the purpose of supporting his title.

For the appellant we have been referred to the recent decision of the Calcutta High Court (*Gurdeo Singh* v. *Chandrikah Singh* and *Chandrikah Singh* v. *Rashbhehary Singh*(5)), in which the American authorities are considered, but we do not think they help the appellant. The American Courts apply to cases of this kind an equitable doctrine of subrogation borrowed from the Civil Law, and when equity requires it allow persons paying off mortgages on properties which do not belong to them to be subrogated

(1) 3 Mer., 210.

(2) I.L.R., 21 Calc., 142.

(3) (1892), A.C., 166.

(4) I.L.R., 21 Mad., 143.

(5) 5 C.L.J., 611.

CHAMA SWAMI v. PADALA ANANDU.

to the rights of the original mortgagees. This right of subrogation is not extended to mere volunteers who pay off other people's debts without having any concern in them. This was held by the Supreme Court in *Aetna Life Insurance Company* v. *Middleport*(1); but in the course of their judgment in that case the learned Judges cite with approbation a passage from Shelden on 'Subrogation' in which subrogation is allowed as a matter of right for the benefit of a purchaser who has extinguished an encumbrance on the estate which he has purchased.

We think this is the right principle to apply especially, whereas in the present case the plaintiffs were in possession when they paid off the mortgage.

Under these circumstances we agree with the lower Courts and dismiss the appeal with costs.

APPELLATE CIVIL.

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

1908. April 24, 30. May 7.

SUBRAMANIAN CHETTY, MINOR BY MINATCHI (SECOND DEFENDANT), APPELLANT,

v.

VEERABADRAN CHETTY (PLAINTIFF), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, *s.* 559—"*Interested in the result of appeal*"—*Where defendants exonerated and no appeal against that portion of decree, they cannot be brought on record under s.* 559.

A party, who is not made a respondent in an appeal, is not "interested in the result of the appeal" within the meaning of section 559 of the Code of Civil Procedure, unless the decree sought to be obtained against the respondents in the appeal would have the effect of prejudicing him in some way or other. The party sought to be made a respondent in the appeal under section 559 must be shown to be interested in the result of the appeal before he is brought on the record, and the interest he may acquire as a result of being added as a respondent, will not suffice.

Where a defendant has been exonerated, and there is no appeal against so much of the decree as exonerates him, no decree can be passed against him in an appeal by any other party as he is not a party to the appeal and cannot be said to be interested in the result of such appeal.

Atma Ram v. *Balkishen*, (I.L.R., 5 All., 267), followed.

Upendra Lal Mukerjee v. *Girindra Nath Mukerjee*, (I.L.R., 25 Calc., 565), not followed.

(1) 124 U.S., 534.

* Second Appeal No. 82 of 1905, presented against the decree of H. Moberly, Esq., District Judge of Madura, in Appeal Suit No. 86 of 1904, presented against the decree of M.R.Ry. M. C. Parthasarathy Aiyangar, District Munsif of Tirumangalam, in Original Suit No. 195 of 1902.

SUBRAMANIAN CHETTY v. VEERABADRAN CHETTY.

THE facts necessary for the report of this case are sufficiently stated in the judgment.

K. B. Ranganatha Ayyar for appellant.

T. R. Venkatrama Sastri for The Hon. The Advocate-General for first respondent.

L. Narayana Ayyar for third to fifth and seventh to ninth respondents.

JUDGMENT.—In this case the plaintiff sues to recover possession of certain property usufructuarily mortgaged by the first defendant to the sixth defendant's grandfather whose interest was subsequently purchased by the plaintiff in execution of a money decree against the sixth defendant's grandfather. In the alternative the plaintiff seeks to recover the amount of the mortgage debt due on the mortgage by the first defendant to the sixth defendant's grandfather. Prior to the purchase in execution by the plaintiff of the sixth defendant's grandfather's interest the plaint alleges that the sixth defendant's grandfather, for the purpose of defeating the plaintiff's claim against him, got the first defendant to execute a collusive mortgage of the same property in favour of the second defendant's father who sued on this mortgage and brought the suit property to sale when it was purchased by defendants Nos. 3 to 5. The lower Appellate Court held that the second mortgage was collusive, but that defendants Nos. 3 to 5 were *bonâ fide* purchasers for value and gave the plaintiff a personal decree against the second defendant. The second defendant then preferred this second appeal and the learned Advocate-General who appeared for the first respondent (plaintiff) admitted that he could not support the decree against the present appellant, and the second appeal must accordingly be allowed, and the decree of the lower Appellate Court modified and the suit against the second defendant dismissed with costs throughout. At the hearing of this second appeal on the 13th November 1907 the Advocate-General when admitting that he could not support the decree against the second defendant, applied that defendants Nos. 1 and 3 to 9 should be made parties to the

second appeal in order to fix them with liability, and the Court on the authorities cited made the order subject to objections. Defendants Nos. 1 and 3 to 9 who have now been made parties, appear and object that section 559, Civil Procedure Code, is inapplicable, and that they have been wrongly made parties, and, after hearing the question fully argued, we are of opinion that their objection is well founded. Section 559, Civil Procedure Code, provides that "If it appear to the Court at the hearing that any person who was a party to the suit in the Court against whose decree the appeal is made, but who has not been made a party to the appeal, is interested in the result of the appeal, the Court may adjourn the hearing to a future day to be fixed by the Court, and direct that such person be made a respondent." Looking at the language of the section apart from authority it would appear to have been inserted to protect parties to the suit who had not been made respondents in the appeal from being prejudiced by modifications made behind their backs in the decree under appeal. The party whom it is sought to bring on is required to be interested in the result of the appeal, that is to say, he must be shown to be interested in the result of the appeal before he is brought on, for once he is brought on he may be said to acquire an interest as a result of being brought on. Now, when a defendant has been exonerated and there is no appeal against so much of the decree as exonerates him, no decree can be passed against him in an appeal by any other party to the suit as he is no party to such appeal, and he cannot, in our opinion, be said to be interested in the result of such appeal by another party unless the decree sought to be obtained against the respondents in the appeal would have the effect of prejudicing him in some way or other. This is the interpretation put upon the section in *Atma Ram* v. *Balkishen*(1) where the learned Judges say "We do not think that section 559 of the Code empowers an Appellate Court virtually to make an appeal for an appellant who has refrained from availing himself of his privileges under the law, by introducing for him other respondents than those he has included in his petition of appeal. Moreover, we do not think it can be said that Atma Ram was interested in the result of the appeal, as having the unappealed decree of the Assistant Commissioner

(1) I.L.R., 5 All., 267.

behind him, his position was secure." We may further observe that section 559 was adopted from section 73 of Act VIII of 1859, and follows the language of that section with some modifications. The persons to be brought on under that section were "all the persons who may be entitled to, or who claim some share or interest in the subject-matter of the suit, and who may be likely to be affected by the result;" and these persons are described in the marginal notes to the section as "parties appearing to be interested in a suit."

In *Upendra Lal Mukerjee* v. *Girindra Nath Mukerjee*(1), a Bench of the Calcutta High Court refused to follow *Atma Ram* v. *Balkishen*(2) and referred to cases such as the present in which the plaintiff having obtained a decree against one of several defendants might well rest content with this decree until the defendant who had been held liable preferred an appeal when he would naturally desire to fall back on his claim against the exonerated defendants in the result of the appeal being successful. In such a case it would be open to the plaintiff after the filing of the appeal to prefer another appeal against so much of the decree as exonerated any of the defendants, and if his appeal would be out of time there might possibly be ground for excusing the delay. But however this may be, the hardship which might arise in a case of this kind is no reason for extending the section to cases which do not come within the scope of the language used as we understand it. We may further observe that the decision in *Upendra Lal Mukerjee* v. *Girindra Nath Mukerjee*(1) was followed with reluctance in *Hudson* v. *Basdeo Bajpye*(3) and was disapproved as to this point by the referring Judges in *Rup Jaun Bibee* v. *Abdul Kadir Bhuyan*(4). It was no doubt held by the Full Bench to have been rightly decided, but no question as to section 559, Civil Procedure Code, was actually before the Full Bench, as the appellant had made all the other parties respondents. We have not been referred to any reported case in this Court and for the reasons already given, we prefer to follow *Atma Ram* v. *Balkishen*(2) and uphold the objection and set aside with costs, the order making defendants Nos. 1 and 3 to 9 respondents to the second appeal.

(1) I.L.R., 25 Calc., 565.
(2) I.L.R., 5 All., 267.
(3) I.L.R., 26 Calc., 109.
(4) I.L.R., 31 Calc., 643.

APPELLATE CIVIL.

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

1908.
February 20.
April 28.

CHALLA SUBBIAH SASTRI AND OTHERS (DEFENDANTS NOS. 2, 5 AND 6), APPELLANTS,

v.

PALURY PATTABHIRAMAYYA AND ANOTHER (PLAINTIFF AND FIRST DEFENDANT), RESPONDENTS.*

Hindu Law—Conveyance by a widow to reversioner of whole life estate, validity of—Conveyance not invalid by reason of contemporaneous agreement between the widow and reversioner.

Where a widow conveys the whole of her limited estate to the next reversioner in consideration of an undertaking by such reversioner that he would reconvey a portion of such property to a person named by the widow, the conveyance is valid and is not vitiated by such agreement. The title of such reversioner and that of the person to whom the property is reconveyed in pursuance of such agreement cannot be impeached by other reversioners.

Rangappa Naick v. *Kamti Naick*, (I.L.R., 31 Mad., 366), referred to and explained.

Hem Chunder Sanyal v. *Sarnamoyi Debi*, (I.L.R., 22 Calc., 354), referred to and distinguished.

Per SANKARAN-NAIR, J.—The validity of the renunciation by the widow is independent of the validity of the agreement as to the subsequent disposal of the property by the alienee.

The surrender by the widow of her life estate to the next reversioner is analogous to the case of a widow divesting herself of her estate by adoption; and as an adoption cannot be questioned on the ground of improper motive in the widow, so the validity of the surrender cannot be affected by her motives or by any conditions that may be imposed by her.

SUIT to set aside an alienation of land made by the first defendant.

The first defendant was the widow of one Yoganna. She succeeded to his properties on his death, and conveyed the entire estate inherited by her to *V* the father of the fourth defendant who, at the time, was the nearest reversioner, for a nominal consideration of Rs. 500. *V* resold the greater portion of the properties two days later to defendants Nos. 2 and 3 who were

* Second Appeal No. 878 of 1905, presented against the decree of F. H. Hamnett, Esq., District Judge of Godavari, in Appeal Suit No. 620 of 1903, presented against the decree of M.R.Ry. D. Raghavendra Rao, District Munsif of Rajahmundry, in Original Suit No. 536 of 1902.

brothers of the first defendant for a nominal consideration of Rs. 600. *V* died and the plaintiff, as the next reversioner, brought this suit for a declaration that the aforesaid sales were collusive and did not affect his reversionary rights.

It was found that no consideration passed for the sale-deeds and that the consideration for the first sale-deed was the undertaking by *V* to reconvey a portion of the lands comprised therein to defendants Nos. 2 and 3.

The Munsif passed a decree for plaintiff which decree was confirmed on appeal.

The defendants Nos. 2, 5 and 6 appealed to the High Court.

T. V. Seshagiri Ayyar for appellants.

P. Anandacharlu for first respondent.

JUDGMENT—Sir ARNOLD WHITE, C.J.—In this case a Hindu widow conveyed the whole of her limited estate to her husband's brother the then nearest reversioner. Two days later the latter conveyed the greater portion of the property which the widow had conveyed to him to the widow's brothers reserving for himself a portion which has devolved on his daughter the fourth defendant.

A consideration of Rs. 500 is recited in the conveyance by the widow to her husband's brother, but the finding is that this consideration was not paid. A consideration of Rs. 600 is recited in the conveyance by the husband's brother to the widow's brothers. The finding is that this Rs. 600 was not paid.

The question is, do these transactions create a good title in the widow's brothers and her husband's brother as against the plaintiff, the present reversioner to the widow's husband?

It would seem that the real consideration for the first conveyance was an undertaking by the husband's brother that he would reconvey the greater portion of the property to the widow's brother. This undertaking was carried into effect by the second conveyance.

In my judgment in *Rangappa Naick* v. *Kamti Naick*(1) which came before a Full Bench, I expressed the opinion that the Privy Council in their judgment in the recent case of *Bajrangi Singh* v. *Manokarnika Bakhsh Singh*(2), did not intend to hold that reversioners could give to a widow a general release of their reversionary rights with the view of enabling her to give an absolute title to

(1) I.L.R., 31 Mad., 366. (2) I.L.R., 30 All., 1.

property inherited from her husband; I stated that I did not think that the decisions of this Court in *Manickam Pillai* v. *Ramalinga Pillai*(1), and in *Narasimham* v. *Madhavarayudu*(2), were affected by the recent judgment of the Privy Council.

In the two Madras cases, there was no conveyance as in the present case by the widow of her limited estate to the reversioners. In *Manickam Pillai* v. *Ramalinga Pillai*(1), the conveyance was a conveyance by the reversioner of his interest in reversion to a third party. In *Narasimham* v. *Madhavarayudu*(2) the conveyance was by the reversioner to the widow. In *Hem Chunder Sanyal* v. *Sarnamoyi Debi*(3) there was a conveyance by the widow of the whole of her limited estate to the then reversioner and a reconveyance by him to the widow of a moiety. The Court held that these transactions were ineffective for the purpose of giving the widow an absolute estate in the moiety reconveyed to her; but that the reversioner's title to the other moiety could not be impeached by the reversioner who brought the suit. As to whether it could be impeached by the widow the Court expressed no opinion.

In the present case we have a conveyance by the widow to the reversioner of the whole of her limited estate, and this being so, in accordance with the view which I expressed in the Full Bench case, I think the conveyance is good. It is not necessary for me to consider what would be the effect of a conveyance of this nature followed by a reconveyance to the widow with the view of vesting the absolute estate in her. Here the widow's limited estate having been conveyed to the reversioners, the entire estate vested in them and they could, in my opinion, give a good title to a third party. With reference to the deeds in question in *Hem Chunder Sanyal* v. *Sarnamoyi Debi*(3), the learned Judges said (p. 363) "The two deeds that are sought to be declared invalid after the widow's death must, so far as they relate to the moiety of the estate that the widow has retained for herself, be regarded as a mere contrivance to convert the qualified estate of the widow into an absolute estate to be enjoyed by her free from all restraints on alienation." In the present case there was an out and out conveyance by the widow to the then reversioner. The widow's estate became extinguished and all her powers of dealing with the property became vested in the then reversioner. The validity of the transaction does not seem to me to be affected by the fact that it was carried out in pursuance of an undertaking that the reversioner should retain a portion of the property for himself and convey a portion to a third party.

(1) I.L.R., 29 Mad., 120.
(2) 13 M.L.J., 323.
(3) I.L.R., 22 Calc., 354 at p. 363.

In the Full Bench case I construed the document in question as a release to the widow by the reversioners of their reversionary interest in consideration of the widow conveying to them her interest in a portion of the property. In the present case there is no release by the reversioner, but a conveyance to him by the widow.

I am of opinion that the husband's brother, on the strength of exhibit I, obtained a good title to the portion of the property, which he retained for himself and which has now devolved upon his daughter the fourth defendant, and that defendants Nos. 2 and 3 have a good title to the property conveyed to them by exhibit II.

I think the appeal should be allowed and the suit dismissed with costs throughout.

SANKARAN-NAIR, J.—I agree. Following my judgment in *Rangappa Naick* v. *Kamti Naick*(1) I hold that the relinquishment by exhibit I and the subsequent transfer (exhibit II) are valid and binding on the other reversioners. To carry out the object of transferring the property to defendants Nos. 2 and 3, it was necessary for the widow to transfer the entire estate to the fourth defendant's father, and, as the instrument in terms carries out that intention, it appears to me to be impossible to hold that the entire property did not vest in the fourth defendant's father, and, if the entire property vested in him, it was open to him to deal with it in any way he liked, and the transfer by him to defendants Nos. 2 and 3 must be upheld.

Does it then make any difference that the property was given to the fourth defendant's father on the condition that he was to convey a portion thereof to defendants Nos. 2 and 3? No contract which limits the interest of the fourth defendant's father in the property is alleged; and in my opinion the validity of the renunciation is quite independent of the validity of any agreement as to the disposal or enjoyment of the property by the alienee.

(1) I.L.R., 31 Mad., 366.

I am unable to agree with the view that the validity of the surrender of her interest or title to the reversioner depends upon the motive of the widow or upon any question of any benefit that may accrue to her or to any other person. Such might have been the case if the widow were holding the property in trust for any purpose or for the benefit of the actual reversioner at the time of her death.

We may compare the case of the surrender of her estate by the widow and the consequent vesting of the estate in the presumptive reversioner with the case of an adoption by the widow which has the effect of divesting her of her estate and vesting it in the adopted son, her husband's heir, the effect of both the transactions being the same so far as the widow and the actual reversioner at the time of her death are concerned. Can it be maintained that the actual reversioner is entitled to dispute the validity of the adoption, on the ground that the widow made the adoption on condition of the adopted son conveying to her or some other person a portion of the entire property which the Hindu law vests in him on adoption or for the reason that she was actuated by malicious motives : even in the case of a minor adopted son an agreement of that nature is not void, and its validity would depend upon other considerations. In the case of an adoptee of full age—say an unmarried Sudra—that agreement would clearly bind him. But whether the agreement is binding or not, I do not see how the adoption can be invalid. As the Privy Council pointed out in *Bhaiya Radibat Singh* v. *Maharani Indar Kunwar*(1) " the analogy, such as it is, presented by the doctrines of equity in this country relating to the execution of the powers of appointment would rather suggest that, even in that case, the adoption would have been valid and the conditions void."

Similarly as to motive the discussion of a widow's motive has been held to be irrelevant by a Full Bench of the Bombay High Court (*Ramchandra* v. *Mulji Nanabhai*(2)). An admittedly sinful and irreligious act as the adoption of an only son, has been held to be valid by the Privy Council (*Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshmamma*(3)). It is difficult to see how the validity of a surrender by a widow which stands on a higher footing can

(1) L.R., 16 I.A., 53 at pp. 55, 59. (2) I.L.R., 22 Bom., 558.
(3) L.R., 26 I.A., 113.

therefore be affected by her motives or by any such conditions that may be imposed by her as referred to above.

Further, there is nothing in the reason of the law to support this contention. Supposing this succession is accelerated by the widow becoming a sanyasi or remarrying, can it be contended that the actual reversioner at the time of her death is entitled to claim the property on the ground that her renunciation of the world or remarriage was made in order to vest the property in a favourite presumptive reversioner, or that it was made under an arrangement by which he was to convey a portion of the property to another ? On her renunciation of the world, or remarriage, the Hindu Law vests the property in the reversioner and it is not the less his property because he has promised the widow to give a portion of that property to some stranger who himself could not enforce that agreement.

The right to surrender the property to the next reversioner by deed is based on this capacity of renunciation. In the case of a reconveyance to the widow it may be suggested that the deeds of surrender and reconveyance must be treated as one transaction and therefore there was no surrender or extinguishment of the entire estate. The decision in *Hem Chunder Sanyal* v. *Sarnamoyi Debi*(1), may be supported on this ground. But whether this is so or not where the alienation is to strangers as in the case before us, I fail to see how it can be said that her entire interest has not become extinguished or has not vested in the alienee.

I am therefore of opinion that the entire estate of the widow was extinguished by exhibit I and that the suit must therefore be dismissed with costs throughout.

(1) I.L.R., 22 Calc., 354.

APPELLATE CIVIL.

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

1908. May 1, 7.

SRINIVASA RAGHAVA DIKSHADAR AND OTHERS (PLAINTIFFS AND SECOND PLAINTIFF'S REPRESENTATIVES), APPELLANTS,

v.

RENGASAMI AIYANGAR AND OTHERS (DEFENDANTS NOS. 2 TO 6), RESPONDENTS.*

Limitation Act, Act XV of 1877, *sch. II, arts.* 83, 113, 116—*Suit to recover money on a covenant in a registered document not a suit for specific performance, but for damages and falls within art.* 116 *and not* 113 *of the Limitation Act.*

A and *B* exchanged lands under a registered deed which contained the following clause: "There is no dispute in respect of the said lands. If disputes should so arise, the respective party should be answerable to the extent of his private property." *A* was deprived of some of the lands he got by the exchange, and he sued *B* on the above covenant for the value of the lands of which he was dispossessed. The suit was brought more than six years after the exchange and more than three but less than six years after the date of deprivation:

Held, that the suit was not a suit for specific performance, but a suit for compensation for breach of a contract in writing registered and for purposes of limitation, fell within article 116 and not 113 of schedule II of the Limitation Act.

The rule that in actions for damages for breach of covenant of title in a sale, the breach must be held to have occurred as and from the date of sale, does not apply when there is a special contract. The provision in the deed above stated was a special contract to indemnify when deprivation took place, and the period of limitation ought to be computed from such date. As the suit was brought within six years of such date, it was not barred by limitation.

THE facts are sufficiently stated in the judgment.

S. Subrahmania Ayyar for first and third to fifth appellants.

C. Govindan Nair for *T. V. Seshagiri Ayyar* for third respondent.

T. R. Venkatarama Sastri for first respondent.

S. Rajagopala Ayyangar for first and second respondents.

JUDGMENT.—In this case there had been an exchange of lands between the parties and the exchange deed (exhibit A), which is a registered document contains the following provisions:

* Second Appeal No. 263 of 1905, presented against the decree of District Court of Tanjore, in Appeal Suit No. 538 of 1904, presented against the decree of District Munsif of Valangiman in Original Suit No. 292 of 1902.

"There is no dispute in respect of the said lands. If disputes should so arise the respective party shall be answerable to the extent of his private property." The plaintiff was subsequently deprived of some of the land acquired by the exchange and brings this suit upon the above covenant more than three but less than six years after the date of deprivation. The lower Courts have dismissed the suit with costs on the fact that it is barred by article 113 of the Limitation Act as a suit for specific performance of a contract. It is no doubt true that article 110 of the Limitation Act regarding contracts in writing registered does not apply to suits for specific performance of such contracts, but only to suits for compensation for the breach of them. It is, however, well settled that suits such as this for failure to pay money according to contract are to be regarded as suits for compensation for breach of contract and not as suits for specific performance. (See Mitra's 'Limitation Act,' 4th Edition, page 941 and the authorities there cited.) The lower Courts were therefore wrong in applying article 113 of the Limitation Act to the present case. It is, however, further argued that the provisions above cited amount to a covenant for title and that the breach must be considered to have occurred as and from the date of the deed (exhibit A) which in this case was more than six years before the institution of the suit. This is no doubt so in the absence of a special contract (Dart on the 'Law of Vendors and Purchasers,' Vol. II, page 788); but we think that in this case there was a special contract to indemnify the party as and when the deprivation took place. Under article 116 of the Limitation Act read with article 83 of the Act the plaintiff in the present case had six years from the date when he was actually damnified and the suit was within time. The decrees of the lower Courts must be reversed and the suit remanded to the District Munsif for disposal according to law. Costs will abide the event. As regards the third respondent, however, the appeal is not pressed and must be dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Abdur Rahim.

1908. August 14, 26.

VALIA KONI KALATHIL CHERIA PANGA ACHAN (PLAINTIFF), PETITIONER,

v.

MARUTHA VEERA KAVUNDAN AND OTHERS (DEFENDANTS NOS. 1 TO 3), RESPONDENTS.*

Civil Procedure Code, Act XIV of 1882, *s.* 108—*Setting aside* ex parte *decree—Power of Court—Decree to be set aside only so far as it affects applicant.*

On an application under section 108 of the Code of Civil Procedure by one of several defendants, against all of whom a decree *ex parte* had been passed, the Court ought not to set aside any part of the decree which does not affect the defendant applying, but only affects those defendants who have not applied.

When a decree *ex parte* had been passed against three defendants personally and against devasam property of which they were alleged to be managers, and one of the defendants applied to have the *ex parte* decree set aside, the Court can set aside only such part of the decree as affected the applicant (*i.e.*) the decree against the devasam property and the personal decree against the applicant.

Per MUNRO, J.—The object of section 108 of the Code of Civil Procedure is that a successful applicant should be placed in exactly the same position as if no decree had been passed in the suit, and the decree must be set aside so far as is necessary to achieve this object, and no further.

The decree ought to be set aside only in respect of matters to which the applicant could have taken objection in the suit itself.

Per ABDUR RAHIM, J.—Section 108 of the Code of Civil Procedure *primâ facie* means that the decree, so far as it gives any relief to the plaintiff against the defendant who is able to establish that he was prevented for a sufficient cause from appearing at the time of hearing, is to be set aside and not against other defendants in the suit who have not shown good cause for not appearing. The decree against the latter cannot be set aside, except to the extent to which it is inseparable from the decree against the successful applicants.

SUIT to recover from defendants personally, and as managers of devasam, the amount of revenue paid by the plaintiff for the defendants.

* Civil Revision Petition No. 186 of 1907, presented under section 622 of the Code of Civil Procedure, praying the High Court to revise the order of M.R.Ry. Raman Menon, the District Munsif of Palghat, in Civil Miscellaneous Petition No. 699 of 1906 in Small Cause Suit No. 361 of 1906.

The defendants being absent, an *ex parte* decree was passed for the amount claimed against the defendants personally and against the devasam property.

On an application by the third defendant under section 108 of the Code of Civil Procedure to set aside the *ex parte* decree, the Munsif, passed the following order:—

"The *ex parte* decree is set aside. The suit will be restored to file."

The plaintiff put in revision petition under section 622 of the Code of Civil Procedure on the ground that the lower Court acted illegally in setting aside the whole decree.

V. Ryru Nambiyar for petitioner.

B. Sita Rama Rao for *C. V. Anantakrishna Ayyar* for respondent.

JUDGMENT (MUNRO, J.).—The petitioner brought a suit to recover from three persons personally and as managers of a devasam Rs. 27-6-0 being revenue paid by him for the defendants. The defendants did not appear and the petitioner obtained an *ex parte* decree ordering that "the defendants personally and from the Devasam property do pay to the plaintiff the sum of Rs. 27-6-0" with interest and costs. On application by the third defendant under section 108, Civil Procedure Code, the District Munsif set aside the whole decree as against all the defendants. The petitioner contends that the District Munsif acted illegally.

Section 108, Civil Procedure Code, does not lay down that if an application by one of several defendants is granted the whole decree must be set aside in favour of all the other defendants *Gopala Chetti* v. *Subbier*(1). The extent to which the decree must be set aside will depend upon the circumstances of each particular case. On what principle then is the Court to act in deciding how far any particular decree is to be set aside? There can, I think, be no doubt that the object of the section is that a successful applicant should be put in exactly the same position as if no decree had been passed in the suit; and the decree therefore must be set aside so far as is necessary to achieve this object and no further. In the present case the third defendant was entitled to plead in the suit that neither himself personally nor the devasam property was liable for the petitioner's claim. Therefore, on the principle above

(1) I.L.R., 26 Mad., 604.

enunciated, he was entitled to have the *ex parte* decree set aside so far, and so far only, as it ordered payment by himself personally and from the devasam property. With the personal decree against the first and second defendants there was no need to interfere. The personal decree against the first and second defendants is therefore restored and the District Munsif's order is modified accordingly. There will be no order as to costs.

ABDUR RAHIM, J.—The petitioner sued to recover from three persons personally and as managers of a devasam property Rs. 27-6-0 being the amount of revenue paid by the plaintiff for the defendants with interest and the defendants not appearing a decree was passed *ex parte* in the terms of the prayer in the plaint. Subsequently the third defendant made a successful application under section 108, Civil Procedure Code, and the District Munsif thereupon set aside the entire decree as against all the defendants. The petitioner contends that he was not authorized to do so at least as against the first and second defendants and that is the objection pressed before us.

As I read section 108, Civil Procedure Code, it *primâ facie* means that the decree so far as it gives any relief to the plaintiff against the defendant who is able to establish that he was prevented for a sufficient cause from appearing at the time of hearing is to be set aside and not against those defendants in the suit who have no good excuse to make for non-appearance or have not chosen to take any action. But it may happen that the decree from its nature must, if set aside, necessarily exempt all the defendants from liability as is the case here with respect to so much of the decree as directs the amount in question to be paid out of the devasam property. In such cases the scope of section 108, Civil Procedure Code, as I understand it, is no doubt widened but that is because it cannot be helped. But if one were to go further and to hold that in all cases where there is one cause of action against all the defendants or where there is a common defence the Court acting under this section has the power to set aside the decree so far as it affects the defendants other than the applicant would in my opinion be putting too great a strain on the language of the legislature. I may refer to section 544, Civil Procedure Code, where in the case of an appeal the legislature found it necessary to expressly empower one of several plaintiffs or defendants in a suit in which the decree proceeds on a ground common

to all the plaintiffs or all the defendants to appeal against the whole decree and to authorize the Court to reverse the whole decree if it thinks fit, as furnishing a strong through indirect corroboration of the view I have suggested.

The decisions of the different High Courts on the point are not in accord with one another. The view I have mentioned is in agreement with that of the Bombay High Court in *Manakukom Pedru* v. *Sitaram Atmaram Vagh*(1), and of W. S. Saton Kan and Dwarka Nath Mitter, JJ., as expressed in *Huro Krishno Doss* v. *Motee Chand Baboo*(2). The language of section 119 of Act VIII of 1859 which the learned Judges in the last case had to construe was substantially the same as that of section 108, of the present Code more recently however in *Mahomed Hamidulla* v. *Tohurennissa Bibi*(3), the judgment of Maclean, C.J., would at first sight seem to imply that in all cases, under section 108, the decree must necessarily be set aside as against all the defendants but Bannerji, J., seemed inclined to limit this to cases in which the decree is one and indivisible or is based upon a ground applicable to the case of all the defendants. In *Monomohini Chowdhurani* v. *Nara Narayan Roy Chaudhri*(4), however Maclean, C.J., points out that he did not intend to lay down in *Mahomed Hamidulla* v. *Tohurennissa Bibi*(3), any proposition wider than that enunciated by Bannerji, J. In *Bhura Mal* v. *Har Kishan Das*(5), the majority of the Full Bench (Stanley, C.J., and Burkit, J.) adopted the view of the Calcutta High Court but Aikman, J., while agreeing with the judgment of the Court in that particular case gives strong reasons for the more limited construction of the section. In this High Court in *Gopala Chetti* v. *Subbier*(6) the learned Judges held that when the claim of the plaintiff as in the case with which they had to deal did not rest on a basis common to all the defendants the Court could not on an application by one of them set aside the decree as against the other defendants as well but they expressed a doubt as to whether the result might not be different if the decree was based on a common ground.

Holding as I do for the reasons which I have briefly set forth that the decree as against the defendants other than the one who

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(1) I.L.R., 18 Bom., 142.
(2) 8 W.R.C.R., 260.
(3) I.L.R., 25 Calc., 155.
(4) 4 C.W.N., 456.
(5) I.L.R., 24 All., 383.
(6) I.L.R., 26 Mad., 604.

VALIA PANGA ACHAN v. MARUTHA VEERA KAVUNDAN.

has shown sufficient cause within the meaning of section 108, Civil Procedure Code, cannot be set aside except so far as it is one and indivisible. I am of opinion that the Munsif had no power to set aside the decree obtained against the defendants Nos. 1 and 2 personally but that he was right in setting aside so much of the decree as made the devasam liable for the money. I therefore agree that the order of the Munsif should be modified as indicated.

APPELLATE CIVIL.

Before Mr. Justice Miller.

1908. January 28.

DURAISAMI REDDI (PLAINTIFF), PETITIONER,

v.

MUTHIAL REDDI BY RAMALINGA REDDI, APPOINTED GUARDIAN, *ad litem* OF THE MINOR RESPONDENT IN PLACE OF AUTHI AMMAL, HIS FORMER GUARDIAN (DEFENDANT), RESPONDENTS.*

Guardian and minor—Minor bound by bond of guardian for existing liability binding on minor—Civil Procedure Code, s. 622—Material irregularity.

A bond executed by the guardian of a minor as such but which contains only a personal covenant by the guardian to pay and does not charge the minor's estate, will nevertheless be binding on the minor, if it is executed for a pre-existing debt which is binding on him.

A mistaken view of law by the lower Court is no ground for the interference of the High Court under section 622 of the Code of Civil Procedure.

But where the case has not been properly heard by the lower Court and the mistake of law was probably the result of such defective trial, the High Court will interfere on the ground that the lower Court had acted with material irregularity within the meaning of section.

THE mother of the minor defendant purporting to act as his guardian executed, in favour of the plaintiff, a bond which was as follows :—

"Simple debt bond executed on 20th September 1902 to Duraisami Reddiyar, son of Subba Reddiyar, residing in Attandamaruthur, Tirukkoyilur taluk, by Authi Ammal, guardian and mother

* Civil Revision Petition No. 449 of 1906, presented under section 622 of the Code of Civil Procedure, praying the High Court to revise the decree of F. H. Hamnett, Esq., District Judge of South Arcot, in Appeal Suit No. 207 of 1905, presented against the decree of M.R.Ry. K. V. Desikachariar, District Munsif of Vriddhachalam, in Original Suit No. 652 of 1905.

DURAISAMI REDDI v. MUTHIAL REDDI.

of Muthial Reddi, a minor son of T. Kesava Reddiyar, residing in Puvanur (K). A dispute arose in the said Attandamaruthur between you and Muthial Reddiyar about partition; and the common paddy of you, etc., was sold and Rs. 192 was deposited with T. Venkata Reddiyar. As this sum of one hundred and ninety-two rupees has been received by my husband from the said Venkataraya Reddiyar, the sum due out of this amount to you is Rs. 96. For this sum of rupees ninety-six the interest due from the month of Thai, Manmatha (January-February 1895) up to date is Rs. 76-14-0: total for the two items is Rs. 172-14-0. As the panchayat has decided that I should pay the whole of this sum of rupees one hundred and seventy-two annas fourteen to the owner, I shall pay, on demand, the principal together with interest at the rate of 1 per cent. per mensem, in one single instalment and discharge the debt."

The plaintiff brought this suit to recover the amount due on the bond and the plaint recited the original liability of the father of the minor defendant, and the execution of the plaint bond in consideration of such liability. The mother who was the guardian *ad litem* of the minor defendant admitted the claim.

The Munsif, however, dismissed the suit on the ground that the bond as drawn contained only a personal covenant by the guardian and could not bind the minor. No evidence as to the nature of the debt was taken.

The Munsif's judgment was confirmed on appeal by the District Judge. The plaintiff put in revision petition in the High Court under section 622 of the Code of Civil Procedure. While the petition was pending, another guardian *ad litem* was appointed, who disputed the liability of the minor.

T. R. Ramachandra Ayyar for petitioner.

T. Pattabhirama Ayyar for respondent.

JUDGMENT.—A new guardian has now been appointed and contests the petitioner's claim. I take it that Subrahmania Ayyar, J.'s order amounts to a ruling that the minor was not duly represented in the Courts below, and the question I have to decide is whether the Courts below have acted irregularly in dismissing the suit on the grounds, (1) that the bond is not so drawn as to bind the minor and, (2) that the guardian could not bind the minor. The bond does not purport to create a liability, but evidences a pre-existing liability, and there seems to be no reason in law why,

DUBAISAMI REDDI v. MUTHIAL REDDI.

if there actually was upon the minor a liability to pay the debt of his father, the guardian should not bind him by a bond (vide *Subramania Aiyar* v. *Arumuga Chetty*(1)). I cannot, acting under section 622, Civil Procedure Code, reverse the decree of the District Judge merely because he has made a mistake in law, but it is urged before me that but for the admission of the minor's mother, the petitioner would have been able to establish his claim, and the Courts have acted with material irregularity in deciding against him without hearing his case.

The District Judge does not determine as a fact that the document was not executed by the guardian as guardian on behalf of the minor and on that point, in my opinion, it was open to the petitioner to adduce evidence, if the admission of the guardian had not rendered that unnecessary. I think the Courts have acted irregularly and had they heard the petitioner's case it is not impossible that they would not have made the mistake of law which they have assuming the petitioner's case to be true now made.

I therefore set aside the decrees of both Courts and remand the suit for disposal by the Court of First Instance. Costs will abide the event.

(1) I.L.R., 26 Mad., 330.

APPELLATE CIVIL.

Before Mr. Justice Wallis.

KUPPU KONAN AND ANOTHER (DEFENDANTS), PETITIONERS,

v.

THIRUGNANA SAMMANDAM PILLAI (PLAINTIFF), RESPONDENT.*

1908. April 15. May 1.

Evidence Act, Act I of 1872, *s.* 116—*Estoppel of tenant—Where deed executed in the name of the benamidar, the real owner is the landlord within the meaning of the section—Action on deed not maintainable by benamidar.*

Where a deed is executed by a tenant in favour of a person, *benami* for another, the real owner and not the benamidar is the landlord whose title the tenant is estopped from denying under section 116 of the Evidence Act. In a suit by such *benamidar* for rent, the tenant can deny his right to sue on the ground that he is not the person entitled.

A *benamidar*, as such, has no right to sue unless he can show a legal right to sue under the general law.

Kuthaperumal Rajali v. *Secretary of State for India*, (I.L.R., 30 Mad., 245), followed.

CLAIM for Rs. 78-12-0, value of 45 kalams of paddy being the rent due for the first instalment under a deed executed on 13th August 1906 to the plaintiff by the defendants for one year in respect of certain lands belonging to the plaintiff.

The defendants denied the plaintiff's title to the land and contended that the land had belonged to the plaintiff's wife under a will of her father; that the deed was *benami* for plaintiff's wife who died within two weeks after the deed; that, subsequently Kandasamy and two others who were entitled to the property after her death as her heirs had taken away the produce after giving the defendant his waram.

The second point framed by the Sub-Judge for decision was—

"Are defendants not estopped from denying the title of the plaintiff—their lessor."

* Civil Revision Petition No. 481 of 1907, presented under section 25 of Act IX of 1887, praying the High Court to revise the decree of M.R.Ry. V. K. Desikachariar, Subordinate Judge of Negapatam, in Small Cause Suit No. 124 of 1907.

KUPPU KONAN v. THIRUGNANA SAMMANDAM PILLAI.

On this point the Subordinate Judge decided as follows:—

"In my opinion, the defendant is estopped from denying that plaintiff had title to lease out the suit lands at the beginning of the tenancy under section 116 of the Evidence Act. The point is well discussed and thrashed out at 1031 to 1034 of the Third Edition of Ameer Ali and Woodroff's 'Law of Evidence' and the learned authors of this treatise incline to the view that the tenant will be estopped from disputing the landlord's title, even though he had no title whatever. At page 1033 in the foot notes, they observe as follows":—

"It is to be noted that the first mentioned case (20 W.R., 352) "(1871) was decided prior to this Act and proceeded on the "ground that the technical doctrine of estoppel was not applicable "to this country. But that doctrine has been sanctioned by the "present section, and according to the principle upon which it "rests, the question of the lessor's title is wholly foreign to a suit "instituted against the lessee for rent." * * * "The principle, "however, laid down in *Douzelle* v. *Kedarnath Chuckerbutty* (20 "W.R., 352) was reaffirmed in *Mussamut Indurbuttee Koer* v. "*Shaikh Mahboob Ali Ticcadar* (24 W.R., 44)."

"In a later case (1894) reported in I.L.R., 19 Bombay 133, it was held that the tenant could not deny the landlord's title. In the 24 W.R. case, section 116 of the Evidence Act has not been referred to and considered at all, and in my opinion, this considerably weakens the value of the decision in favour of tenants. The 20 W.R. case was decided before the Act came into force. It does not appear that these two cases had been followed in any later cases. The 19 Bombay case is directly in conflict with the W.R. cases. The learned commentators aforesaid hold the view that the question of the lessor's title is foreign to a suit for rent or in ejectment against a lessee. I am not prepared, therefore, to treat these W.R. cases as of binding authority. The learned pleader for the defendants cited the case of *Usman Koya* v. *Chidria Mokkonsa Akoth* reported in 15 Madras Law Journal, 368, in support of his contention but I am of opinion that it helps the plaintiff's contention more than that of the defendants. It enunciates the general rule of estoppel that a tenant is estopped from disputing the title of the landlord who has let him into possession, and further lays down that a tenant cannot set up a *jus tertii* in a third person (having a title paramount) unless

KUPPU KONAN v. THIRUGNANA SAMMANDAM PILLAI.

during the period of the tenancy there has been an ouster by the person having the title paramount so as to determine the original lessor's right at the date of the lease. Defendants do not set up the title paramount to the original male owner's estate, but they set up the title of the legal heirs of Subbammal—the alleged real owner—as her representatives. Moreover, they do not allege any ouster by such third persons having the title paramount. The written statement seems to show an attornment by the defendants to Subbammal's legal heirs as landlords and adjustment of rent claimed. Hence this decision is inapplicable to the defendants' contention, and, as I observed already, it favours the plaintiff's contention more than that of the defendants. I would accordingly find that defendants are estopped from disputing the plaintiff's title to the lands sued for and that the plea of benami cannot be raised by them in this suit for rent."

The Subordinate Judge decreed for plaintiffs.

Defendants moved the High Court under section 25 of the Small Cause Court Act.

T. Natesa Ayyar for petitioner.

T. R. Venkatarama Sastri for respondent.

JUDGMENT.—The plaintiff sues to recover rent under a rent deed executed in his favour by the defendants. The defendants plead that the deed was benami for the plaintiff's wife, to whom the land belonged, and stated that she died a fortnight after the execution of the deed and her heirs have received the waram rent due under the deed. There was evidence that the lands belonged to the plaintiff's wife and at the close of the defendants' evidence the plaintiff's vakil admitted that the plaintiff was holding the lands as guardian of his wife. The Subordinate Judge, however, held that this question could not be gone into, as the defendants are estopped from denying the title of their landlord the plaintiff. Section 116 of the Indian Evidence Act reproducing the law in England provides that no tenant of immoveable property shall, during the continuation of the tenancy, be permitted to deny that the landlord of such tenant, had, at the beginning of the tenancy, a title to such immoveable property. The question then is whether the real owner or the benamidar is to be regarded as the landlord for the purposes of the section. In my opinion the real owner rather than the benamidar must be regarded as the landlord for the purposes of the section which

KUPPU KONAN v. THIRUGNANA SAMMANDAM PILLAI.

therefore does not apply to the present case. Under these circumstances the question of the plaintiff's right to sue must be decided in accordance with the principles laid down in the recent case of *Kuthaperumal Rajali* v. *The Secretary of State for India*(1) and the plaintiff having admitted that he is a *benamidar* and not having shown any legal right to sue under the general law, the decree of the Subordinate Judge must be set aside. As the plaintiff says he is the heir and representative of his wife and so entitled to maintain the suit, the case must be sent back for decision on this ground, permission being given to him to amend the plaint if necessary. Fresh evidence may be taken. Costs will abide the result.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Munro.

1908. May 1, 6.

THE ARBUTHNOT'S INDUSTRIALS (LTD.), (THE LEGAL REPRESENTATIVES OF MESSRS. ARBUTHNOT & CO.), FIFTH COUNTER-PETITIONERS), APPELLANTS IN APPEAL AGAINST ORDER No. 174 OF 1907,

v.

MUTHU CHETTIAR AND OTHERS (PETITIONERS' DECREE-HOLDERS), RESPONDENTS IN THE ABOVE.

MUTHU CHETTIAR AND OTHERS (PETITIONERS' DECREE-HOLDERS AND DEFENDANTS NOS. 1, 2, 3 AND 5), APPELLANTS IN APPEAL AGAINST ORDER NO. 201 OF 1907,

v.

PATRICK MACFAYDEN (DECEASED), SIR GEORGE ARBUTHNOT AND OTHERS (JUDGMENT-DEBTORS—PLAINTIFFS AND FOURTH DEFENDANTS), RESPONDENTS IN THE ABOVE.*

ivil Procedure Code, Act XIV of 1882, *ss.* 234, 372—*Legal representative, execution against—Transferee, after money decree against a company, if such company's properties with liabilities, cannot be proceeded against as a legal representative.*

B sued A & Co., the proprietors of a rice mill, for moneys due in respect of contracts connected with the said mill and obtained a money decree

(1) I.L.R., 30 Mad., 245.

* Civil Miscellaneous Appeals Nos. 174 of 1907 and 201 of 1907, presented against the orders of M.R.Ry. V. Visvanatha Ayyar, Subordinate Judge of Negapatam, dated 12th April 1907 and 22nd August 1904, respectively, in Execution Petitions Nos. 271 of 1906 and 92 of 1907 in Original Suits Nos. 45 and 47 of 1904, respectively.

THE ARBUTHNOT'S INDUSTRIALS (LTD.). v. MUTHU CHETTIAR.

against A & Co. While the suit was pending A & Co. sold the business with all its assets and liabilities to another company C, of which A & Co. were managing agents, and the suit was defended by A & Co. on behalf of C, but the fact was not brought to the notice of the Court. After decree, A & Co. became insolvent, and B sought execution against C as the legal representative of A & Co.:

Held, that B was not so entitled.

Neither section 234 nor 372 of the Civil Procedure Code (supposing the latter applicable to execution) authorised such a proceeding.

Harish Chandra Tewary v. *Chandpore Company Ltd.*, (I.L.R., 30 Calc., 961), followed.

The fact that A & Co. after the transfer of the business defended the suit on behalf of C, made no difference as the decree was merely a personal decree against A & Co. and did not profess to bind the properties of C.

THE facts necessary for the report are set out in the judgment.

Mr. *Downing* for appellant in Civil Miscellaneous Appeal No. 174 of 1907.

T. Subrahmania Ayyar and *T. V. Gopalasami Mudaliar* for respondent in the above case.

T. V. Gopalasami Mudaliar for appellant in Civil Miscellaneous Appeal No. 201 of 1907.

The respondents were not represented.

JUDGMENT.—One Muthu Chetti agreed to purchase rice from Messrs. Arbuthnot & Co., who were the proprietors of a rice mill at Tiruvallur. Disputes arose, and each party sued the other for money alleged to be due under the contract. The suit, Original Suit No. 47 of 1904, brought by Messrs. Arbuthnot & Co. was dismissed with costs. Muthu Chetti got a simple money decree in his suit, Original Suit No. 45 of 1904. Pending the suits Messrs. Arbuthnot & Co. transferred the Tiruvallur mill with all assets and liabilities to Arbuthnot's Industrials of which they were to be the managing agents. As such agents they prosecuted and defended the suits above mentioned on behalf of Arbuthnot's Industrials, though the fact was not brought to the notice of the Court nor was Muthu Chetti, it is alleged, aware of it till after decree. Subsequently in execution proceedings the Court below on the application of Muthu Chetti added Arbuthnot's Industrials as parties recognising them as the legal representatives of Messrs. Arbuthnot & Co. who had become insolvent after the decrees were passed. On notice of this Arbuthnot's Industrials objected to being made parties as legal representatives of Messrs. Arbuthnot & Co., and to the decrees being executed against them. The

THE ARBUTHNOT'S INDUSTRIALS (LTD.) v. MUTHU CHETTIAR.

Subordinate Judge held in respect of the decree in Original Suit No. 45 of 1904 that Arbuthnot's Industrials were rightly added and were liable for the decree. Appeal Against Order No. 174 of 1907 is the appeal against this order. In respect of the decree in Original Suit No. 47 of 1904 the above Subordinate Judge's successor took the opposite view and exonerated the Industrials. Appeal Against Order No. 201 of 1907 is the appeal against the last order.

We are of opinion that the order appealed against in Appeal Against Order No. 201 of 1907 is right and that the other order is wrong. In *Harish Chandra Tewary* v. *Chandpore Company Ltd.*(1) a money decree was obtained against a company which after the decree sold all their properties, with the liabilities to a third party who sold again to another company. It was sought to execute the decree against the latter company substituting them on the record as the legal representatives of the first company. It was held that this could not be done, as section 234 of the Civil Procedure Code had no application, and as, even if section 372 of the Civil Procedure Code applied to execution proceedings the case did not fall within that section, inasmuch as there was no assignment creation or devolution of any interest in the property, the subject-matter of the suit. With this decision we agree and are of opinion that it governs the present cases. An attempt, however, is made to distinguish the present cases. It is pointed out that the transfer to the Industrials was during the pendency of the suits, and that after the transfer, the suits were conducted by Arbuthnot & Co. on behalf of the Industrials as their managing agents. In these circumstances it is contended that the decrees are binding on the Industrials and can be enforced against them in execution (*Norendra Nath Pahari* v. *Bhupendra Narain Roy*(2) and *Hari Saran Moitra* v. *Bhubaneswari Debi*(3)) are cited in support of the contention. *Norendra Nath Pahari* v. *Bhupendra Narain Roy*(2) is clearly distinguishable from the present cases for there the decree was binding on the estate which by reason of adoption came to the person who was substituted as judgment-debtor. A widow had mortgaged her husband's estate and then adopted a son. A suit was afterwards brought against the widow

(1) I.L.R., 30 Calc., 961. (2) I.L.R., 23 Calc., 374.
(3) I.L.R., 16 Calc., 40.

THE ARBUTHNOT'S INDUSTRIALS (LTD.) v. MUTHU CHETTIAR.

on the mortgage bond and a decree obtained which was not a mere personal decree against the widow but one binding the estate which was liable to be sold for the decree amount. *Hari Saran Moitra* v. *Bhubaneswari Debi*(1) is also distinguishable, for there the property which was the subject-matter of the suit devolved by adoption upon the person who was held bound by the decree, though he had not been made formally a party to it.

Appeal Against Order No. 174 of 1907 is therefore allowed with costs throughout. Appeal Against Order No. 201 of 1907 is dismissed.

Messrs. *Branson and Branson*—Attorneys for appellants.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Munro.

1908. April 28. May 5.

MAHOMED KHAN BAHADUR (COUNTER-PETITIONER), APPELLANT,

v.

MAHOMED MUNAWAR SAHIB (PETITIONER), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, *s.* 258—*Agreement discharging one of several defendants an adjustment and must be certified.*

Where, after a decree is passed against several defendants, the decree-holder enters into an agreement with some of the defendants, by which the latter are discharged from liability under the decree, such agreement is an adjustment, in part, of the decree, and must be certified to the Court under section 258 of the Civil Procedure Code.

THE plaintiff, decree-holder, obtained a decree against the first defendant, appellant, and two others in the Court of Small Causes and after partial satisfaction had been obtained, he transferred the decree to the respondent.

(1) I.L.R., 16 Calc., 40.

* Civil Miscellaneous Appeal No. 230 of 1907, presented against the order of M.R.Ry. C. V. Kumarasawmi Sastriar, City Civil Court Judge, Madras, in Execution Petition No. 373 of 1907 and Civil Miscellaneous Petition No. 1049 of 1907, connected with Suit No. 22207 of 1898 on the file of the Presidency Court of Small Causes, Madras.

MAHOMED KHAN BAHADUR. v. MAHOMED MUNAWAR SAHIB.

The respondent had the decree transferred for execution to the City Civil Court and applied for execution against the appellant.

The further facts are stated in the judgment of the Court Execution was ordered by the lower Court.

Appellant, first defendant, appealed to the High Court.

G. Krishnaswami Ayyar for appellant.

K. C. Desikachariar for respondent.

JUDGMENT.—In this case the first defendant in answer to an application by the transferee decree-holder for execution against him sets up an agreement entered into between himself, the original decree-holder and the transferee decree-holder by virtue of which the claims of the original decree-holder were satisfied, and the decree was transferred to the transferee for execution against the second defendant only who was no party to the agreement. The Judge of the City Civil Court held that this agreement was an adjustment of the decree within the meaning of section 258, Civil Procedure Code, and that, as it had not been certified, it could not be set up in bar of execution.

We agree with this decision under the section, if a decree is adjusted in whole or in part, the adjustment must be certified and unless certified cannot be recognised. Where there is a money decree against two defendants, an agreement discharging one of them is, in our opinion, an adjustment in part of the decree and so requires to be certified. In *Laldas* v. *Kishordas*(1), the agreement set up was come to before decree and all that was decided was that the existence and validity of such an agreement should be decided in execution under section 244, Civil Procedure Code. In *Krishnamachariar* v. *Rukmani Ammal*(2), also the agreement referred to was also entered into before decree. We are not called upon to consider the effect of such agreements before decree in this case, but, when after decree an agreement is made discharging some of the defendants, we think such an agreement is clearly an adjustment in part of the decree. The appeal is dismissed with costs. The order staying sale in Civil Miscellaneous Petition No. 719 of 1908 is discharged.

(1) I.L.R., 22 Bom., 463. (2) 15 M.L.J., 370.

APPELLATE CIVIL—FULL BENCH.

Before Sir Arnold White, Chief Justice, Mr. Justice Wallis and Mr. Justice Miller.

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

v.

SESHA REDDI (FIRST PLAINTIFF), RESPONDENT.*

1907. October 10, 21. November 29. 1908. March 16.

Civil Procedure Code, Act XIV of 1882, s. 574—Judgment of lower Appellate Court not complying with the requirements of section—Order to be made on second appeal.

Where, on second appeal, it is found that the judgment of the lower Appellate does not fulfil the requirements of section 574 of the Code of Civil Procedure, the proper order to be made on second appeal is one setting aside the decree and remanding the case to the lower Appellate Court to be disposed of according to law.

Krishna Reddi v. *Srinivasa Reddi*, (4 M.H.C.R., 174), not followed.

If the Judge of the Court to which the case is remanded is the Judge who heard the appeal in the first instance, he is not bound to re-hear the appeal if he considers that the case might be properly disposed of without so doing. In such a case, his writing a judgment satisfying the requirements of section 574 will be a sufficient compliance with the order to dispose of the case according to law. But where the Judge of the Court to which the case is remanded is not the Judge who heard the appeal in the first instance, as also in cases where the Judge, though the same, considers such a course necessary for a proper disposal of the case, a re-hearing is necessary for a disposal of the case according to law.

SUIT for possession of land.

The District Munsif framed issues and examined witnesses and finally passed a decree for the plaintiff.

The defendants appealed, impugning the findings of the lower Court on questions of law and fact, and questioning the appreciation of evidence, oral and documentary, by the lower Court.

The Appellate Court passed the following judgment :—

I entirely concur with lower Court's findings and its reasons for those findings, and I dismiss this appeal with costs.

The defendants Nos. 1 to 3 appealed to the High Court.

* Second Appeal No. 958 of 1905, presented against the decree of F. H. Hamnett, Esq., District Judge of Chingleput, in Appeal Suit No. 533 of 1904, presented against the decree of K. S. Lakshminarasa Aiyar, District Munsif of Chingleput, in Original Suit No. 252 of 1902.

SARAVANA PILLAI v. SESHA REDDI.

The three main grounds of appeal were—

(1) That the District Judge had not recorded any judgment in the case.

(2) That the District Judge had not stated what the points for decision were and his decision thereon.

(3) That there has been no attempt on the part of the District Judge to discuss the evidence in the case.

The appeal was heard by BODDAM and SANKARAN-NAIR, JJ., who made the following Order of Reference to the Full Bench.

"When in second appeal it appears that the judgment of the lower Appellate Court does not substantially comply with the requirements of section 574 of the Civil Procedure Code, the question arises whether the judgment must be reversed and the case sent back for disposal according to law as in *Sitarama Sastrulu* v. *Suryanarayana Sastrulu*(1), or whether the case should only be sent back to the Judge who decided the case in order that he may comply with the requirements of the section, as decided in *Kristna Reddi* v. *Srinivasa Reddi*(2) with which we agree. Having regard to the conflict in the decisions we refer the above question to the Full Bench."

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

T. Rangachariar for appellants.

T. R. Krishnaswami Ayyar for respondent.

The Court expressed the following

OPINION.—We are unable to agree with the judgment in *Kristna Reddi* v. *Srinivasa Reddi*(2) if it is to be regarded, as would seem to have been the view of the learned Judges by whom the present order of reference was made, as a decision to the effect that, when there has been a failure by the lower Appellate Court to comply with the requirements of section 574 of the Code of Civil Procedure, the only course open to this Court in second appeal is to send back the case to the Judge who heard the appeal, and that, when this is impracticable, no further action can be taken.

We are of opinion that the proper form of order is that which, in recent years, has, we believe, been almost invariably adopted

(1) I.L.R., 22 Mad., 12. (2) 5 M.H.C.R., 174.

SARAVANA PILLAI v. SESHA REDDI.

by this Court, namely, an order setting aside the decree and remanding the case to the lower Appellate Court to be disposed of according to law. See, for instance, the orders in *Kunhi Marakkar Haji* v. *Kutti Ummâ*(1), and *Sitarama Sastrulu* v. *Suryanarayana Sastrulu*(2). This would seem to be in accordance with the present practice of the Calcutta and Bombay High Courts. See *Rami Deka* v. *Brojo Nath Saikia*(3), *Bhagvan* v. *Kesur Kuverji*(4) and *Ramchandra Govind Manik* v. *Sono Sadashiv Sarkhot*(5), although, in the last-mentioned case, there was no formal order setting aside the decree.

If the Judge of the Court to which the case is remanded is the Judge who heard the appeal in the first instance, and if he considers that he can properly dispose of the remanded case without a re-hearing of the appeal, the writing of a judgment which satisfies the requirements of section 574, without re-hearing the appeal, would, in our opinion, be a compliance with the order that the case be disposed of according to law. But in all cases where the Judge of the Court to which the case is remanded is not the Judge who heard the appeal in the first instance, and in all cases where the Judge of the Court is the Judge who heard the appeal in the first instance, but he does not consider that he can properly dispose of the re-manded case without a re-hearing of the appeal, a re-hearing is necessary in order that there may be a compliance with the order of this Court that the case be disposed of according to law.

The case came on for final hearing before (BODDAM and SANKARAN-NAIR, JJ.), when the Court delivered the following

JUDGMENT.—In accordance with the decision of the Full Bench, the case is remanded to the lower Appellate Court for hearing, and disposal in accordance with law. Costs hitherto incurred will abide the result.

(1) I.L.R., 20 Mad., 496. (2) I.L.R. 22 Mad., 12.
(3) I.L.R., 25 Calc., 97. (4) I.L.R., 17 Bom., 428.
(5) I.L.R., 19 Bom., 551.

APPELLATE CIVIL.

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

1908. April 23, 24.

ERASALA GURUNATHAM CHETTY AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

ADDEPALLY RAGHAVALU CHETTY AND OTHERS (DEFENDANTS), RESPONDENTS.*

Hindu Law—Son's liability for father's debt incurred in transaction amounting to criminal offence.

Where an undivided Hindu father acting as the administrator of a certain estate was made liable in respect of monies received by him and not properly accounted for, the undivided son cannot escape liability for such claim on the ground that the debt was the result of a criminal act of the father, unless he shows that, in respect of the particular amounts claimed, the father had made himself amenable to the Criminal Law by doing or omitting to do any thing.

Proof of mere omission to account, without any thing more, will not suffice to exempt the son from liability.

McDowell & Co. v. *Ragava Chetty*, (I.L.R., 27 Mad., 71), distinguished.

Natasayyan v. *Ponnusami*, (I.L.R., 16 Mad., 99), followed.

THE two minor plaintiffs were the sons of the third defendant.

The third defendant and his two brothers obtained letters of administration to the estate of *G*, the father of defendants Nos. 1 and 2. The defendants Nos. 1 and 2 instituted Civil Suit No. 32 of 1904 against the third defendant and his co-administrators to recover various amounts alleged to have been received and misappropriated by them in the course of administration by them of the estate of *G*, and a decree for Rs. 27,000 and odd was passed against the third defendant and his two brothers.

In execution of this decree the plaint house belonging to the plaintiffs and the third defendant was attached and sold.

The plaintiffs now brought this suit for a declaration that the sale was not binding on their shares, as the decree against the third defendant was obtained in respect of sums criminally misappropriated by him in the course of administration of the estate of *G*.

* Original Side Appeal No. 14 of 1907, presented against the decree and judgment of Mr. Justice Boddam, dated 25th January 1907, in Original Suit No. 39 of 1906.

The suit was dismissed by Boddam, J.

The plaintiffs appealed.

K. Srinivasa Ayyangar and *L. A. Govindaraghava Ayyar* for *C. P. Ramaswami Ayyar* for the appellants.

Mr. *M. A. Tirunarayana Chariar* for the first respondent.

JUDGMENT.—For the purposes of this judgment we assume that the house, which has been sold in execution, formed part of the joint family property of the plaintiffs and the third defendant. On this assumption the question for determination is, are the plaintiffs' two-thirds share in the house liable for the decree obtained against the third defendant in Civil Suit No. 32 of 1904.

The contention on behalf of the appellants has been that the suit of 1904 was in respect of moneys due to the first and second defendants by the third defendant as one of the administrators of the estate of Gopala Chetty with regard to which, as the appellants contended, the third defendant was criminally liable for breach of trust. For the purpose of establishing this criminal liability the appellants have relied on the judgment of Boddam, J., in that suit. There is no express finding in that judgment, that the third defendant was guilty of criminal misappropriation as regards any of the sums of money for which he, together with the other administrators, was held accountable, and the general observations in the judgment, which go to show that, in the opinion of the learned Judge, the third defendant, together with the other administrators, had acted dishonestly, are certainly not evidence that, as regards any particulars of claim made in the suit of 1904, the third defendant was under any criminal liability in connection with any thing done or omitted to be done by him, in the administration of the estate.

The case of *Mahabir Prasad* v. *Basdeo Singh*(1) is clearly distinguishable, for, there the parties alleged to have been criminally liable had been prosecuted and convicted. The case of *McDowell & Co.* v. *Ragava Chetty*(2) is also, in our opinion, distinguishable. There, the Court was able to find on the evidence that every one of the items making up the total of the claim related to moneys which had been misappropriated in circumstances which amounted to a criminal offence.

(1) I.L.R., 6 All., 234. (2) I.L.R., 27 Mad., 71.

GURUNATHAM CHETTY v. RAGHAVALU CHETTY.

In the present case the evidence is not in our opinion sufficient to warrant us in holding that the failure by the third defendant to account as an administrator, amounted to a criminal offence.

In our opinion the evidence in the case before us is not sufficient to bring the case within the rule of Hindu Law on which the decision in *McDowell & Co.* v. *Ragava Chetty*(1) was based.

We think this case falls within the principle of the decisions in *Natasayyan* v. *Ponnusami*(2) and in *Kanemar Venkatappayya* v. *Krishnacharya*(3).

The appeal is dismissed with costs payable by the next friend of the plaintiffs.

M. K. Ramasawmi Iyer—Attorney for the respondents.

APPELLATE CIVIL.

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

1908. August 14, 17, 25.

OLATI PULLIAH CHETTI (PLAINTIFF), APPELLANT,

v.

VARADARAJULU CHETTI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Compromise—Claim not frivolous or vexatious—Right to set aside—Transfer of Property Act, s. 6 (a)—Release of Reversionary right—Succession Act, s. 82.

A compromise entered into between parties, litigating on doubtful rights under a document, cannot be impeached by one of the parties to it on the sole ground that the party whose right is admitted by the compromise had in fact no such right under the document, when it is not shown that such right was set up frivolously or vexatiously or that there was misrepresentation or surprise.

Where the compromise is deliberately entered into and the party admitting the right receives valuable consideration for recognising such right, he will be bound unless he can show that such compromise was illegal or void.

A compromise between a widow and a reversioner, by which the latter admits that the former takes an absolute interest under the will of her deceased husband, does not effect a *transfer* by the latter of his reversionary right, as the

(1) I.L.R., 27 Mad., 71. (2) I.L.R., 16 Mad., 99.

(3) 2 M.L.T., 529.

* Original Side Appeal No. 14 of 1906, presented against the decree of Mr. Justice Boddam in Civil Suit No. 223 of 1904.

PULLIAH CHETTI v. VARADA-RAJULU CHETTI.

existence of any such right is negatived by the compromise, and the transaction does not fall within, section 6 (*a*) of the Transfer of Property Act, as a transfer of a mere *spes successionis*.

The acceptance by the widow of a release from the reversioner, in accordance with the terms of the compromise is not an acknowledgment by her of any right in the reversioner but an arrangement by which she gives something to avoid disturbance.

In the case of wills by Hindus to which the provisions of section 82 of the Succession Act apply, a gift, *simpliciter*, of immoveable property by a husband to his wife will convey the whole interest of the husband, unless it appears that only a restricted interest was intended for her.

THE facts of this case are sufficiently stated in the judgment.

The Hon. Mr. *V. Krishnaswami Ayyar* and *G. Krishnaswami Ayyár* for appellant.

P. Anandacharlu for second respondent.

Mr. *C. E. Odgers* for third to tenth respondents.

JUDGMENT.—The suit was brought by one Olati Pulliah to recover possession of certain properties which belonged to his father's elder brother Olati Lakshmiah. Lakshmiah died in 1892 leaving a will. It is the plaintiff's case that under that will the testator's adopted grandson Kuppiah and his widowed daughter-in-law Ranganaikammal took a joint life interest in the properties left by him, and that on the death of Kuppiah without any issue in April 1893, Ranganaikammal took the whole property only as a tenant for life; that in any event the will did not give her anything more than a widow's estate under Hindu Law; and on her death, therefore, in April 1904, the plaintiff and his deceased father Veeriah became entitled to the property left by Lakshmiah.

The defendants who claim under a will executed by Ranganaikammal answer that it is not open to the plaintiff to rely upon the will as the nature of the interest taken by her under it was in dispute in a suit brought by her against the plaintiff's father Veeriah to which the plaintiff was also made a party, and the dispute was settled by a razinamah between the parties which was embodied in the decree passed in that suit.

They also deny that Ranganaikammal took only a widow's interest as alleged by the plaintiff. That suit (Civil Suit No. 124 of 1893) was brought by Ranganaikammal as the "sole owner of the whole" of the testator's property under his will, with the exception of a certain portion left for charity, against the plaintiff's father and a son-in-law of the testator who were her

PULLIAH CHETTI v. VARADA-RAJULU CHETTI.

co-executors under the will, for a declaration that she had become "solely entitled to and to the possession of the property" and for other reliefs. Those defendants denied her claim to the sole ownership. The parties having agreed to settle their dispute, the plaintiff then a minor and the daughter of the testator were made parties to the suit, and leave of the Court having been obtained to enter into the compromise on the plaintiff's behalf a razinamah was entered into by which the property in suit was acknowledged to be the absolute property of Ranganaikammal in accordance with the terms of the will; she also obtained the right of adoption, and in return she gave the plaintiff and his father a house and a sum of Rs. 3,500, and to the daughter of the testator a house and a sum of Rs. 1,000. She also agreed to pay to the plaintiff, as directed by the will Rs. 500 for his marriage. A decree was passed in accordance with the terms of the razinamah, and a deed of release was also executed by the plaintiff and his father. After the death of Ranganaikammal and his father, the plaintiff now sues to recover possession from the respondents before this Court who claim under a will left by her.

The plaintiff alleged that the razinamah is invalid for misrepresentation and coercion. Mr. Justice Boddam disbelieved the evidence to prove the same; and we see no reason to differ from him on that point.

Mr. Justice Boddam also held that the estate given to Ranganaikammal by the will was a widow's estate only; if it is open to us to go into that question we should be inclined to take the same view; but we have no doubt that this case is one of compromise of a doubtful right.

There is a bequest of half the property to Ranganaikammal and the other half to the adopted grandson Kuppiah Chetty, and on the death of either of them, the survivor was to take that share; and, under section 82 of the Indian Succession Act, Ranganaikammal was therefore, on the death of Kuppiah Chetty, entitled to take the whole interest of the testator unless it appeared that only a restricted interest was intended for her. The provision that she was to take in a certain event Rs. 40 per mensem for her maintenance and that her jewels were to go on her death not to her heirs but to Kuppiah is no doubt a strong indication that the testator intended that she should take only a widow's estate. But in the face of the other provisions referred to it is impossible to

PULLIAH CHETTI v. VARADA-RAJULU CHETTI.

say that the claim was not *bonâ fide* or that it was frivolous or vexatious.

Ranganaikammal's claim under the will was thus brought into controversy in a Court of Justice; by way of compromise her full ownership was recognised by the plaintiff and his father who received valuable properties for such recognition. Can they now turn round and repudiate the entire transaction for the purpose of claiming those properties on the ground that she was not the full owner?

As the right must always be on the one side or the other, the fact that the right is on his side is not by itself sufficient for a party to set aside a compromise entered into by him on the supposition of a doubtful right. In the case before us there was no misrepresentation, no surprise. The terms of the compromise were under discussion for many days. Counsel's opinion was taken on both sides. The compromise was sanctioned by Mr. Justice Subramania Ayyar in the interests of the plaintiff who was then a minor; about a year after the compromise, the plaintiff and his father executed a release deed in pursuance of its terms; they got a house and a sum of Rs. 3,500 from the widow in consideration of their acknowledgment of her full ownership under the will. She paid another sum of Rs. 1,000 to the daughter as a part of the same transaction. The plaintiff's father never repudiated the transaction, and it is repudiated by the plaintiff only many years afterwards after the widow's death when it has become impossible to restore the parties to their former position.

Under these circumstances we have no doubt that the plaintiff is bound by the razinamah unless, as contended on his behalf, the razinamah and the decree are illegal and void.

It is argued before us that, on the true construction of the will, Ranganaikammal took only a widow's interest in the property and as the interest of the plaintiff's father in the property was at the date of the compromise only a chance of succession, the razinamah should be treated as effecting a transfer of such interest to the widow, that such a chance or mere possibility being incapable of transfer by virtue of section 6 (*a*) of the Transfer of Property Act, such transfer is illegal and invalid, and as the Court cannot empower the parties to do what they are otherwise prohibited from doing on grounds of public policy, the razinamah decree cannot

be held to effect such transfer to the widow, and the cases of *Ramasami Naik* v. *Ramasami Chetty*(1), *Nagappa* v. *Venkat Rao*(2), *Lakshmanaswami Naidu* v. *Rangamma*(3), and *Raja of Vizianagram* v. *Dantivadachelliah*(4) were relied upon.

It will be noticed that the argument proceeds upon the supposition that there was a transfer by the alleged reversioners of their chance of succession.

We are unable to agree to this view. The widow never acknowledged that the plaintiff or anybody else had any reversionary interest in the property; she claimed full ownership herself. The plaintiff and his father never purported to convey any interest to her for the very good reason that they admitted they had no reversionary interest.

The razinamah and the decree in terms state that Ranganaikammal is to have absolute powers as regards the estate of the deceased Lakshmiah "which is the absolute property of the plaintiff (widow) in accordance with the terms of the will." These words rebut the idea of any transfer of any reversionary right by the plaintiff and his father by distinctly negativing the existence of any such right in them.

The acceptance of the release deed in this case is not an acknowledgment that any right existed in the release. The words in exhibit M, the release deed, on the other hand, distinctly allege that the full ownership vested in the widow under the will. As Lord Redesdale observed in a similar case about a release "It amounts only to this. I give you so much for not seeking to disturb me." *Underwood* v. *Lord Courtown*(5).

The cases cited which would only apply if there was a transfer by the reversioners do not therefore apply.

There is, of course, nothing illegal in a widow acquiring full ownership in any property under a will; and a razinamah or decree recognising that right is not therefore illegal.

We agree with the learned Judge therefore in his view of the compromise and disallow this contention.

Messrs. *Branson & Branson*—Attorneys for third and tenth respondents.

(1) I.L.R., 30 Mad., 256.
(2) I.L.R., 24 Mad., 265.
(3) I.L.R., 26 Mad., 31.
(4) I.L.R., 28 Mad., 84.
(5) 2 Sch. & Lefr., 68.

The decree is confirmed, and the appeal is dismissed with the costs of the respondents, the Trustees of Pacheappa's Charities.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Wallis.

SUBBIAH IYER (PLAINTIFF), APPELLANT,

v.

SUBRAMANIA AIYAR AND OTHERS (DEFENDANTS NOS. 2 TO 5), RESPONDENTS.*

1908. May 7.

Civil Procedure Code, Act XIV of 1882, *ss.* 520, 522—*Appeal against decree on fresh award made after order of remittal under s.* 520 *of the Code of Civil Procedure.*

Where the Court remits an award under section 520 of the Code of Civil Procedure and the arbitrators submit a fresh award, and the Court passes a decree in accordance with such revised award under section 522 of the Code of Civil Procedure, no appeal lies against such decree on the ground that the order of remittal under section 520 was wrong and that the original award ought to have been accepted and acted upon.

SUIT for a declaration and injunction. On the agreement of parties the dispute was referred to arbitration, and an award was submitted by the arbitrator. The plaintiff put in objections to the award praying that it may be remitted and the fifth defendant opposed the plaintiff's application on the ground that the award was legal and ought not to be remitted. The District Munsif remitted the award under section 520, and the arbitrator put in a supplemental award which not only dealt with the objections for a consideration of which it was remitted, but went much further and reviewed his former award on points not objected to.

The fifth defendant took objection to the revised award. The Munsif overruled the objections and passed a decree in accordance with the revised award. The fifth defendant appealed against this decree on the ground *inter alia* that the order remitting the

* Second Appeal No. 1110 of 1905, presented against the decree of M.R.Ry. T. Sadasiva Ayyar, Subordinate Judge of Tinnevelly, in Appeal Suit No. 512 of 1904, presented against the decree of T. Munro French, Esq., District Munsif of Tinnevelly, in Original Suit No. 257 of 1903.

SUBBIAH IYER v. SUBRAMANIA AIYAR.

award was illegal. The Subordinate Judge upheld this contention. The material portion of his judgment was as follows :—

"I think the second ground is well-taken. In *George* v. *Vastian Soury* (22 Mad., 202), it was held that, the legality of an order remitting an award for the reconsideration of the arbitrators may be challenged on appeal against the ultimate decree. It was further held that where there was a decision on the whole matter in issue between the parties and there was no illegality on the *face of the award*, the Court ought not to remit the case to the arbitrators, simply because they did not give their findings expressly on some issues in the case. There are certain observations in the Privy Council case in *Ghulam Khan* v. *Muhammad Hassan* (29 Calc., 167 at p. 186) which are also pertinent. The arbitrators 'were not indeed bound to give an award on each point. They had to give their award on the whole case. They may have erred in law, but arbitrators may be Judges of law as well as of fact and an error in law certainly does not vitiate an award.' The expression 'objection to the legality apparent on the face of the award' cannot mean an error of law made in the reasons given by the arbitrator's first award, or an error in the construction of a document or an omission to consider the probative value of certain evidence. It must be an illegality apparent on the face of the award itself, for instance, where the arbitrator says that the defendant shall pay plaintiff an amount which shall be determined by the casting of lots, or that a third person not a party shall pay plaintiff something in satisfaction, or where the arbitrator directs that the defendant, though a woman or infant, shall be arrested and sent to jail if the decreed amount is not paid and so on.

It is impossible, in my opinion, to state on a perusal of the first award in this case that there is any illegality apparent on the face of the award or that it has left undetermined, any matters referred to the arbitrator.

It might be that, in complicated cases, it is better that the arbitrator appointed by the Court should be given a power to review his award. The Court seems also to have power to remit awards made outside the Court under the Arbitration Act IX of 1899 on equitable grounds other than those mentioned in section 520 of the Civil Procedure Code (see *Protap Chunder Dey* v. *Toolsey Dass Dey* (29 Calc., 793)). But so far as arbitrators in a

SUBBIAH IYER v. SUBRAMANIA AIYAR.

suit are concerned, section 520 clearly applies, and it is only on the three grounds mentioned in that section that awards can be remitted for reconsideration. I am of opinion that none of the grounds applied to the first a ward made by the arbitrator and that the lower Court did not act legally in remitting the award for reconsideration.

In the result, I direct that the judgment in the suit shall follow the first award of the arbitrator and that the decree be drawn up in accordance with the said award. The respondents will pay half of appellant's costs in this appeal and bear their own costs."

The plaintiff appealed to the High Court.

S. Muthiah Mudaliar for *S. Srinivasa Ayyangar* for appellant.

A. S. Balasubrahmania Ayyar for respondent.

JUDGMENT.—This appeal raises an interesting question as to which there is apparently no precise authority. The question is whether after the Court has remitted an award to the arbitrators under section 520, Civil Procedure Code, and the arbitrators have submitted a revised award and the Court has given judgment under section 522, Civil Procedure Code, according to the revised award, and a decree has followed thereon, an appeal will lie from such decree on the ground that the order of remittal under section 520, Civil Procedure Code, was wrong, and that the original award ought to have been accepted and acted on. Section 522, Civil Procedure Code, says that no appeal shall lie from the decree so passed except in so far as the decree is in excess of, or not in accordance with the award, and this, in our opinion, means the award according to which judgment was given, which is of course the revised award. The present decree is in accordance with the revised award and, in our opinion, section 522, Civil Procedure Code, bars an appeal on the ground that the earlier order of remittal under section 520, Civil Procedure Code, was wrongly made. It was not contended that an appeal would lie against a decree passed by the Court in accordance with the award on the ground that the Court had improperly refused an application for an order of remittal under section 520, Civil Procedure Code, and the policy of the law appears to be to refuse to allow appeals against decrees in accordance with awards on the ground either that an order under section 520, Civil Procedure Code, was improperly made or improperly refused. The decision of the

SUBBIAH IYER v. SUBRAMANIA AIYAR.

Privy Council in *Ghulam Khan* v. *Muhammad Hassan*(1) shows that the provisions of section 522, Civil Procedure Code, as to appeals, must be strictly enforced. The case of *George* v. *Vastian Soury*(2), and the cases there cited, are not in point, as, in each of those cases, after the order of remittal under section 520, Civil Procedure Code, had been made, the arbitrators refused to reconsider their award, which consequently, became void under section 521, Civil Procedure Code, and the Court proceeded to try the case and pass a decree in the ordinary way.

The appeal must be allowed and the decree of the Subordinate Judge set aside, and that of the District Munsif restored, with costs here and in the lower Appellate Court.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Abdur Rahim.

1908. July 31.

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

v.

NARAYANASAMI NAICKER AND OTHERS (PLAINTIFF AND DEFENDANTS NOS. 4 TO 8), RESPONDENTS.*

Hindu Law—Partition, Proof of—Presumption of general division from the separation of one.

Separate residence is not, of itself, conclusive or even strong evidence of partition.

There is no presumption of a general division among all the members of a coparcenary from the fact that one of its members has separated.

Balabux v. *Rukhma Bai*, (I.L.R., 30 Calc., 725), referred to.

SUIT for partition.

The plaintiff and the defendants were members of a Hindu family which was once joint. There was a partial partition in 1864, and a list was made of the properties which remained joint.

(1) I.L.R., 29 Calc., 167. (2) I.L.R., 22 Mad., 202.

* Second Appeal No. 1183 of 1906, presented against the decree of F. D. P. Oldfield, Esq., District Judge of Tanjore, in Appeal Suit No. 1440 of 1905, presented against the decree of M.R.Ry. A. N. Anantarama Ayyar, District Munsif of Tanjore, in Original Suit No. 207 of 1903.

RANGANATHA RAO v. NARAYANASAMI NAICKER.

This list was marked as exhibit A in the suit. The senior member of the family, the first defendant, was in possession of the properties kept joint. This suit was brought by the plaintiff for the division and allotment of his share.

The District Munsif dismissed the suit. On appeal his decree was modified, and the plaintiff was decreed a share in some of the items claimed.

Defendants Nos. 1 to 3 appealed.

S. Varadachariar for The Hon. the Advocate-General for the appellants.

T. R. Krishnaswamy Ayyar for *T. R. Ramachandra Ayyar* and *G. S. Ramachandra Ayyar* for the first respondent.

JUDGMENT.—We are asked to hold that the family was divided in 1864, although the District Judge has found that it was not; but we do not think we can disturb his finding on this point. The question depends almost entirely on the construction of exhibit A, from which it may be gathered that all the moveable property of the family except certain outstandings, was divided, while the immoveables and the outstandings were kept joint. The outstandings were to be collected by a third party to be appointed and paid by the members of the family jointly; and irrecoverable items were written off, with a proviso that should anything out of them be recovered it should be divided. Exhibit B executed in the following year refers to the land and outstandings as remaining joint or common.

There is little other evidence on which to form an opinion as to the meaning of these documents: it is said that the parties have always lived apart, but that is not of great importance. But the parties declare that this property is kept joint; there is no sort of division into shares, and nothing to show that the third party if he collected the outstandings was to divide them between the parties. In these circumstances the fact that the other moveables were divided is not, we think, strong evidence in favour of a complete division in status and we accept the District Judge's finding that there was no division in 1865.

It is then contended that a division of the family was effected by the decree in a former suit of 1890 in which another member of the family obtained a money decree for his share of collections made for the family by the first defendant. Reliance is placed on

RANGANATHA RAO v. NARAYANA-SAMI NAICKER.

Balabux v. *Rukhma Bai*(1), where their Lordships of the Privy Council point out that when one member separates from the family there is no presumption that the others remain joint. Their Lordships however do not say that in such a case the family is in all cases to be deemed to be divided ; they point out that there may be cases where the shares of all the members of the family have to be ascertained, and say that, it is in that sense that the separation of one is said to be the separation of all. It is not suggested that in the suit of 1890 it was necessary to fix and set out the shares of all, and there is here evidence that, after 1895, the plaintiff was given a share of some land which he till then had enjoyed along with the first defendant. The decree in the suit of 1890 does not in these circumstances prove a complete division of the family.

As to limitation, the District Judge says that once it was found that article 127 of the second schedule of the Limitation Act is applicable, it was not denied that the suit was not barred. Here it is urged that even if article 127 be applicable, the suit is barred as the plaintiff was excluded, to his knowledge, from participation in the family property at least as early as 1890.

This is based on evidence of the witnesses in the suit of 1890 which has not been printed, but probably the point was not contested in the lower Appellate Court because it was found at the first trial of the present suit that in 1895, the plaintiff obtained a share of land which had been purchased by the first defendant out of the family money collected by him. However that be, there is no evidence before us on which we can sustain the appellants' contention.

We agree with the District Judge that the evidence is insufficient to prove the collection of item No. 3 by the first defendant and the memorandum of objections fails.

The appeal and the memorandum of objections are dismissed with costs.

(1) I.L.R., 30 Calc., 725 at pp. 735, 736.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Abdur Rahim.

KONDETI KAMA ROW, MINOR, BY RAMANNA, (PLAINTIFF), APPELLANT,

v.

NUKAMMA AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1908. July 29, 30. September 8.

Fraudulent conveyance—Conveyance to defraud creditors cannot be impeached if creditors have been defrauded or if conveyance held valid by decree, though collusively obtained.

A party who conveys property to another for no consideration to shield such property from the claims of creditors, cannot set up the fraudulent nature of the transaction when creditors have been defrauded thereby.

Even where no creditors have been defrauded, if, in a suit to which the vendor and vendee are parties, the *bona fides* of the transaction is alleged and upheld, the vendor cannot, in a subsequent suit, get rid of the effect of the decree collusively obtained as between himself and the vendee, when such decree had been obtained in a proceeding intended to carry out the fraud.

Where the former collusive decree had proceeded on the footing that the consideration had been paid, the purchaser, in the subsequent suit, is entitled to obtain possession without payment of purchase money, even though it is shown that it was not paid, as the effect of compelling the purchaser to pay will be to enable the vendor to get rid of the effect of the former collusive decree, which neither party can be permitted to do.

Ranqammal v. *Venkatachari*, (I.L.R., 18 Mad., 378), referred to.

Yaramati Krishnayya v. *Chundru Papayya*, (I.L.R., 20 Mad., 326), referred to.

Per ABDUR RAHIM, J.—It is a clear and well-established principle of law that, when the decree of a Court has been passed upholding a certain transaction between the parties to a suit, neither the plaintiff nor the defendant will be allowed afterwards to say that the decree was the result of a collusive arrangement arrived at by them in order to carry out a scheme of fraud and that it should therefore be treated as a nullity, and the state of things which existed previously to the passing of such decree be restored. And so also, when two persons have combined to defraud a third person and succeeded in their effort without obtaining the decree of a Court, the Court will not permit one of the parties to such fraud to show that the transaction between him and the other party to the fraud was not really what it purported to be and that it does not therefore bind him.

In the first case the decree is regarded as a subsisting and effectual decree so that the question covered by it is treated as *res judicata*; and, in the second case, the Court refuses on grounds of public policy to help a man, who, by his act, has imposed upon another, to get rid of the consequences of that act as against himself.

SUIT for possession of a house.

The facts of the case are sufficiently set out in the judgment.

* Second Appeal No. 1331 of 1905, presented against the decree of T. Varada Row, Additional Subordinate Judge of Godavari at Rajahmundry, in Appeal Suit No. 442 of 1904, presented against the decree of C. Rama Row, District Munsif of Cocanada, in Original Suit No. 48 of 1903.

KAMA ROW v. NUKAMMA.

The District Munsif dismissed the suit and his judgment was confirmed on appeal.

The plaintiff appealed to the High Court on the following grounds :—

That the lower Appellate Court had failed to give due legal effect to the decree and judgment in Original Suit No. 218 of 1894.

That the lower Appellate Court ought to have held that the said decree and judgment estopped the second defendant from disputing the deed, dated 21st May 1893, under which the plaintiff claimed.

That the lower Appellate Court had overlooked, and failed to apply the principle of law that fraudulent conveyances cannot be avoided after decrees have been obtained thereon by the fraud and collusion of both the parties.

P. Nagabhushanam for appellant.

T. Ramachandra Row for respondents.

JUDGMENT (MILLER, J.).—It is necessary to set out in some detail the facts found in this case.

In execution of a decree against the father of the second defendant, the house in dispute was attached; the plaintiff by his next friend laid claim to the property as vendee of the second defendant, and obtained a decree declaring him to be the owner. In the suit in which this decree was obtained he, and the attaching creditor, and the second defendant were parties, the second defendant being then the third defendant, the Court found that the property was the self-acquisition and separate property of the second defendant Mondi Venkanna, purchased by him after separation from his father.

On the strength of the declaration and his title as vendee the plaintiff, by his next friend, now sues for possession of the house and site, and the second defendant, who is in possession, resists the suit on the ground that the sale-deed was nominal and colourable, executed because the second defendant "had to pay certain debts at the time." The Court of First Instance has found that the sale to the plaintiff was not valid or supported by consideration, that the second defendant has remained in possession after the sale-deed as before it, and that money borrowed in the plaintiff's name for the reconstruction of the house after a fire was paid off by, and borrowed from, the second defendant. The lower Appellate Court concurs in these findings and both Courts have dismissed the suit, the question of law raised in the appeal momorandum to the lower Appellate Court (grounds 5 and 6) not being dealt with by the Subordinate Judge.

Finally, it is not found by either Court that the second defendant has or ever had any creditor who has been defrauded by the colourable sale to the plaintiff. On the finding of the Court in

KAMA ROW v. NUKAMMA.

the former suit the creditor of the second defendant's father could in no circumstances have had recourse to this property, whether it had or had not been sold to the plaintiff.

In these circumstances the plaintiff appeals, contending that the second defendant being party to a collusive decree cannot set up the collusion to defeat the effect of the decree; and the respondents, on the other hand, contend that no fraud was effected by the decree, and consequently the plaintiff can rely on it only as estopping the second defendant from contesting it, and that inasmuch as the plea of *res judicata* was not taken in the Court of First Instance effect cannot be given to that plea now. It is also contended for the respondents, and not denied on behalf of the appellant that, as the law has been laid down by this Court, a purchaser cannot demand possession of the purchased property until he has paid the purchase money.

Now it was the case of the second defendant that the nominal sale was intended to shield the property from his creditors: that is what he alleged in his written statement; upon that case the first issue was drafted, and upon that case the Subordinate Judge in the appeal propounded the question for his decision. We must take it, in those circumstances, that the keeping up of the sham in the suit No. 218 of 1894, though it may not have deprived the first defendant in that suit of the property, was none the less a fraudulent and collusive proceeding, intended to carry out the fraudulent intention in pursuance of which the sale-deed was originally executed and registered.

The second defendant is now alleging his own fraud to escape from the consequence of the decree thus fraudulently and collusively obtained, and, on the authorities in this Court, he cannot be allowed to succeed (*Venkatramanna* v. *Viramma*(1), *Rangammal* v. *Venkatachari*(2), *Yaramati Krishnayya* v. *Chundru Papayya*(3)). I do not think *Petherpermal Chetty* v. *Munisndy Servai*(4) overrules these authorities: in that case the question of the effect of a decree between the parties is not discussed. We must therefore, in my opinion, proceed in the view that the decree is a subsisting and effectual decree, and that as between himself and the second defendant the plaintiff is the owner of the house and site in dispute. He is therefore entitled to possession, but both Courts have found that he has not paid the price fixed in the sale-deed. I have had some doubt whether the plaintiff ought to be allowed to succeed without now paying the price before obtaining possession; but as I find that the decree in the former suit was

(1) I.L.R., 10 Mad., 17. (2) I.L.R., 18 Mad., 378.
(3) I.L.R., 20 Mad., 326. (4) I.L.R., 35 Calc., 551.

KAMA ROW v. NUKAMMA.

based on a finding that he had paid the price, or at any rate a large portion of it, I think that to direct him to do so now would in effect be to call in question the decree which is just what neither party can be permitted to do.

I would therefore reverse the decrees of the Courts below and give the plaintiff a decree, but, in the circumstances, without costs.

ABDUR RAHIM, J.—It is a clear and well-established principle of law that, when the decree of a Court has been passed upholding a certain transaction between the parties to a suit, neither the plaintiff nor the defendant will be allowed afterwards to say that the decree was the result of a collusive arrangement arrived at by them in order to carry out a scheme of fraud and that it should therefore be treated as a nullity, and the state of things which existed previously to the passing of such decree be restored. And so also, when two persons have combined to defraud a third person and succeeded in their effort without obtaining the decree of a Court, the Court will not permit one of the parties to such fraud to show that the transaction between him and the other party to the fraud was not really what it purported to be and that it does not therefore bind him.

In the first case the decree is regarded as a subsisting and effectual decree so that the question covered by it is treated as *res judicata*; and, in the second case, the Court refuses on grounds of public policy to help a man, who, by his act, has imposed upon another, to get rid of the consequences of that act as against himself.

The subject is fully discussed in *Chenvirappa* v. *Puttappa*(1) and the law as explained therein has been accepted in *Rangammal* v. *Venkatachari*(2), and *Yaramati Krishnayya* v. *Chundru Papayya*(3). That being so, the defendants in the suit out of which this second appeal has arisen have no proper answer to make to the plaintiff's claim. Some time between May 1893 and June 1894, a creditor of the second defendant's father, in execution of a decree obtained by him, attached the property which is the subject-matter of this suit alleging that it belonged to his judgment-debtor. Thereupon the present plaintiff preferred a claim to the property stating that he had purchased it under a deed of sale, dated the 21st May 1893, from the second defendant who owned it as his separate and self-acquired property. He succeeded in establishing this claim in Original Suit No. 218 of 1894 with the aid of the second defendant, who was impleaded in that suit as the third defendant, obtaining a decree declaring his

(1) I.L.R., 11 Bom., 708. (2) I.L.R., 18 Mad., 378.
(3) I.L.R., 20 Mad., 326.

KAMA ROW v. NUKAMMA.

right to the property with the result that it was released from attachment. It is argued on behalf of the respondents that, it being found in Original Suit No. 218 of 1894 that the house in question was the separate property of the second defendant, there was no necessity for propounding the nominal and colourable deed of sale executed by the second defendant in favour of the plaintiff. But, even if that be so, the conveyance was put into use in order to put off the creditor of the second defendant's father, and that, in my opinion, is sufficient to estop the second defendant from saying that between himself and the plaintiff the sale was a sham. Further, as I have said, there being a decree of the Court in favour of the plaintiff declaring the validity of the sale in the presence of and with the concurrence of the second defendant, the question is concluded once for all so far as those two persons are concerned. The learned vakil for the respondents however urges that the plaintiff is not in any case entitled to have possession of the property without paying the amount of consideration mentioned in the deed of sale, as it has been found that no part of the consideration was paid by him. But I do not think that this contention is well founded. In the first place it is the case of the defendants themselves that it was never intended that any money should be paid. And the law being that, in circumstances such as these, the effect of the apparent transaction (especially when, as in this case, it has been confirmed by a decree of the Court), cannot be got over by shewing that the real transaction was something different, if we were now to compel the plaintiff to pay the purchase money as a condition precedent to his recovering possession of the property the force of the rule would be materially impaired. The decision in *Subrahmania Ayyar* v. *Poovan*(1) cited at the Bar is not in my opinion relevant to the question. That was a case of the buyer of a certain property under a *bonâ fide* deed of sale seeking to recover possession of it from the vendor who claimed to retain possession by virtue of a lien for his unpaid purchase money. For these reasons, I agree that the judgments of both the lower Courts should be reversed, and the suit of the plaintiff be decreed, but that, in the circumstances of the case, each party should bear his own costs throughout.

(1) I.L.R., 27 Mad., 28.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Abdur Rahim.

1908. August 13, 14. September 4.

RANGIAH NAIDU (PLAINTIFF), PETITIONER,

v.

RUNGIAH AND OTHERS (LEGAL REPRESENTATIVES OF THE FIRST RESPONDENT), RESPONDENTS.*

Civil Procedure Code, Act XIV of 1882, s. 622—Revisional power of High Courts over Presidency Courts of Small Causes—Presidency Small Cause Courts' Act, s. 69—Where the Judges differ matter must be referred to High Court.

There is nothing in the Code of Civil Procedure or in the Presidency Small Cause Courts' Act to exempt Presidency Courts of Small Causes from the revisional powers of the High Court under section 622 of the Civil Procedure Code.

Where the Judges of such Court sitting together in Full Bench to dispose of a suit take different views on a point affecting the merits of the case, they are bound under section 69 of the Act to refer the matter for the opinion of the High Court and ought not to deal with the matter finally.

Where the order of the Full Bench, on the application of the party for a retrial, fully deals with all the points arising for decision in the suit itself, without granting a formal order for retrial, the absence of such formal order is immaterial, and the Judges must be considered to have sat together in the suit within the meaning of section 69. The substantial effect of the order and not its mere form must be considered.

Seshammal v. *Munusamy Mudali* (I.L.R., 20 Mad., 358), referred to.

THE facts so far as they are necessary for the purposes of the report are fully stated in the judgment.

The order of the Full Bench was as follows :—

"For the reasons given in my original judgment, I concur in the conclusions arrived at by my learned brother the 3rd Judge. This application is therefore dismissed with costs."

The plaintiff applied to the High Court under section 622, Civil Procedure Code, to have this order set aside.

T. Narasimha Ayyangar for petitioner.

V. V. Srinivasa Ayyangar for respondent.

JUDGMENT.—The petitioner P. Rungiah Naidu sued one C. Rungiah in the Presidency Court of Small Causes for the

* Civil Revision Petition No. 456 of 1907, presented under section 622 of the Code of Civil Procedure, praying the High Court to revise the decision of the Full Bench of the Madras Court of Small Causes in Suit No. 15090 of 1904.

recovery of damages for non-acceptance of certain glassware indented for by the latter. The defendant refused to accept the goods on the ground that they were not packed in square and wide cases as required by the indents, contending that, the provision as to the mode of packing was an essential term of the contract between him and the plaintiff. The learned Chief Judge, who originally tried the suit, gave effect to this plea and dismissed the action. The plaintiff thereupon made an application to the Full Bench which was heard by the Chief Judge and the second and the third Judges sitting together. The questions arising in the suit were then fully discussed before them, but they eventually differed among themselves and delivered separate judgments, one Judge holding that the plaintiff's claim should be decreed, the other two being of opinion that the suit should be dismissed. In the result 'the application' was dismissed in accordance with the opinion of the majority.

The petitioner urges that the learned Judges of the Madras Court of Small Causes having differed as to the proper construction of the indent, were bound to refer the matter to the High Court under section 69, Presidency Small Cause Courts Act, and that they acted without jurisdiction in disposing of the case, finally, without first obtaining the opinion of the High Court upon the point.

The learned pleader for the defendant has taken a preliminary objection to our entertaining this petition under section 622, Civil Procedure Code, and argues that that section does not apply to a Presidency Court of Small Causes. We think that there is no force in this objection. The Presidency Courts of Small Causes are undoubtedly subordinate Courts and we can find nothing in the language of section 622, Civil Procedure Code, or in any other provision in the Civil Procedure Code or the Presidency Small Cause Courts Act which may be said to indicate an intention on the part of the Legislature to exclude such Courts from the application of section 622. Further a series of decisions giving rise to a long course of practice leaves no room for any doubt upon the question (see *Peary Mohun Ghosaul* v. *Harran Chunder Gangooly*(1), *Sassoon* v. *Hurry Das Bhukut*(2), *Sadasook Gambir*

(1) I.L.R., 11 Calc., 261. (2) I.L.R., 24 Calc., 455.

RANGIAH NAIDU v. RUNGIAH.

Chund v. *Kannayya*(1), *Seshammal* v. *Munusami Mudali*(2), *Srinivasa Charlu* v. *Balaji Rau*(3), and *Chinnathambi Mudaliar* v. *Veerabadriah Naidoo*(4).

The next question we have to consider is, whether the learned Judges of the Madras Court of Small Causes can be said in this case to have sat together in the suit within the meaning of section 69 of the Presidency Small Cause Courts' Act. We find that the Judges sitting in the Full Bench fully dealt with all the points arising for decision in the suit itself and there can be no doubt that they intended to dispose of the suit finally. If no formal order was made granting a new trial we agree with the learned Judges who decided the case of *Seshammal* v. *Munusami Mudali*(2) that that could make no difference.

We think we must have regard to the substantial effect of the order and not to its mere form. It virtually amounted to a revival or re-hearing of the suit. That being so, and the learned Judges having taken different views as to the right construction of the indent on the question as to whether the condition regarding the manner of packing was an integral part of the contract or not, and as such construction undoubtedly affects the merits of the case we are of opinion that they were bound to refer the question to the High Court and could not deal with the case in the way they have done. The order of the Madras Small Cause Court, dated the 18th March 1907, on the Full Bench Application No. 46 of 1906 is therefore set aside, and we direct that the suit be disposed of according to law. The costs of this petition will abide the result.

(1) I.L.R., 19 Mad., 196. (2) I.L.R., 20 Mad., 358.
(3) I.L.R., 21 Mad., 232. (4) I.L.R., 26 Mad., 163.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Sankaran-Nair.

SUNDARAPPAIYAR AND OTHERS (DEFENDANTS NOS. 8, 2 AND 10), APPELLANTS,

v.

ARUNACHELLA CHETTIAR (PLAINTIFF), RESPONDENT.*

1908. July 21, 22, 28.

Insolvent Act, 11 and 12 Vict., Cap. 21, s. 7—All property of insolvent at date of petition vests in Official Assignee.

Where, prior to sale of a judgment-debtor's property in execution of a simple decree for money, the judgment-debtor becomes insolvent and the vesting order under section 7 of the Insolvent Act is made:

Held that the purchaser at such sale acquires no interest in the property sold.

When the vesting order under section 7 of the Insolvent Act is made, the insolvent ceases to have any saleable interest in the property.

THE facts necessary for the report are set out in the judgment.

The Munsif dismissed the suit on the ground that the purchaser at the Court sale, *i.e.*, the assignor of the plaintiff acquired no interest, the property having vested in the Official Assignee. On appeal the District Judge reversing the decree of the Munsif, passed a preliminary decree for partition and remanded the case to the lower Court to take evidence and pass the final decree.

The second, eighth and tenth defendants appealed to the High Court.

T. R. Venkatarama Sastri for appellants.

S. Srinivasa Ayyangar for respondent.

JUDGMENT.—A simple money decree was obtained against the first defendant and in execution thereof the first defendant's undivided one-fourth share in certain immoveable family property was sold and purchased by one Vellayappa Chetty who conveyed his right to the plaintiff. The plaintiff now sues for partition and possession of the share. Prior to the execution sale the first defendant had become an insolvent and all his property including the share now in question had vested in the Official Assignee

* Civil Miscellaneous Appeal No. 232 of 1907, presented against the order of F. D. P. Oldfield, Esq., District Judge of Tanjore, in Appeal Suit No. 1036 of 1906, presented against the decree of M.R.Ry. C. S. Mahadeva Aiyar, District Munsif of Shiyali, in Original Suit No. 161 of 1905.

SUNDARAP-PAIYAR v. ARUNA-CHELLA CHETTIAR.

under section 7 of the Indian Insolvent Act, 11 and 12. Vict., Cap. 21. The question for decision in this appeal is whether the plaintiff has any interest which entitles him to maintain the suit.

In *Ram Soondur Dey* v. *Shoshi Mohun Pal Chowdhry*(1), it was held that, where an order has been made under section 7 of the Indian Insolvent Act vesting the property of a judgment-debtor in the Official Assignee, the judgment-debtor has no saleable interest in such property. In *Sádodin and another* v. *W. Spiers*(2), it was laid down that, as soon as an order under section 7 is made, any rights of property, which an insolvent may have possessed at the date of his petition in insolvency, vest in the Official Assignee who alone can maintain a suit to enforce such rights. These decisions give effect to what we think is the plain meaning of section 7 and they are exactly applicable to the present case. If they are followed the plaintiff cannot maintain the suit, as nothing passed by the execution sale. It has no doubt been held (vide *Sriramulu Naidu* v. *Andalammal*(3)), that in the case of property acquired after his insolvency an insolvent may in certain circumstances maintain a suit. But *Sriramulu Naidu* v. *Andalammal*(3), and the decisions which it follows, are no authority with regard to property possessed by the insolvent at the time of his insolvency as in the present case. We hold therefore that the plaintiff cannot maintain this suit. The decree of the District Judge is set aside, and that of the District Munsif restored with costs in this and in the lower Appellate Court.

(1) 11 C.L.R., 389. (2) I.L.R., 3 Bom., 437.
(3) I.L.R., 30 Mad., 145.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Munro.

THE REGULATION COLLECTOR OF UTHUMALAI ESTATE (COUNTER-PETITIONER), APPELLANT,

v.

SUBBIER (CLAIMANT-PETITIONER), RESPONDENT.*

1908. March 19, 20. April 30. May 6.

Court of Wards Act (Madras)—Act I of 1902 and rules 3 and 7 of rules framed thereunder—Regulation Collector, power of, to reject claims as barred.

Where, under the provisions of the Court of Wards Act and the rules framed thereunder, a Regulation Collector and a Decree Collector have been appointed and a claim is duly presented to the former before the expiry of the period prescribed for enforcing the same by a civil suit, he cannot by keeping such claim pending before him until a suit on it would be barred, subsequently refuse to pay it on the ground that it is barred by limitation.

In such cases, the claimant can obtain an adjudication of the Courts on his claim without resorting to a civil suit.

When the Regulation Collector is called on by the Decree Collector under rule 3 of the rules to 'furnish him with full particulars of all claims notified to him,' it is his duty to 'thereupon furnish him (the Decree Collector) with such particulars.'

If the claim was disputed, it was the duty of the Decree Collector under rule 7 to refer the matter to the Civil Court and the matter that could properly be referred will be whether the claim was legally enforceable *at the time it was presented to the Regulation Collector.* If the Court decides that it was so enforceable, the Decree Collector was bound to place it on the list and proceed to discharge it according to the provisions of the Act and the rules.

The reference to the Civil Court is not to be regarded as the institution of a suit and section 4 of the Limitation Act will not apply.

Semble, where no Decree Collector is appointed, the party whose claim is disallowed by the Court of Wards, will have no remedy, but to file a civil suit. The provisions of section 4 of the Limitation Act will then apply and the exclusion of the time during which the claim was pending before the Regulation Collector cannot be claimed under section 14 of the Limitation Act.

THE Zemindary of Uthumalai was placed under the superintendence of the Court of Wards and a Regulation Collector was appointed under the Court of Wards Act. The Regulation Collector published a notification under the Act calling on claimants to submit their claims, and within six months of the

* Civil Miscellaneous Second Appeal No. 62 of 1907, presented against the order of C. G. Spencer, District Judge of Tinnevelly, in Civil Miscellaneous Appeal No. 5 of 1907, presented against the order of P. Aiyasami Mudaliar, District Munsif of Ambasamudram, in Miscellaneous Petition No. 3207 of 1906.

notification, *i.e.*, in December 1901 the claimant notified his claim. The claim was for remuneration in respect of legal services rendered in 1900 and was not barred at the time it was presented. Before the claim was presented a Decree Collector was appointed who, in September 1902, called on the Regulation Collector to give particulars of all claims notified to him. Particulars of this claim were not sent to the Decree Collector, but the Regulation Collector kept it pending before himself till the end of 1903 and then disallowed it on the ground that it was barred by limitation and his decision was upheld by the Court of Wards.

This decision being disputed by the claimant, the Decree Collector made a reference to the District Munsif under rule 7 of the rules.

The District Munsif decreed in favour of the claimant on the ground that, under section 14 of the Limitation Act, the time during which the claim was pending before the Regulation Collector, ought to be excluded in computing the period of limitation.

On appeal, his decision was supported but on different grounds. The material portion of the judgment on appeal is as follows:—

"Section 14 (Limitation Act) does not apply, because, it cannot be said that the Court of the Regulation Collector was a Court unable to entertain the suit. I have also perused the *ex parte* decision of the Subordinate Judge, in Miscellaneous Petition No. 219 of 1906, in which in dealing with a similar claim he came to an opposite conclusion from that arrived at here by the District Munsif. He had regard to section 41 of Act I of 1902, and he held that claimants were not precluded by the Act from pursuing their remedies in the ordinary Court. He remarked that it was nowhere laid down that the time taken up by the Regulation Collector in adjudicating upon claims should be excluded in computing the period of limitation. The Advocate-General is stated to have pronounced an opinion which I have not seen.

My view is this. No question of limitation arose at all in the Regulation Collector's Court. He was there to administer the law as laid down in Act IV of 1899 or Act I of 1902 under which he was proceeding. He should have been content to see that the claim was in time when it was presented in his Court. It was not for him to speculate whether the claim would have been time-barred if it had been made to some other Court, acting under some

other law which he was not administering on the date that he chose to pronounce his award or any other arbitrarily fixed date. Reading sections 37 to 47 of Act I of 1902 and the rules framed by the Local Government under section 45 of the Act which have the force of law and are contained in the appendix to the Board's Standing Orders, I perceive that the procedure of the Regulation Collectors and of the Civil Courts to which disputed claims are referred under rule 7 is intended to be all of one piece. A separate law of limitation does not apply to the different Courts. Thus, if claims are in time when presented to the Regulation Collector, no provision of the Court of Wards Act or the Limitation Act can make them barred."

The Regulation Collector appealed to the High Court.

Mr. *C. F. Napier* for appellant.

T. V. Seshagiri Ayyar and *T. V. Muthukrishna Ayyar* for respondent.

JUDGMENT.—This appeal relates to a claim duly preferred to the Regulation Collector of the Uthumalai Estate for a sum due to the claimant by the Estate. The claim was made within six months of the publication of a notification under section 30 of Regulation V of 1804 as amended by Madras Act IV of 1899, and, at the time when it was made in December 1901, its recovery by suit in a Civil Court was not barred by the Limitation Act.

A Collector for the purpose of executing decrees which were in force against the Estate, generally called a Decree Collector as opposed to a Regulation Collector, was appointed on the 20th September 1901.

A new Regulation Collector was appointed on the 30th October 1901, and, as already stated, the present claim was made to the Regulation Collector on the 1st December 1901. On the 17th September 1902 the Decree Collector called on the Regulation Collector under rule 3 of the rules framed under the Act, "to furnish him with full particulars of all claims notified to him under section 30." It was the duty of the Regulation Collector to "*thereupon* furnish the (Decree) Collector with such particulars", and to state in regard to such claim whether it was allowed or disallowed in whole or in part. This, however, the Regulation Collector did not do. So far as appears from the record he kept the claim pending before him until 1904, and then refused to pay it on the ground that a suit for its recovery had become barred at

the end of 1903, though admittedly a sum of Rs. 255-8-0 was legally due and recoverable when the claim was made in 1901. His decision was upheld by the Court of Wards, and the Regulation Collector then reported to the Decree Collector that he had disallowed the claim as time-barred.

The Decree Collector then, under rule 7, referred the matter to the Civil Court for decision, and both the District Munsif and the District Judge held that there was no bar by limitation. It is against this order of the Courts that the present appeal is made.

The construction of the Act and of the rules framed under it, are not free from difficulty, but we think it is clear that there is no bar by limitation in this case.

This is not a case in which no Decree Collector was appointed, but only a Regulation Collector. In such a case, if the claim was disallowed by the Regulation Collector and the Court of Wards, the claimant would have no remedy except to file a suit in the Civil Court as contemplated in section 40 of the Act. If such a suit were instituted, no doubt section 4 of the Limitation Act would bar it unless it were instituted within the time allowed by law, and the time during which the claim was pending before the Regulation Collector could not be excluded since there is no provision in the Act for the exclusion of such time, and section 14 of the Limitation Act cannot be relied on to justify the exclusion, since it cannot be said that the Regulation Collector is "a Court which from defect of jurisdiction was unable to entertain" the claimant's suit. Provision for the exclusion of such time seems to be obviously required for the protection of both wards and claimants, for, in the absence of such a provision, each prudent claimant will have to file a suit in the Civil Court before his claim is barred even though the Regulation Collector may be eventually prepared to discharge it.

The present, however, is not a case of this kind. There is no suit in the Civil Court, and there is no need for any such suit in order to obtain the decision of the Courts on the validity of the claim. Here both a Regulation Collector and a Decree Collector were in existence before the claim was made. The claim was therefore bound to be placed before the Civil Court for decision unless the Decree Collector was prepared to pay it. The only question in regard to limitation that could properly be placed before the Civil Court was whether the claim at the time that it

was made to the proper authority under the Act was or was not one that was irrecoverable at law. If it was not irrecoverable when made, and if the sum was then otherwise legally due it was the duty of the Decree Collector to admit the claim and to discharge it to the extent of assets in his hands and with due regard to the provisions of the Act relating to the discharge of proved debts. If the Decree Collector was in doubt, or if the Regulation Collector, on behalf of the Estate disputed the claim, it was the duty of the Decree Collector to refer the matter for the decision of the Civil Court and to be guided by its decision. The reference by the Decree Collector to the Court is not to be regarded as the institution of a suit in the Court by the claimant as plaintiff, against the Regulation Collector as defendant. It is a reference made to the Court under a special provision of law and therefore section 4 of the Limitation Act has no application. The question that could properly be referred is whether the claim, was legally enforceable at the time when it was made to the Regulation Collector, not whether it was legally enforceable on some subsequent date arbitrarily fixed by the Regulation Collector. There is no ground for the contention that it is open to the Regulation Collector to keep the claim pending before him until a suit on it would be barred and then to refuse to pay it on the ground that it had become barred. We dismiss the appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Sankaran-Nair and Mr. Justice Abdur Rahim.

1908. August 5, 26.

SALAKSHI (PETITIONER—THIRD DEFENDANT), APPELLANT,

v.

LAKSHMAYEE (RESPONDENT—PLAINTIFF), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, s. 266—Attachable interest—Hindu Law—Right of residence of widow in family house is personal and cannot be attached in execution.

The right of a widow, under the Hindu Law, to reside in her husband's family house, is a purely personal right and cannot be transferred.

Such right cannot be attached in execution under section 266 of the Code of Civil Procedure.

THE facts of the case are sufficiently stated in the judgment.

T. V. Seshagiri Ayyar for appellant.

G. S. Ramachandra Ayyar for respondent.

JUDGMENT.—The question for decision is whether the respondent has any interest in the property—a dwelling house—liable to be attached and sold in execution of a decree against her.

In a suit for maintenance brought by the respondent, a Hindu widow, against her step-son, his two sisters, wife and daughter, she obtained a decree against the first defendant, the step-son, for past and for future maintenance which was made a charge on certain properties. There was also a decree for surrender to her of the first defendant's share of item No. 1 in the plaint for her residence during life. Her interest in that property is now attached by one of the other defendants in execution of the decree for costs decreed against her.

The judge has held that she has no alienable interest and the attachment must therefore be set aside. In appeal reliance is placed upon the dictum of Muttusami Ayyar, J., in *Ramanadan* v. *Rangammal*(1). That was a suit in which the question for

* Civil Miscellaneous Second Appeal No. 87 of 1907, presented against the decree of F. D. P. Oldfield, Esq., District Judge of Tanjore, in Appeal Suit No. 466 of 1907, presented against the order of M.R.Ry A. N. Anantharama Ayyar, District Munsif of Tanjore, on Execution Petition No. 715 of 1906 (Original Suit No. 241 of 1899).

(1) I.L.R., 12 Mad., 260.

decision was as to the right of a Hindu widow to live in the family house sold in execution of a decree for a debt binding on the family, and purchased by a stranger in good faith but with notice of her claim to reside therein. In the course of his judgment, negativing her claim, Muttusami Ayyar, J., observed "a sale for the payment of her own debt would bind her interest in the house whatever it might be." This expression of opinion is referred to without disapproval in *Jayanti Subbiah* v. *Alamelu Mangamma*(1). The right of the widow is to live in the husband's family house. She has no right to insist on residing in any particular house, and, ordinarily, when living with the members of her husband's family, she must accept such reasonable arrangements for her residence therein as they make for her. The interest is therefore obviously one restricted in its enjoyment to her, and it is this interest which the decree gives to the respondent. If this interest can be transferred, what is it that the purchaser takes? It is the right to reside in the portion allotted to her, with the other members of the family living in the family house. This could not have been contemplated by the Hindu Law-givers. The case may be different where lands or other property may have been allotted to a widow in lieu of her claim for maintenance. It appears to us therefore that the respondent has been given a portion of the house only for her personal use and her right of enjoyment cannot be transferred. Recognizing a right of sale might be oppressive to the family, and would result in allowing her a right to choose a separate residence even where she is not entitled to do so under the Hindu Law.

We agree with the Judge and dismiss this appeal with costs.

(1) I.L.R., 27 Mad., 50.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim.

1908. September 4, 22.

AMARA VEERAYYA, PETITIONER,

v.

ANNAMALA CHETTY PICHAYYA AND OTHERS, RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, ss. 295, 490, 648—Right to rateable distribution of creditor attaching before judgment—"Realization" of assets—Attachment before judgment if property outside jurisdiction.

Under section 490 of the Code of Civil Procedure read with section 273, the property of a judgment-debtor attached before judgment is brought into Court by stress of the attachment, and, where a decree follows the judgment, the creditor will be entitled, without a fresh attachment, to rateable distribution out of the proceeds of the sale of such property under section 295. The fact that, subsequent to realisation, he applies for attachment of the amount, will not affect his right, as no such attachment was necessary.

The operation of section 295 is not confined to cases where the property actually sold and realised belongs to the judgment-debtor. It is also applicable where the attached property is a decree in favour of the judgment-debtor against others, and the money is realised in execution of such decree by the sale of property belonging to such others:

Semble, under section 648 of the Code of Civil Procedure, property outside the jurisdiction of a Court in which a suit is pending can be attached by such Court in anticipation of its judgment.

Ram Pertab Jhowar v. *Madho Rai*, (7 C.W.N. 216), referred to.

Srinivasa Ayyangar v. *Seetharama Ayyar*, (I.L.R., 19 Mad., 72), distinguished.

THE facts of this case are fully stated in the judgment.

T. Pattabhi Rama Ayyar for petitioners.

V. V. Srinivasa Ayyangar for respondents.

JUDGMENT.—The petitioner Amata Veerayya obtained a decree, on the 29th January 1901, against one Krishnam Ramasamy and two other persons for Rs. 342 and odd, in the Court of the District Munsif of Kavali. Before he obtained that decree, he had applied under section 483, Civil Procedure Code, for attachment before judgment of a mortgage decree passed by the Nellore

* Civil Revision Petition No. 473 of 1905, presented, under section 622 of the Code of Civil Procedure praying the High Court to revise the order of the District Judge of Nellore in Execution Petition No. 183 of 1904 (Original Suit No. 993 of 1900).

District Court in Original Suit No. 21 of 1895 in favour of Krishnam Ramasamy against certain other persons; and, on the 6th December 1900, a prohibitory order was issued by which the District Judge of Nellore was requested to order that the execution of the decree in Original Suit No. 21 of 1895 might be suspended until the further orders of the District Munsif of Kavali. The District Judge of Nellore on receiving the notice gave effect to the prohibitory order. This was either on the 8th or the 10th December 1900. It also appears from the Execution Petition No. 183 of 1904 of the counter-petitioner Annamala Chetty Pichayya that he also obtained, on the 8th December 1900, a similar order before judgment attaching that very decree of Krishnam Ramasamy. Krishnam Ramasamy's decree was then executed, and the property of his judgment-debtors was sold on the 3rd October 1904, and the purchase money paid into Court on the 18th October 1904. The sale was confirmed on the 6th December 1904.

I ought to have mentioned that Krishnam Ramasamy was not the only decree-holder in Original Suit No. 21 of 1895 but had a fourth share in the decree, and, therefore, a fourth share in the sale-proceeds of the property sold under it, which amounted in all to Rs. 5,140. Besides the petitioner several other persons had decrees for money against Krishnam Ramasamy; and the petitioner by his petition under section 622, Civil Procedure Code, seeks to set aside the order of the District Judge of Nellore refusing to allow him to participate in a rateable distribution under section 295, Civil Procedure Code, of the fourth share of Krishnam Ramasamy, the common judgment-debtor in the sum of Rs. 5,140 standing to his credit in the Nellore District Court. The reason why the petitioner has not been allowed to come in and take his share is that he made his application for attachment of the amount on the 25th October 1904, while it had been "realized," as held by the District Judge, within the meaning of section 295, Civil Procedure Code, on the 18th October 1904. Only those decree-holders were admitted to a rateable distribution who had applied for execution before the latter date.

But, the facts I have stated show that, the decree of Krisham Ramasamy in Original Suit No. 21 of 1895 was already under attachment at the instance of both the present petitioner and the counter-petitioner Annamala Chetty Pichayya made in

VEERAYYA v. ANNAMALA CHETTY.

anticipation of judgment, and, that at any rate under the prohibitory order obtained by the petitioner, the attachment was to continue until the further order of the Munsif's Court of Kavali. In the absence therefore of anything appearing to the contrary, I must take it in the first place that the fourth share of Krishnam Ramasamy in the Rs. 5,140, came into Court under the stress of these attachments or of one of them by virtue of section 490, Civil Procedure Code read with section 273, Civil Procedure Code. This is clearly indicated in Execution Petition No. 183 of 1904 of the counter-petitioner Annamala Chetty Pichayya. Section 490, Civil Procedure Code, lays down that, when there has been an attachment before judgment, the plaintiff in the suit if he gets a decree need not again attach the same property in execution. The language of the section is clear, and explicit; and the case of *Srinivasa Ayyangar* v. *Seetharama Ayyar*(1) which the executing Court relies on does not lay down anything different. The attachment before judgment made at the instance of the petitioner therefore subsisted at the time of the sale, and the fact that he made a further application for payment on the 25th October 1904, should not affect the question.

The amount in question having been realised in execution of the decree against the judgment-debtor Krishnam Ramasamy as contemplated by section 295, Civil Procedure Code, the fact that it represented the sale-proceeds of the property of Krishnam Ramasamy's judgment-debtors sold under the decree makes no difference in this respect. To hold otherwise would be to exclude from the application of the very equitable provisions of section 295, Civil Procedure Code, a large class of cases for no apparent valid reason.

It is also urged in support of the executing Court's order that the attachment of Krishnam Ramasamy's decree before judgment was a nullity, because only property within the jurisdiction of the Munsif's Court of Kavali could be so attached. Supposing that to be a correct statement of the law, which I do not think it is, it has not been shown that the property attached in this case was not in fact within the territorial jurisdiction of the Munsif's Court of Kavali. But it seems to me as held by Sale, J., in *Ram Pertab Jhowar* v. *Madho Rai*(2) that, under section 648, Civil

(1) I.L.R., 19 Mad., 72. (2) 7 C.W.N., 216.

VEERAYYA v. ANNAMALA CHETTY.

Procedure Code, even property outside the jurisdiction of the Court in which a suit is pending, can be attached by that Court in anticipation of its judgment.

The petitioner is thus entitled to a rateable share in the sum of Rs. 1,207-8-0, the amount available in Original Suit No. 21 of 1895, along with those other decree-holders of Krishnam Ramasamy whose claims to rateable distribution have been admitted by the District Judge of Nellore, and I direct accordingly. The order of the District Judge, dated 23rd December 1904, refusing the petitioner's application for a rateable distribution will therefore be set aside. The petitioner is entitled to the costs of this petition.

APPELLATE CIVIL.

Before Mr. Justice Sankaran Nair and Mr. Justice Abdur Rahim.

MUNIAPPAN CHETTI (SIXTH DEFENDANT), APPELLANT,

v.

BALAYAN CHETTI (PLAINTIFF), RESPONDENT.*

1908. August 3, 4.

Civil Procedure Code, Act XIV of 1882, s. 108—Section applies to a defendant who has filed written statement.

A defendant who had filed a written statement, but had not appeared at the hearing is entitled to apply under section 108 of the Code of Civil Procedure to set aside the decree passed against him.

THE facts are sufficiently set out in the judgment.

T. R. Venkatrama Sastri for The Hon. the Advocate-General for appellant.

K. Narayana Rao for respondent.

JUDGMENT.—The appellant, the sixth defendant, filed a written statement, but failed to appear at any adjourned hearing, and a decree was passed against him in his absence. He has now applied under section 108, Civil Procedure Code, to set aside the decree passed, *ex parte*, against him. Following the decisions in *Ramanuja Reddiar* v. *Rangaswami Aiyangar*(1), *Jonardan Dobey* v.

* Appeal No. 8 of 1908, presented under section 15 of the Letters Patent against the judgment of Mr. Justice Munro, dated 10th January 1908, in Civil Revision Petition No. 292 of 1907.

(1) 18 M.L.J., 51.

MUNIAPPAN CHETTI v. BALAYAN CHETTI.

Ramdhone Singh(1), *Hildreth* v. *Sayaji Piraji Contractor*(2), and *Shankar Dat Dube* v. *Radha Krishna*(3), which were apparently not cited before the learned Judge, we hold that the appellant is entitled to make this application. The lower Courts have not decided whether the appellant was prevented by sufficient cause from appearing when the suit was heard. It is also alleged that the application is barred by limitation. We therefore set aside the orders passed by the learned Judge and the Courts below and direct the District Munsif to restore the application to his file and dispose of it in accordance with law. Costs will abide the result.

APPELLATE CRIMINAL.

Before Mr Justice Sankaran-Nair and Mr Justice Abdur Rahim.

1908. August 3, 11.

CHINNA RAMANA GOWD

v.

EMPEROR.*

Penal Code, Act XLV of 1860, s, 211—False charge must be to one having authority to set criminal law in motion—Criminal Procedure Code, s. 162—Statement made under cannot be the basis of prosecution for false charge.

A statement made under section 162 of the Code of Criminal Procedure in answer to questions put by a police officer making an investigation under section 161 of the Code of Criminal Procedure cannot be made the basis of a prosecution under section 211 of Indian Penal Code.

Information of an alleged dacoity was given to a Village Munsif who sent a report to the police. The police thereupon investigated the case and rejected it as false.

The informant was prosecuted under section 211 of the Indian Penal Code:

Held, that there was no institution of criminal proceedings by the informant, as the Village Munsif had no power to investigate in cases of dacoity.

The informant had made no 'false charge' within the meaning of section 211 as it was not made to one having power to investigate and send up for trial. The subsequent investigation was not the result of the information given but of the report sent by the Village Munsif.

Karim Buksh v. *Queen-Empress*, (I.L.R., 17 Calc., 574), followed.

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(1) I.L.R., 23 Calc., 738. (2) I.L.R., 20 Bom., 380.
(3) I.L.R., 203 All., 195.

* Criminal Appeal No. 231 of 1908, presented against the sentence of A. T. Forbes, Esq., Sessions Judge of Bellary Division, in Case No. 26 of the Calendar for 1907.

RAMANA GOWD v. EMPEROR.

THE facts for the purpose of this report are sufficiently set out in the judgment.

Mr. *T. Srinivas* and *A. Sangappa* for appellant.

The Ag. Public Prosecutor for respondent.

JUDGMENT.—The appellant complained to the Village Reddi that, as he was returning to his house, he was robbed by certain persons, whose names were mentioned by him. The Village Reddi embodied this information in his reports to the Sub-Magistrate (exhibit B-1), and to the Inspector (exhibit B), who went to the appellant's village, and took a statement from him (exhibit C), in the handwriting of the karnam, which was read over to the appellant and signed by him. His complaint was on enquiry by the Inspector found to be false, and he was, originally, charged under the second part of section 211, Indian Penal Code, with having instituted criminal proceedings by falsely charging the persons named by him with dacoity before the Police Inspector (exhibit C).

The Sessions Judge, who first tried the case, held that (exhibit C) was a statement taken under section 162, Criminal Procedure Code, and that the appellant could not be prosecuted for an offence under section 211, Indian Penal Code, for answering qustions put to him by a police officer making an investigation under section 161 of the Criminal Procedure Code and accordingly acquitted the appellant. In his judgment, referring to a suggestion made before him by the Public Prosecutor that the complaint to the Village Magistrate might amount to an offence under section 211, Indian Penal Code, he held, following the case *In the matter of the petition of Jamoona*(1) that the false charge must be made to a Court or to an officer who has powers to investigate and send up for trial.

On appeal against this acquittal the learned Judges of this Court who heard the appeal held that "the case is on all fours with the case in *Emperor* v. *Jonnalagadda Venkatrayudu*(2), which should have been followed by the acting Sessions Judge."

The acquittal was set aside, and the Sessions Judge has now convicted the appellant of an offence under the second part of section 211, Indian Penal Code, and the appellant has appealed from that conviction. We are satisfied that exhibit (C) cannot

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(1) I.L.R., 6 Calc., 621. (2) I.L.R., 28 Mad. 567.

be treated as a complaint or charge. It is a statement made under section 162, Criminal Procedure Code. The statements in (C) are answers to questions asked by the Police Inspector, often as if in cross-examination. We agree with the acting Sessions Judge that exhibit (C) cannot be made the basis of a prosecution for an offence under section 211, Indian Penal Code.

The next question is whether the statement to the Village Magistrate can be treated as a false charge or as an institution of criminal proceedings.

In the judgment setting aside the acquittal, it is stated that the case is on all fours with the case of *Emperor* v. *Jonnalagadda Venkatrayudu*(1).

This is clearly an error. In that case the question for consideration was whether the oral information given was "information" under section 182, Indian Penal Code.

That case had no reference, whatever, to section 211, Indian Penal Code, and we have therefore allowed the appellant's pleader to argue whether the information given to the Village Magistrate was a 'charge' or the institution of any criminal proceeding under section 211, Indian Penal Code. In *Karim Buksh* v. *Queen-Empress*(2) it was decided by the Full Bench of the Calcutta High Court that a false charge to the police of a cognizable offence is the institution of criminal proceedings under section 211, Indian Penal Code, on the ground that from the time a person makes the charge the control of the investigation or enquiry passes out of his hands into the hands of the constituted authorities: and that for the same reason a charge to the police of a non-cognizable offence can hardly be called to the investigation of criminal proceedings. See also *Queen-Empress* v. *Nanjunda Rao*(3) and the *Queen-Empress* v. *Subbanna Goundan*(4).

The Village Reddi, like the police officer to whom information of a non-cognisable offence is given, has no power to make any investigation in a case of dacoity, and for the reason given in *Karim Buksh* v. *Queen-Empress*(2), therefore, the appellant cannot be held to have instituted any criminal proceedings.

Has he then made any false charge? The only direct authority on the point brought to our notice is the case, *In the matter*

(1) I.L.R., 28 Mad., 567.
(2) I.L.R., 17 Calc., 574.
(3) I.L.R., 20 Mad., 79.
(4) 1 M.H.C., 30.

of the petition of Jamoona(1). In that case a woman charged a non-commissioned officer with the offence of rape before the Station Staff Officer who had neither magisterial nor police powers.

The High Court therefore held that section 211, Indian Penal Code, will not apply on the ground "that the false charge must be made to a Court or to an officer who had powers to investigate and send up for trial."

It appears to us that this decision is right. Though the section does not state that the charge must be made before any officer entitled to investigate, that appears to be the reasonable conclusion. It is obvious that accusing a person of the commission of an offence, or giving information against him to a person, other than an official, cannot be treated as a 'charge' under that section.

An accusation before an official who has nothing to do with the administration of justice seems to stand on the same footing. In our opinion, the test is, was the appellant setting the criminal law in motion against the persons against whom he gave the information? Under the Code he may set the criminal law in motion by preferring a charge to the police, of a cognisable offence (section 154), or by preferring a complaint to the Magistrate (section 191).

It was not the appellant, but the report of the Village Magistrate which set the criminal law in motion, and we are therefore of opinion that the appellant cannot be said to have made a false charge under section 211, Indian Penal Code.

On this ground we set aside the conviction, allow the appeal, acquit the accused and direct him to be set at liberty.

(1) I.L.R., 6 Calc., 620 at p. 621.

APPELLATE CRIMINAL.

Before Mr. Justice Sankaran-Nair and Mr. Justice Abdur Rahim.

1908.
August 3, 11.

JOGIAH AND ANOTHER, PETITIONERS,

v.

EMPEROR, RESPONDENT.*

Charter Act, s. 15, and Letters Patent, cls. 28, 29—Power of High Court to order stay of proceedings initiated under s. 476 of the Code of Criminal Procedure.

The High Court has power, under section 15 of the High Courts Act, and under clauses 28, 29 of the Letters Patent, to stay proceedings, when action, under section 476 of the Code of Criminal Procedure, is taken by a Court subject to its powers of superintendence.

Where a Court, in a Civil suit, finds a document to be a forgery and, while an appeal against its decision is pending, takes proceedings in the Criminal Courts under section 476 of the Code of Criminal Procedure, the High Court will direct further proceedings in the Criminal Court to be stayed, if, on a consideration of the circumstances, it is satisfied that such proceedings are oppressive and will prevent the party from conducting his appeal.

In the matter of the Petition of Ram Prasad Hazra, (B.L.R., F.B., 426), distinguished.

THE facts of this case are sufficiently stated in the judgment.

T. R. Venkatarama Sastriar for petitioners.

The Ag. Public Prosecutor, *contra.*

ORDER.—In a Civil suit, a document, filed by the petitioners, was found a forgery, and proceedings have been taken against them under section 476 of the Criminal Procedure Code. The petitioners have filed an appeal against the decree passed against them in the Civil suit in which the main question for determination is whether the document is genuine, and they apply to this Court under section 15 of the Charter Act to stay further proceedings in the Criminal Courts against them pending the disposal of the appeal.

On a consideration of the circumstances of the case, it appears to us that it would be oppressive to the petitioners to allow the criminal proceedings to be prosecuted, as they must thereby be prevented from carrying on the appeal; and, as the prosecution

* Criminal Revision Case No. 190 of 1908, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the proceedings of M.R.Ry. S. Krishnamoorthy Iyer, Sub-Magistrate of Ooty, dated 2nd April 1908, in P.E. No. 1 of 1908.

was one instituted by a Court, it is probable in the event of the document being found genuine by the Appellate Court, the proceedings against the petitioners might be dropped. There was no suggestion that the petitioners will abscond or not be forthcoming, if the finding of the Court as to the genuineness is confirmed. We are therefore of opinion that further proceedings should be stayed.

It was then argued by the Public Prosecutor that this Court has no power to stay proceedings, and reliance was placed on the case of *In the matter of the Petition of Ram Prasad Hazra*(1).

It is pointed out in *Jadu Lal Sahu* v. *Lowis*(2), that the Full Bench only decided that, under the Code of Procedure then in force, the High Court sitting as a Court of Civil Appeal had no power to direct that criminal proceedings ordered by a Civil Court should be stayed. The High Court did not consider the effect of section 15 of the Charter Act and sections 28 and 29 of the Letters Patent.

The power of general superintendence given by section 15 is not limited by any other provision of law, and it appears to us to include the power to point out to the subordinate Courts the inexpediency of trying a case when it is likely to interfere with the due course of justice. The power of superintendence (section 15), and transfer (section 29) implies the power to send for the records in any case in the lower Courts, which must necessarily stay further proceedings in that case.

It appears to us therefore that this Court has the power to stay proceedings. The fact that we may not have the power to set aside the order under section 476, Criminal Procedure Code, is in itself no reason for holding the other way.

The proceedings are stayed, not on the ground that the High Court may ultimately quash the proceedings, but on account of the injustice that may be done to the petitioners in preventing them from prosecuting the appeal.

We therefore order the stay of proceedings as prayed for.

(1) B.L.R., F.B., 426. (2) I.L.R., 34 Calc., 848 at p. 851.

APPELLATE CRIMINAL.

Before Mr. Justice Benson and Mr. Justice Miller.

1907. September 2, 13.

RAGHAVALU NAIDU (COMPLAINANT), PETITIONER,

v.

SUNDRAMURTHI MUDALI AND ANOTHER (ACCUSED), RESPONDENTS.*

Merchandise Marks Act, Act IV of 1889—Books are goods within the meaning of the Act—Indian Penal Code, s. 482—Ingredients of offence under.

Books are 'goods' within the meaning of the Merchandise Marks Act of 1889. *Kanai Das Bairagi* v. *Radha Shyam Basack*, (I.L.R., 26 Calc., 232), followed.

Where a spurious publication by *K* of a book by *A* is identical with the genuine publication of *A*, the description in the title page of the former that it is the book of *A*, is not, if it is a trade description, untrue in a *material respect* as regards the goods to which it is applied.

To constitute an offence under section 482 of the Indian Penal Code, it must be shown that the goods were marked in a manner, reasonably calculated to cause it to be believed that they were the manufacture or merchandise of, or that they belonged to a person whose manufacture or merchandise they were not or to whom they did not belong. If this is shown it will be on the accused to show that it was not done to defraud any one.

THE facts are stated in the order of the Magistrate, the material portions of which are as follows :—

"The complainant has a proprietary right in the copyright of a publication entitled 'A Manual of Telugu Grammar.' This grammar is known in the market as 'Abboyee Naidu's Grammar.' The gist of the complaint is that first accused unauthorisedly printed the grammar, and that second accused sold them. The complainant states that the contents of the spurious and genuine publication are exactly the same, the only difference being that, on the outer cover, a few words are introduced, a part of the preface omitted, and, on the reverse side, the list of books published by the same author is also omitted. These are of such a trifling

* Criminal Revision Case No. 255 of 1907, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the order of J. R. Coombes, Esq., Presidency Magistrate, Georgetown, in Calendar Case No. 817 of 1907.

nature that the two books are practically identical, the large type which is intended to attract notice being 'Telugu Grammar' by 'Abboyee Naidu.' Counsel urges that the changes in the title page, preface, etc., were made for a particular reason, say to prevent complainant from instituting a civil suit; and that the case quoted in XXVI Bom., p. 289, is not on all fours and does not apply. In this particular case, no one was defrauded. On those facts counsel charges accused under sections 478, 489, Indian Penal Code, and section 7, Act IV of 1889.

Assuming the facts stated to be true, is an offence disclosed? In this particular case, the idea that the book conveys to the purchaser is that the Telugu Manual is Abboyee Naidu's Grammar. It does not purport to be what it is not. It does not profess to say that it was printed by complainant in the "K.R." Press, for it distinctly states that it was printed at Bargavi Press. The "Manufacture," *i.e.*, the actual printing of the work is distinctly stated to be that of the Bargavi Press. What it does state is that it is the identical grammar written by Abboyee Naidu. From an examination of the genuine and spurious publication I find that the two copies are identical, and that, therefore, so far as the substance of the publication is concerned the accused did not attempt to pass off a spurious article as a genuine one. The book is Abboyee Naidu's, *verbatim, etc.*, I hold that the purchaser got what he wanted, viz., Abboyee Naidu's Grammar, and therefore *he*, at all events, was not defrauded. Nor could that class of purchaser who wanted the particular publication or edition have been deceived for the origin of manufacture is printed and he was in a position to choose or reject any copy."

Mr. *E. R. Osborne* for petitioner.

N. Rajagopalachari for respondent.

JUDGMENT.—The complainant's case in effect is that the accused has, with intent to defraud, published a book, of which the copyright is vested in him (the complainant), and we may say at the outset that we have not been shown any reason why we should refuse our assent to the ruling in *Kanai Das Bairagi* v. *Radha Shyam Basack*(1) that books are goods within the meaning of the Merchandise Marks Act IV of 1889.

(1) I.L.R., 26 Calc., 232.

RAGHAVALU NAIDU v. SUNDRA MURTHI MUDALI.

The complaint contains allegations of offences punishable under section 482 of the Indian Penal Code, sections 12 and 16 of Act XXV of 1867, and sections 6 and 7 of Act IV of 1889. The Presidency Magistrate has dismissed it under section 203 of the Criminal Procedure Code, finding, after examining the complainant, that it discloses no offence.

He has not dealt with the allegations in regard to the Act of 1867, but we have no reason to believe that the complainant withdrew them or professed his inability to prove them, and we think that enquiry should be made into them.

With regard to the charges under the Merchandise Marks Act, sections 6 and 7, the Magistrate following *Radha Krishna* v. *Kissondal*(1) has held that the description on the cover of the book complained of is not a false trade description. If that part of the title which describes the book as "a Manual of Telugu Grammar by P. Abboyi Naidu" is a trade description it is not untrue in a material respect as regards the goods to which it is applied. It accurately describes the book to which it is applied.

Before us it was contended that the phrase "all rights reserved" is a trade description within the meaning of section 2 (2) (*e*) of Act IV of 1889. As applied to the book in question that phrase may be untrue but it is not perhaps very easy to see how it is untrue in a material respect. It may be however that the complainant can prove that it is so, and we must leave the question to the decision of the Magistrate.

With regard to the charge under section 482 of the Indian Penal Code the question will be whether the accused has marked the book in a manner reasonably calculated to cause it to be believed that it is the manufacture or merchandise of, or that it belongs to, a person whose manufacture or merchandise it is not, or to whom it does not belong.

It is contended that the name P. Abboyi Naidu is a property mark, used to denote that the books bearing that name on the cover are the property of the complainant, and are recognised as such in the Madras book market; in other words a buyer of books, say a schoolmaster, buying "a Manual of Telugu Grammar for the use of junior classes by P. Abboyi Naidu" asks for and believes that he is getting not merely a work of which P. Abboyi

(1) I.L.R., 26 Bom., 289.

RAGHAVALU NAIDU v. SUNDRA-MURTHI MUDALI.

Naidu is the author, but a book of which the complainant is the proprietor.

If this is made out, and if it be further shown that the accused has applied the name "P. Abboyi Naidu" to books published by himself, in a manner reasonably calculated to evidence the belief that those books belong to the complainant, it will then lie on the accused to show that what he has done was done without intent to defraud the complainant or any one else.

The question is a question of fact. To us it may appear that there are in the way of the complainant difficulties so great as to be almost insuperable: to others more conversant than we are with the book trade of the Madras Presidency the matter may bear a different complexion. The complainant will have to satisfy the Magistrate by sufficient evidence; and it is not for us, no evidence having as yet been recorded, to say that he cannot do so.

The Magistrate is accordingly directed to make further inquiry into all the charges made by the complainant against the accused.

APPELLATE CRIMINAL.

Before Mr. Justice Sankaran-Nair.

JOGHI KANNIGAN

v.

EMPEROR.*

1908. September 11.

Criminal Procedure Code, Act V of 1898, ss. 123, 397—Sentence of imprisonment on person already in prison under s. 123.

A person committed to prison under section 123 of the Code of Criminal procedure is not undergoing a 'sentence' of imprisonment.

Where such a person is convicted of an offence and sentenced to a term of imprisonment, such term cannot, under section 397 of the Code of Criminal Procedure, be made to commence on the expiry of the period for which he has

* Case Referred No. 62 of 1908 (Criminal Revision Case No. 274 of 1908) for the orders of High Court, under section 438 of the Code of Criminal Procedure by the Acting District Magistrate of Chingleput in his letter, dated 1st June 1908.

KANNIGAN v. EMPEROR.

been committed to prison under section 123, but must commence from the date of the order.

Emperor v. *Muthukumara*, (I.L.R., 27 Mad., 525), followed.

King-Emperor v. *Tulakhan*, (I.L.R., 30 All., 334), dissented from.

THE facts are stated in the reference which was as follows:—

One Joghi Kannigan was convicted of an offence under sections 394 and 75, Indian Penal Code, and sentenced, on 18th November 1904, by the Joint Magistrate, Chingleput, in Calendar Case No. 148 of 1904, to undergo rigorous imprisonment for two years (of which three months should be in solitary confinement) and to receive 30 lashes, and was further ordered under section 565, Criminal Procedure Code, to notify his residence to the police for three years after his release. The prisoner was released from the jail on 20th September 1906 but failed to notify his residence to the police. He was arrested and prosecuted under section 176, Indian Penal Code, before the Stationary Sub-Magistrate, Chingleput, who convicted and sentenced him to six months' simple imprisonment on the 27th February 1908. Meanwhile the accused was put up before the Joint Magistrate, Chingleput, under security sections 109 and 110, Criminal Procedure Code, and ordered to furnish security for good behaviour for one year. On his failure to do so, the accused was committed (a copy of the Joint Magistrate's warrant is submitted) to jail, on the 27th January 1908, under section 123, Criminal Procedure Code, for one year or until the security would be sooner furnished by him. The Sub-Magistrate while passing sentence upon him under section 176, Indian Penal Code, as shown above, has inadvertently directed that the sentence should commence after the expiry of the imprisonment which the accused is undergoing under the security sections. He has overlooked the High Court's decisions in Criminal Revision Cases Nos. 393 and 466 of 1903. The prisoner appealed to the Head Assistant Magistrate, Chingleput, who confirmed the conviction, but reduced the sentence to one month's simple imprisonment, as the offence came under the purview of the first part of section 176, Indian Penal Code. As the Stationary Sub-Magistrate's order in respect of the currency of the sentence is illegal with reference to the High Court's decisions quoted above, I request that the High Court may be pleased to modify it to take effect from the day on which it was passed.

The Acting Public Prosecutor in support of the reference.

KANNIGAN v. EMPEROR.

ORDER.—I follow the decision in *Emperor* v. *Muthukumara*(1) which was followed by Subramania Ayyar and Boddam, JJ., in *Venkatigadu* v. *Emperor*(2).

The decision of the Allahabad Full Bench in *King-Emperor* v. *Tulakhan*(3) is opposed to the Madras decisions.

To me it appears to be quite clear that a person committed to prison under section 123, Criminal Procedure Code, is not undergoing a 'sentence' of imprisonment. It is not for the commission of any offence that he is committed to prison under section 123, and section 397 of the Criminal Procedure Code therefore does not apply.

The sentence of imprisonment for the offence under section 176, Indian Penal Code, should have been ordered, therefore, to commence from the date of the order, and it is modified accordingly.

APPELLATE CIVIL.

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

SIVASANKARA PILLAI (THIRD PLAINTIFF), APPELLANT,

v.

SOOBRAMANIA PILLAI AND OTHERS (DEFENDANTS NOS. 1 TO 4), RESPONDENTS.*

1908. August 17, 18, 19, 21.

Will, construction of—Indian Succession Act, ss. 101, 102—*Hindu Wills Act, s.* 3, *para.* 4.

A power to distribute property conferred by a testator under his will, which is exercisable "when my grandsons may attain their age" is void under sections 101 and 102 of the Indian *Succession Act*, as extending the period beyond the limit allowed by section 101, whether the point of time referred to is taken to be the attaining of age by the grandsons in existence at the date of the testator's death, or such attaining of age by all his grandsons. If the intention of the testator to

(1) I.L.R., 27 Mad., 525.

(2) 2 Weir, p. 452; Crl. R.C. No. 466 of 1903 (unreported.)

(3) I.L.R., 30 All., 334.

* Original Side Appeal Nos. 78 and 79 of 1906, presented against the judgment and decree of Mr. Justice Boddam, dated 1st November 1906, in Civil Suit No. 238 of 1905.

SIVA-SANKARA PILLAI v. SOOBRA-MANIA PILLAI.

benefit *all* his grandsons is clear from the will, the latter view ought to be adopted; and a secondary intention to benefit such grandsons at least as should be in existence at his death ought not to be assumed.

The rule applicable to such cases in India is that, "if the exercise of a power is made contingent on the happening of an event, which, may, by possibility happen beyond the limits of the rule, the mere fact that the contingency has happened earlier and has rendered the exercise of the power practicable within the prescribed limit does not validate the power."

Section 3, paragraph 4 of the Hindu Wills Act, has not the effect of making section 101 of the Succession Act inapplicable to Hindu Wills when section 2 makes it applicable in terms. Section 3 may have the effect of invalidating a disposition which may be valid under section 101, but it cannot have the effect of validating a disposition invalid under section 101.

ADMINISTRATION Suit. One P. Venkatachalam died in 1887, leaving considerable property, and having made his last will and testament which contained *inter alia* the following provisions:—

"Should my son Subramaniem, who is the (chief person or) executor to this will and testament, be willing to divide and give the aforesaid landed properties, ready money and all the other properties, when my grandsons may attain their age, he shall divide the same into five shares as I have had five sons, and give away the same to their respective sons, that is to say, my grandsons. He shall give away the share of such son of mine as may not beget a grandson (to me) to himself. Should he not be willing to effect a division he may deliver up the properties to such of these persons, namely, his brothers, or his sons, or his brother's sons, as may be competent to cause matters to be conducted properly as my eldest son Subramaniem who is the (chief person or) executor to this will and testament has been conducting them. Should the (chief person or) executor Subramaniem be not willing to do so, he may, as he thinks proper, arrange that at least the Administrator-General should conduct matters for a fixed time in the same manner in which he himself shall have conducted matters and, that (the properties) should thereafter, be divided and given to the aforesaid grandsons or that the same should be delivered up to them intact without division."

The testator appointed his eldest son the first defendant, executor to his estate.

The testator had five sons, one of whom died in his lifetime, leaving a widow, the fourth plaintiff, and an only son the fifth plaintiff.

SIVA-SANKARA PILLAI v. SOOBRA-MANIA PILLAI.

Another son, the father of sixth and seventh plaintiffs, died after the testator's death.

The three remaining sons were the first and second plaintiffs and the first defendant.

The first defendant obtained probate of the will, took possession of the properties belonging to the deceased, and continued in enjoyment of the same.

In the present suit the plaintiffs sought for an account of the estate of the deceased and to be put in possession of their shares in the estate.

The case was tried on the Original Side of the High Court by Mr. Justice Boddam who delivered the following judgment:—

"I find that all the grandsons are not of age, and there is no gift directly vesting the property in any of the petitioners, but only alternative options given by the will to the first defendant to divide the property when all the grandsons have attained their ages, or to make other arrangements which will not necessarily vest the property in any one until after the options have been exercised and which may never be done and may never come into force. Moreover the petitioners are members of an undivided family and have no right to sue for administration. The suit is dismissed with costs."

The plaintiffs appealed against this judgment to the High Court.

K. Srinivasa Ayyangar, *T. R. Venkatarama Sastri* and *C. P. Ramaswami Ayyar* for appellant.

Sir *V. Bhashyam Ayyangar*, *V. Masilamani Pillai* and *R. V. Seshagiri Rau* for first respondent.

Mr. *D. M. C. Downing* for second to fourth respondents.

JUDGMENT.—The argument in this appeal turned on the construction of paragraph 11 of the will of Venketachellam which purports to deal with the residuary estate of the testator. The paragraph runs as follows:

"Should my son Subramaniem, who is the (chief person or) executor to this will and testament, be willing to divide and give the aforesaid landed properties, ready money and all the other properties, when my grandsons may attain their age, he shall divide the same into five shares as I have had five sons, and give away the same to their respective sons, that is to say, my grandsons. He shall give away the share of such son of mine as may

SIVA-SANKARA PILLAI v. SOOBRA-MANIA PILLAI.

not beget a grandson (to me) to himself. Should he not be willing to effect a division he may deliver up the properties to such of these persons, namely, his brothers, or, his sons, or his brother's sons, as may be competent to cause matters to be conducted properly as my eldest son Subramaniem who is the (chief person or) executor to this will and testament has been conducting them. Should the (chief person or) executor Subramaniem be not willing to do so, he may, as he thinks proper, arrange that at least the Administrator-General should conduct matters for a fixed time in the same manner in which he himself shall have conducted matters and that (the properties) should thereafter be divided and given to the aforesaid grandsons or that the same should be delivered up to them intact without division."

Stated generally, the question for determination is, do the provisions contained in this paragraph constitute a valid bequest in favour of the parties therein mentioned, or are they ineffective as a testamentary disposition, with the result that, there is an intestacy as regards the residuary estate, either, altogether, or until what has been termed the power of appointment given to the first defendant the executor under the will is exercised ?

It is first to be observed that the paragraph contains no words of gift or bequest. It gives to the first defendant what has been termed a power of appointment. It next provides that, if he is not willing to exercise this power, he may hand over the family property to any competent members of the family for purposes of management. It is not suggested that this provision has the effect of vesting the property in any one. It next provides that, if the first defendant is not willing to hand over the property to members of the family, he may arrange for the management of the property by the Administrator-General for such period as he thinks fit, and may thereafter distribute it among the grandsons.

The paragraph is not easy to construe, but we read it as giving one so-called power of appointment, and not two, as contended for by Sir Bhashyam Ayyangar who appeared for the executor (the first defendant). The subject matter of the power and the persons to be benefited by the power are, in our opinion, the same.

We think the intention of the testator, so far as it can be gathered from the language which he used, was to empower the first defendant to divide his property into five shares, as he had five sons, and to deliver the shares to the grandsons in the case of sons

SIVA-SANKARA PILLAI v. SOOBRA-MANIA PILLAI.

with male issue, and in the case of sons without male issue to the sons themselves "when my grandsons may attain their age," and in the event of the first defendant handing over the properties for management to the Administrator-General to deliver the shares to the grandsons after the management by the Administrator-General had ceased. Sir Bhashyam Ayyangar contended that the words "when my grandsons may attain their age" should be construed as referring to the point of time when all the grandsons who were in existence were of age. We do not think the words should be so construed. Even accepting Sir Bhashyam Ayyangar's contention we think the effect of the disposition is that the bequest, if any, created by the exercise of the so-called power of appointment may be delayed beyond the period specified in section 101 of the Indian Succession Act which when read with section 102 makes the whole disposition invalid. We do not think the principle of the decision in *Slark* v. *Dakyns*(1) is applicable to this case. The rule which, in our opinion, applies is thus stated in the Law of Perpetuities in British India, p. 189. "This rule" (*i.e.*, the rule in *Slark* v. *Dakyns*(1)) "must be distinguished from the rule that, if the exercise of a power is made contingent upon an event which may, by possibility happen beyond the limits of the rule, the mere fact that the contingency has happened earlier and has rendered the exercise of the power practicable within the prescribed period does not validate the power."

We cannot accede to Sir Bhashyam Ayyangar's contention that by virtue of paragraph 4 of section 3 of the Hindu Wills Act, section 101 of the Indian Succession Act, does not apply to Hindu Wills. Section 2 of the Hindu Wills Act makes it applicable in terms, and the provision in section 3, although it might have the effect of invalidating a disposition which is valid under section 101 of the Indian Succession Act cannot, in our opinion, have the effect of validating a disposition which is invalid under that section. See also *Anandrao Vinayak* v. *Administrator-General of Bombay*(2). So far we have accepted the construction suggested by Sir Bhashyam Ayyangar. Adopting what appears to us to be the right construction, viz., that the distribution is to take place only after all the sons who may be born to the sons of the testator have attained their majority, it is clear that the disposition is invalid

(1) (1874) L.R., 10 Ch. Ap., 35 (2) I.L.R., 20 Bom., 450.

SIVA-SANKARA PILLAI v. SOORRAMANIA PILLAI.

under sections 101 and 102 of the Indian Succession Act. In this case we cannot, as has been done in some cases, adopt, so as to give effect to a supposed secondary intention on the part of the testator, a construction which would benefit only three of the grandsons, as that would, in our opinion, be absolutely inconsistent with the intentions of the testator as expressed in the will.

In the result we hold that the dispositions contained in paragraph 11 cannot in law be given effect to, and that with regard to the residuary estate there is an intestacy. The property therefore devolves upon the heirs-at-law.

We must set aside the decree of the learned Judge dismissing the suit and his orders as to costs. We give the parties a decree for the administration of the estate and send back the case to be dealt with by the Original Court in accordance with law on the footing of an intestacy as regards the estate referred to in paragraph 11 of the will. The separate taxed costs of all the parties to these appeals may be paid out of the estate. The costs on the Original Side up to date will be dealt with in the final decree to be passed by the learned Judge on the Original Side. The receiver will continue in possession.

APPELLATE CIVIL.

Before Mr. Justice Sankaran-Nair and Mr. Justice Abdur Rahim.

1908. August 7, 26.

R. M. M. R. M. MUTHYA CHETTIAR (PLAINTIFF), APPELLANT,

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL REPRESENTED BY THE COLLECTOR OF TINNEVELLY (DEFENDANT), RESPONDENT.*

Salt Act (Madras), Act IV of 1889, ss 84, 87—Immunity from action—Period of limitation provided in the section does not apply when the suit is based on contract.

Section 87 of the Madras Salt Act does not apply to a case where the act complained of was neither done nor purported to be done under any section of the Act.

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* Second Appeal No. 579 of 1905, presented against the decree of W. W. Phillips, Esq., District Judge of Tinnevelly, in Appeal Suit No. 138 of 1904, presented against the decree of M.R.Ry. G. Anantha Narayana Aiyangar, District Munsif of Tuticorin, in Original Suit No. 381 of 1902.

MUTHYA CHETTIAR v. THE SECRETARY OF STATE FOR INDIA.

The plaintiff brought the suit for recovery of an amount ordered to be deducted by the Commissioner of Salt in virtue of the provisions of a contract entered into between the parties in respect of certain transport of salt:

Held, that neither section 84 nor section 87 of the Madras Salt Act applied to the case.

PLAINTIFF was a contractor who undertook to transport Government salt from Tuticorin, and the suit was brought against the Secretary of State to recover Rs. 2,168 alleged by the plaintiff to be due under the contracts entered into between him and the defendant. The defendant in his written statement contended that, under the terms of the contract, the plaintiff was not entitled to recover the amount.

Subsequently, an additional statement was put in to the effect that the suit was not maintainable, and that it was barred by limitation under the provisions of section 87 of the Salt Act.

The Munsif upheld the objection under section 87 of the Salt Act and dismissed the suit.

His judgment was upheld on appeal by the District Judge.

The plaintiff appealed to the High Court.

S. Srinivasa Ayyangar for *V. Krishnaswami Ayyar* and *T. V. Muthukrishna Ayyar* for appellant.

The Acting Government Pleader for respondent.

JUDGMENT.—The plaintiff, who is the appellant before us, undertook to transport Government salt from Tuticorin, and he sues the Secretary of State for the sum of Rs. 2,168-0-8 which he says is due to him under the contract. The contract (exhibit I) was entered into by the defendant through the Commissioner of Salt and, with reference to that contract, certain amounts were ordered by the Commissioner to be deducted from the deposit made by the appellant. According to the defendant the terms of the contract entitled the Commissioner to make that deduction. This suit relates to that amount deducted, and also other sums spent by the plaintiff in carrying out the contract which itself provided that the Commissioner's decision should be accepted as final without recourse to any legal tribunal whatsoever as to the "Construction" of the contract or to any other question proceeding therefrom, in the event of any difference of opinion between the parties.

The lower Courts have held that section 87 of the Madras Salt Act is a statutory bar to the suit. The Judge was of opinion

that sections 43 and 85 of the Salt Act make certain provisions for the transport of salt, and that the contract between the parties for the transport of salt was therefore made under the provisions of that Act, and as the Commissioner's order in pursuance of the terms of such contract declining to admit the plaintiff's claims, and ordering certain deductions from the deposit money was, therefore, made *bonâ fide* under the Act, no suit would lie, and, if the suit were maintainable, he further held that it was barred under the latter part of section 87.

Section 87 is in these terms:—"No action shall lie against the Secretary of State for India in Council or against any officer in respect of any order passed or act *bonâ fide* done or ordered to be done under this Act. No suit or prosecution shall be instituted for anything done or ordered to be done under this Act after the expiration of six months from the accrual of the cause of action or from the date of the act or order complained of."

It will be noticed that protection is afforded under the first part of the section against any action, and the short period of limitation is prescribed by the second part for any suit, for anything "done under this Act."

In the case of *Mayandi* v. *McQuhae*(1) a suit was brought to recover from the Municipal Commissioners of Madura, the balance of a sum of money due for timber supplied under a contract duly made with them. The question was whether the suit was "for anything done under the Act"—Town Improvements Act, 1871. The Subordinate Judge, relying on the 12th section of the Act, whereby the Commissioners were empowered to make certain contracts, held that the making of the contract on the part of the defendant was "a thing done under the Act." On appeal the High Court admitting that the contract was doubtless made by the Commissioners under the powers conferred by the Act held that it did "not follow from this alone that a breach of the contract by non-payment of the balance due gives rise to" "a suit for a *thing done* under the Act" and allowed the appeal.

So, in the case of *Trustees of the Harbour, Madras* v. *Best & Co.*(2), it was held by Mr. Justice Shephard sitting on the Original Side that the provision in section 87 of the Madras Harbour Trust Act, 1886, to the effect that the Board, its officers

(1) I.L.R., 2 Mad., 125.

(2) I.L.R., 22 Mad., 524.

and servants, shall not be liable in damages for any act *bonâ fide* done or ordered to be done by them in pursuance of the Act does not apply to a suit in respect of a breach of contract against the Board. In his opinion the immunity there given applies only to those cases in which there is an act done or purporting to be done in pursuance of the Harbour Trust Act. "Otherwise" he said "it would lead to this absurd result that the Legislature would be authorising a public body to make contracts, and at the same time providing that they were not to be sued upon them. That to my mind is an absurdity."

On appeal from that judgment it was admitted by counsel for the defendants that if the goods were received under a contract, section 87 would not be a bar to the suit. These cases are not noticed by the Judge. Where any officer does anything in pursuance of any provision of the Act, and he is authorized to do it by the same, then no suit will lie against him under section 87 of the Act, even if any person suffers any damage, and an action might otherwise be maintainable.

But where the officer in his capacity of public officer purports to do the act complained of in pursuance of any provision of the Act, with reasonable ground for believing that he is authorised by the Act to do it, or does it irregularly or improperly as to cause injury to any person, then a suit may lie against him but it must be brought within the time limited by section 87.

But where the act complained of which is alleged to give rise to the cause of action is not done nor purports to be done under any section of the Act, section 87 does not apply.

In this case the order passed by the Commissioner deducting the sum from the deposit was passed under the terms of the contract, not under any section of the Act. Section 87 does not therefore apply. Neither does section 84 apply, as these amounts are not recoverable under the Act or due to Government on account of the Salt Revenue. The decrees of the lower Courts are therefore set aside. The Munsif is directed to restore the suit to his file and dispose of it in accordance with law. The appellant is entitled to his costs in this and the lower Appellate Court. The costs in the First Court will be provided for in the final decree.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Abdur Rahim.

1908. August 24, September 11.

DEVAGUPTAPU PEDA SATYANARAYANA, MINOR, BY HIS FATHER AND GUARDIAN APPALARAJU (PLAINTIFF), APPELLANT,

v.

GOGULAPATI NARASAMMA AND OTHERS (DEFENDANTS), RESPONDENTS.*

The Proprietary Estates Village Service Act (Madras), Act II of 1894, s. 13—Enfranchisement of lands forming part of emoluments of office, right to.

Mere registration of a minor as the heir of a Kurnam, under section 13 of Madras Act II of 1894, does not give him any right to object to the enfranchisement of lands, forming the emoluments of the office, in the name of one who is the actual heir of the deceased office-holder in respect of his other properties.

Venkata v. *Rama*, (I.L.R., 8 Mad., 249), referred to.

SUIT for cancellation of a putta issued in the name of the first defendant.

The lands in question formed the emoluments of the office of Kurnam of a certain village. The last Kurnam, V, died leaving two daughters, the first defendant and the deceased mother of the plaintiff, and the plaintiff, a minor, him surving. On V's death, the plaintiff was registered as his heir to the office under section 13 of Madras Act II of 1894, which gave him a claim to be appointed when he came of age.

Subsequently, the lands were enfranchised in the name of first defendant, who, as the surviving daughter of V, was his heir. The plaintiff brought this suit to cancel the putta issued to first defendant on the ground that, as he was registered as the heir of V, the lands ought to have been enfranchised in his name.

The Munsif and, on appeal, the Subordinate Judge dismissed the suit.

* Second Appeal No. 1449 of 1907, presented against the decree of M.R.Ry D. Raghavendra Row, Temporary Subordinate Judge of Vizagapatam, in Appeal Suit No. 21 of 1906, presented against the decree of M.R.Ry. A. S. Krishnaswami Ayyar, District Munsif of Yellamanchilli, in Original Suit No. 300 of 1905.

The plaintiff appealed to the High Court.

Sitarama Rau for *D. Srirama Sastri* for appellant.

The Government Pleader for third respondent.

V. Ramesam for first and second respondents.

JUDGMENT.—One Venkappa, deceased, was Kurnam of Koduru. He had two daughters, one the first defendant and the other the mother of the plaintiff. Venkatappa died in 1901 and the plaintiff who was then a minor was registered as Venkappa's heir under section 13 of Madras Act II of 1894. The lands which formed the emoluments of the Kurnam's office were in 1903 enfranchised in the name of the first defendant, the plaintiff being then still a minor and his mother being dead. The plaintiff now sues for cancellation of the putta issued in the name of the first defendant and for issue of putta in his own name. He failed in both the Courts below.

We think the plaintiff's suit was rightly dismissed. At the time of the enfranchisement the first defendant, and not the plaintiff, was Venkappa's heir in respect of any other property of his. The plaintiff's claim is based before us not on the ground that he had actually been appointed Kurnam at the time of the enfranchisement, but on the ground that he had been registered as Venkappa's heir as above mentioned. As was observed in *Venkata* v. *Rama*(1) the plaintiff, if he had been appointed to the office before the lands were enfranchised, might have a foundation for his claim to the lands. But the question is whether mere registration under section 13 of Madras Act II of 1894 gives the plaintiff the right which he seeks to enforce. The effect of such registration is merely to declare that the person registered is entitled on attaining majority, or within three years thereafter, to be appointed to the office, provided he is duly qualified. In the meantime the duties of the office are to be performed by some other qualified person. Till enfranchisement the inam of course continued to be attached to the office but at the time of enfranchisement there was no good ground for passing over the first defendant and issuing putta in the name of the plaintiff who was not the office-holder then, and who might never be appointed to the office.

We therefore dismiss this second appeal with costs.

(1) I.L.R., 8 Mad., 249, p. 263.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Pinhey.

1908. September 28. October 8.

SUNDARASASTRIAL (PLAINTIFF), APPELLANT,

v.

GOVINDA MANDARAYAN (DEFENDANT), RESPONDENT.*

Limitation—Adverse possession, elements of—Party wall.

Where two adjoining houses belonging to a single owner are sold to two different persons *A* and *B*, and the partition wall between the two houses which is included in the sale to *A* is, at the time of sale, used as a support for the rafters of the house sold to *B*, the wall passes to *A* subject to such easement right.

The plastering and repairing by *B* of his side of the wall do not amount to adverse possession and can be referred to the easement right.

To constitute dispossession there must, in every case, be positive acts which can be referred only to the intention of acquiring exclusive control.

Where the acts do not amount to dispossession of the true owner, possession follows the title.

SUIT for possession of a wall and strip of land.

The facts are sufficiently stated in the judgment.

The Munsif passed a decree in favour of the plaintiff.

The Subordinate Judge, on appeal, found that the defendant and his predecessors were allowed to plaster and repair their side of the wall without any interference by the plaintiff, and he held that the wall thus became the joint property of plaintiff and defendant. He accordingly declared that the plaintiff and defendant were jointly entitled to the wall.

The plaintiff appealed to the High Court.

T. M. Krishnaswami Ayyar for *T. Subrahmania Ayyar* for appellant.

T. R. Ramachandra Ayyar for respondent.

JUDGMENT.—The dispute relates to the possession of a boundary wall on which the rafters of both the adjoining houses rest. The District Munsif decreed for the plaintiff declaring his title to the wall and the strip of land in continuation thereof. The

* Second Appeal No. 230 of 1906, presented against the decree of M.R.Ry. I. L. Narayana Rao Nayudu, Additional Subordinate Judge of Tanjore, in Appeal Suit No. 1036 of 1905, presented against the decree of M.R.Ry. S. C. Ramaswamy Aiyar, District Munsif of Tiruvalur, in Original Suit No. 317 of 1903.

Subordinate Judge modified the decree by declaring the joint title of the plaintiff and the defendant to the suit property.

We have no doubt that the decision of the Subordinate Judge is based on an erroneous view of the law.

The two properties of the plaintiff and the defendant respectively, belonged, formerly, to a single owner who alienated the eastern portion in 1868 to the plaintiff's predecessor in title under exhibit C, and the western portion to the defendant's predecessor in title in 1871. Exhibit C shows that the plaint wall was expressly conveyed under it along with the eastern house. The mere fact that subsequent documents under which the eastern house was transferred do not expressly mention the suit wall cannot be taken as any indication of the fact that the suit wall did not also pass under those documents: for, the first of these transfers was in execution of a Court decree and the decree-holder presumably had no access to the title-deed when describing the property. In 1868 when the wall was expressly conveyed the western house roof also rested on it. The wall was therefore conveyed subject to *that easement right*.

The fact that the defendant may have plastered his side of the wall, or repaired the wall itself occasionally does not affect the question of possession. Such acts which can be referred to the easement right, are not adverse to the existing title or rather are not acts of possession at all. To constitute a dispossession there must in every case be positive acts which can be referred only to the intention of acquiring exclusive control. See "Possession in the Common Law" Pollock and Wright, pages 85 and 86. The joint title decreed by the Subordinate Judge was not the case of either party. Possession in such a case is with him who has title.

The decree of the Subordinate Judge must be set aside and that of the District Munsif restored. The appellant will have his costs in this and the lower Appellate Court.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Abdur Rahim.

1908. September 3, 7.

RADHAKRISHNA IYER AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

MUTHUSAWMY SHOLAGAN AND OTHERS (DEFENDANTS), RESPONDENTS.*

Mortgage, decree, form of—Decree for sale subject to prior usufructuary mortgage of plaintiff.

A person having a usufructuary and two subsequent simple mortgages on the same property is entitled in a suit on the two latter mortgages to a decree for sale of the property subject to the prior usufructuary mortgage.

SUIT to recover money on two simple mortgage bonds. Prior to the execution of these mortgages the properties mortgaged had been usufructuarily mortgaged to plaintiffs. The plaintiffs prayed for sale subject to the first mortgage.

Both the lower Courts held that they were not entitled to such a decree.

The plaintiffs appealed to the High Court.

The Hon. The Advocate-General for appellants.

B. Panchapagesa Sastriar for seventh respondent.

JUDGMENT.—Certain property was usufructuarily mortgaged to the plaintiffs in 1890. The plaintiffs subsequently got two other mortgages on the same property. They brought the present suit on the two subsequent mortgages and asked for sale subject to their prior usufructuary mortgage. Both the Courts below held that the suit was not maintainable. That, in a case like the present, the plaintiff could have a decree for sale on the subsequent mortgages, free of the prior mortgage, is clear from *Rengasami Nadan* v. *Subbaroya Iyen*(1). The plaintiffs are willing to accept such a decree if the decree they asked for cannot be granted. But we see no good reason why there should not be a decree for sale subject to the prior mortgage, and there is direct authority for

* Second Appeal No. 1039 of 1905, presented against the decree of F. D. P. Oldfield, Esq., District Judge of Tanjore, in Appeal Suit No. 962 of 1904, presented against the decree of M.R.Ry. C. G. Kuppusawmy Aiyar, Subordinate Judge of Tanjore, in Original Suit No. 23 of 1904.

(1) I.L.R., 30 Mad., 408.

granting such a decree in *Ram Shankar Lal* v. *Ganesh Prasad*(1). We therefore reverse the decree of the District Judge and remand the appeal for disposal on the merits. Costs will abide the result.

RADHAKRISHNA IYER v. MUTHUSAWMY SHOLAGAN.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Pinhey.

1908. September 24, October 7.

SOMASUNDARUM CHETTY (PLAINTIFF), APPELLANT,

v.

VADIVELU PILLAI (DEFENDANT AND HIS LEGAL REPRESENTATIVE), RESPONDENT.*

Pleadings—Declaratory decree—Suit on title—No relief on the ground of adverse possession.

A declaration cannot be given on a title neither stated in the plaint nor raised on the issues. A plaintiff who comes into Court alleging title without more, cannot be allowed to succeed on the basis of title by adverse possession.

SUIT for a declaration of title to property under a sale-deed executed in favour of plaintiff in 1890. The plaintiff, having failed to establish the sale to him, tried to obtain a declaration of his right to the suit property on the strength of his possession for more than twelve years. Both the lower Courts refused to grant him a declaration on his adverse title.

The plaintiff appealed to the High Court.

K. Ramachendra Ayyar for appellant.

The respondent was not represented.

JUDGMENT.—We think that the District Judge, having found that the sale set up by the plaintiff was not true, was justified in refusing to give the plaintiff a declaration of his right to enjoy the suit property on the strength of possession for more than twelve years. It is argued that the District Judge has misconstrued the plaint. We do not think he has. In the plaint the plaintiff alleges that he bought the property in 1890, and that he

(1) I.L.R., 29 All., 385.

* Second Appeal No. 161 of 1906, presented against the decree of H. Moberly, Esq., District Judge of Tanjore, in Appeal Suit No. 114 of 1905, presented against the decree of M.R.Ry. G. Kothandaramanujulu Naidu, District Munsif of Kumbakonam, in Original Suit No. 233 of 1904.

SOMASUNDARUM CHETTY v. VADIVELU PILLAI.

is enjoying it undisputedly, having constructed buildings, etc., thereon. He does not however give the date on which he took possession, or say anything about possession for more than twelve years as giving him a title apart from the alleged sale. The only issue framed as to title is "Whether the suit property belongs to plaintiff?" Reading this issue with the plaint it cannot be said that it raises the question of title based on twelve years' possession. In *Shiro Kumari Debi* v. *Govind Shaw Tanti*(1) it was distinctly held that a declaration cannot be given on a title not stated either on the plaint or the issues. We agree with that decision and dismiss this appeal.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Abdur Rahim.

1908. September 8.

TIRUVENKATACHAR (PLAINTIFF), APPELLANT,

v.

DESIKACHAR (DEFENDANT), RESPONDENT.*

Easement Act, Act V of 1882, *s.* 4—*Right to take water through another's land when sold by Government.*

A right to take water through another person's land whenever Government should sell such water is a right of easement within section 4 of the Easement Act.

It will make no difference that water was not taken for several years because Government refused to sell or because there was no water in the source of irrigation.

SUIT for declaration of plaintiff's right to an artificial channel in defendant's land; for the restoration of a water-course and for an injunction and damages.

The plaintiff claimed a right of easement to carry water through the channel to his own lands whenever Government should sell water to him. The plaintiff's lands in respect of

(1) I.L.R., 2 Calc., 418.

* Second Appeal No. 951 of 1905, presented against the decree of G. F. T. Power, Esq., District Judge of Coimbatore, in Appeal Suit No. 184 of 1903, presented against the decree of M.R.Ry. T. Sadasiva Aiyar, District Munsif of Coimbatore, in Original Suit No. 269 of 1902.

TIRUVENKATACHAR v. DESIKACHAR.

which he claimed the right were punja lands, to which Government was not bound to supply water It was found from the evidence that for several years Government had refused to supply water. The defendant contended that there was no uninterrupted enjoyment, and no right by prescription was acquired by the occasional precarious user.

The Munsif held that such a right *to carry water whenever the owner of the water should consent* cannot be the subject of an easement right, and dismissed the suit.

This was confirmed on appeal.

The plaintiff appealed to the High Court.

The Hon. The Advocate-General for appellant.

V. C. Seshachariyar for respondent.

JUDGMENT.—An easement is a right which the owner of land possesses, as such, for the beneficial enjoyment of the land, to do, and continue to do something, in or upon, or in respect of certain other land not his own (*vide* section 4 of Act V of 1882). In the present case it is found that the plaintiff had the right to take water to his own land through a channel on the defendant's land whenever the water was sold to him by Government. We think that this right amounts to an easement within the definition above given. We do not think the fact that Government is not bound to sell water to the plaintiff affects the question. It might be that for a series of years there was no supply in the irrigation source. It could not be contended that for that reason the plaintiff would lose his right to take water through the channel when water was available, supposing Government was then willing to sell it to him. Whether the plaintiff took no water through the channel because there was no water in the irrigation source or because Government refused to sell him water can make no difference. We therefore modify the decrees of the Courts below and grant the plaintiff the declaration and injunction prayed for. The defendant will also restore the channel to its original condition with a width of 5 feet, including the breadth of the south bank of the channel to a depth of 1½ feet in six months from this date, failing which the plaintiff may do so, and recover the cost from the defendants. Each party will bear his own costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Pinhey.

1908. September 1, 2, 23.

SOWCAR LODD GOVINDA DOSS KRISHNA DOSS VARU (PLAINTIFF), PETITIONER IN ALL,

v.

LEPATI MUNEPPA NAIDU (DEFENDANT), RESPONDENT.*

Court of Wards Act (Madras), Act I of 1902, ss. 43, 57—Dispossession of usufructuary mortgagee—Termination of possession of Court of Wards—Usufructuary mortgagee's right—Negotiable Instruments in the name of Manager of Court of Wards—Right of suit—Real payee.

Where the Court of Wards assumes superintendence of the estate of a disqualified proprietor, and, in exercise of the powers conferred by section 43 of the Court of Wards Act, ousts an usufructuary mortgagee from possession, and the manager of the Court, in the course of his management, takes from the tenants of the property, promissory notes payable to himself or order for the rents and profits of the mortgaged premises, it is competent to such mortgagee or his heirs to maintain a suit on such promissory notes when the Court's superintendence comes to an end and it delivers to the mortgagee the promissory notes without however endorsing or otherwise assigning the same in writing.

Dispossession of an usufructuary mortgagee under section 43 of the Act does not convert the usufructuary into a simple mortgage.

Per MILLER, J.—The position of the Court of Wards on the dispossession of the usufructuary mortgagee, is analogous to that of a receiver for the collection of rents and profits, in respect of such mortgaged properties.

The real payee of the promissory note is the landlord by his agent, the manager. Before dispossession the mortgagee was the landlord for the purpose of collecting rents and profits, and subsequent to dispossession, the Court of Wards to such extent was the landlord.

When the Court's superintendence terminated, its receivership came to an end and the mortgagee as the landlord was the real payee entitled to sue and recover on the promissory notes.

THE plaintiff was the usufructuary mortgagee of Narayanavanam taluk of the Karvetnagar zamindari. When the Court of Wards assumed superintendence of the Karvetnagar Estate, the plaintiff was dispossessed under section 43 of the Court of Wards Act. During the period of superintendence, the defendants who were tenants in Narayanavanam executed the plaint promissory

* Civil Revision Petition No. 10 of 1908, presented under section 25 of Act IX of 1887, praying the High Court to revise the decree of M.R.Ry. A. Ramasami Sastriar, District Munsif of Tirupati, in Small Cause Suit No. 100 of 1907—*vide* Civil Revision Petition Nos. 11 and 12 of 1908.

notes in favour of the manager of the Court of Wards for arrears of rent.

The promissory notes were in the following form—

Bond or promissory note executed and given on 14th March 1904 in favour of M.R.Ry. Velamuru Krishnamacharyulu Varu, B.A., Manager of Karvetinagaram Estate, by Vepati Muneppa Naidu, ryot No. 187 and son of Vepati Muneppa Naidu, ryot of Kotta Aruru village No. 61 in Mangadu Payakat, Narayanavanam taluk, is as follows:—

"In respect of the taxes I have to pay for fasli 1312 in the said Aruru village, after allowing for payment, the balance I still owe, inclusive of the attachment expenses is Rs. 21 (in words twenty-one rupees) which I owe you. So, I shall pay on demand to you or to your order the said principal amount together with interest at Re. 1 per Rs. 100 per month, and shall take back the bond. To this effect is this note of hand caused to be written and given."

On the death of the Zamindar, the Court of Wards gave up superintendence and placed the plaintiff in possession of the taluk, and handed over possession to him of the promissory notes. There was no endorsement or assignment in writing of the promissory notes.

The contention of the defendants appears from the judgment of the lower Court, the material portions of which are as follows:—

"The defendants contend that (1) no suit is sustainable because there is no endorsement of transfer in favour of plaintiff, (2) the plaintiff is not the person for whom the Court of Wards was in management of the estate.

"It was contended for the plaintiff that a negotiable instrument was negotiable otherwise than by endorsement under *Muthar Sahib Maraikar* v. *Kadir Sahib Maraikar*. But having regard to the observations in *Subba Narayana Vathiyar* v. *Ramaswami Ayyar* followed in *Arunachella Reddi* v. *Subba Reddi*, I must hold that, even as a chose in action, the plaintiff cannot sue, as under section 130 of the Transfer of Property Act an instrument in writing is necessary. There is no such instrument in these cases, all that exist being a list of promissory notes made by one of the gumasthas of the manager's office. This list does not show that it relates to documents handed over to the plaintiff, nor is it signed by the manager

"It is in evidence that other promissory notes obtained in the name of the manager relating to the Pallipat taluk were handed over to the plaintiff after having been actually endorsed by the Regulation Collector, and it was contended for defendant that it was not meant that the property in these plaint promissory notes should pass to the plaintiff.

"It was also argued that the manager of the Court of Wards had no power to transfer, and that he is merely a trustee, and section 36 of the Trust Act was quoted."

"Another argument advanced was that the Court of Wards was in management of the Narayanavanam taluk not for the benefit of the plaintiff but of the Karvetnagar Zamindar, and therefore was the agent of the Zamindar, and that the latter was the proper person to sue. I think it is not necessary for me to express myself on these points as, in view of the finding that the plaintiff cannot sue by reason of want of endorsement on the promissory notes or of some other instrument, the suits must fail.

"The suits are accordingly dismissed, but in the circumstances without costs."

Plaintiff applied to the High Court under section 25 of Act IX of 1887.

P. R. Sundara Ayyar and *A. S. Balasubrahmania Ayyar* for petitioners in Civil Revision Petition No. 10 of 1908.

The Respondent was not represented.

A. S. Balasubrahmania Ayyar for petitioner in Civil Revision Petition Nos. 11 and 12 of 1908.

Mr. *M. A. Tirunarayanachariar* for respondent in the above.

JUDGMENTS—MILLER, J.—The Court of Wards, under direction of the Local Government, acting under section 43 of Madras Act I of 1902, dispossessed the plantiff's father, an usufructuary mortgagee, of a portion of the Karvetnagaram Estate and administered the property itself. After some years the disqualified proprietor died, and the Court of Wards released the property from its superintendence and handed over to the plaintiff's father *inter alia* certain promissory notes taken from tenants for arrears of rent due from them; and among them the notes in respect of which the present suits are instituted.

The notes are payable to "M.R.Ry. Velamuru Krishnama Charyulu Varu, B.A., Manager of the Karvetnagaram Estate" or his order, and are not therefore transferable by delivery. They

are not endorsed to the plaintiff, nor are they assigned in writing to him by the holder or the Court of Wards. The question is whether the plaintiff can sue on them.

The principal difficulty I have felt in the case is in deciding whether the notes run in the name of an agent so as to enable the plaintiff to sue on them as the principal. Seeing, however, that they are expressed to be for payment of arrears of rent and run in the name of the manager of the landlord's property, I think it is not improper to hold that the landlord by his agent is sufficiently indicated as the payee. The landlord can therefore sue on them. The Court of Wards on taking possession under section 43 of the Act undoubtedly became the landlord for the time being, at any rate to this extent that it had the right to collect the rents. Before the taking of possession by the Court of Wards, the plaintiff's father was the landlord to this extent, and I do not find anything in the Act to indicate that his right as usufructuary mortgagee to collect the rents is forfeited and vested in the Court of Wards or the disqualified proprietor so as to require a reconveyance on the release of the property from superintendence.

On the assumption of charge by the Court of Wards under section 43, the collection of the rents is entrusted to it, but the effect of section 43 is not, I think, to turn the usufructuary mortgagee into a simple mortgagee. So long as the Court of Wards remains in possession, the usufructuary mortgagee has open to him for the recovery of his money only the remedies open to a simple mortgagee of the land and of its rents and profits, but he does not become a mere simple mortgagee of the land, and the Court of Wards has to furnish him with an account of the rents and profits received by it. If the legislature had intended to enact that at the will of the Local Government an usufructuary mortgagee is to become a simple mortagagee, it would have been easy for it to say so in clear language. It has certainly not done so. The true view seems to me to be that suggested by Mr. Sundara Aiyar that the Local Government is empowered to appoint the Court of Wards to a position analogous to that of a receiver of the rents and profits of that part of the ward's property of which it cannot take immediate possession as guardian of the wards.

On the death of the disqualified proprietor, the Court of Wards took no action under section 57, and the property ceased to be

SOWCAR LODD GOVINDA DOSS v. MUNEPPA NAIDU.

the property of a ward within the meaning of section 43: the receivership therefore terminated and the receiver having been appointed for the better preservation of the property (section 43 (1)) there being no dispute as to the right of the mortgagee, his possession is in respect of the right to recover rents that of the mortgagee, and his hand being withdrawn, the mortgagee regains the right to collect the rents and profits.

He is therefore the landlord, the title to the notes vests in him and he is entitled to sue on them.

The written statements of the defendants raise in paragraph 3 a question of facts, but the argument on both sides in this Court proceeded on the footing that the promissory notes were handed over to the plaintiff's father by the officers of the Court of Wards, and I take it that that is now admitted. The execution of the notes is admitted and payment to the plaintiff or his father is not alleged. There is therefore no necessity to remand the suit and the plaintiff must get a decree with costs throughout.

PINHEY, J.—These were suits on promissory notes executed by tenants for arrears of rent in favour of the Court of Wards, Manager of Karvetnagaram zamindari. The Court of Wards assumed the superintendence of the zamindari under section 18, Act I (Madras), 1902. The Narayanavanam taluk, where the defendants are tenants, was at the time in the possession of the plaintiff's father as mortgagee. The plaintiff's father was dispossessed under section 43 of the Act.

The ward died before the debts and liabilities binding on the estate were discharged. But the Court of Wards declined to exercise its option to retain superintendence under section 57. The Narayanavanam taluk was accordingly handed back to the plaintiff's father, and with it were delivered the promissory notes taken from tenants for arrears of rent. The plaintiff's father having died, the plaintiff sued on the notes in the Small Cause Court.

The present suits are test cases. The District Munsif dismissed the suits on the short point of law that the notes had not been endorsed in favour of the plaintiff's father or duly assigned as a chose in action under section 130, Transfer of Property Act. The notes are admittedly negotiable instruments. The District Munsif appears to have overlooked the fact that property in a note may also pass by operation of law.

SOWCAR LODD GOVINDA DOSS v. MUNEPPA NAIDU.

The Court of Wards having omitted to apply for Government sanction to retain superintendence of the zamindari, its powers of superintendence ceased *ipso facto* on the death of the ward. The question arose to whom should possession be given in such an event. It was apparently decided by the Court of Wards that the principles of section 55 of the Act applied, and, in accordance with clause (2) of that section, the incumbrancer was replaced in possession of the Narayanavanam taluk. I am of opinion that this decision was correct. The promissory notes relating to the taluk were simply handed over to the plaintiff's father, because, on the death of the ward, the power of the Court of Wards having ceased, there was no one who could legally endorse the notes. The manager's powers, as such, had determined. When the plaintiff's father died, property in the notes again descended to the plaintiff by operation of law. I am of opinion that the plaintiff is entitled to sue on the suit notes. It seems to me this is the only equitable decision that can be given. There is no reason why the defendants should escape liability. Under section 43 of the Act the mortgagee, though dispossessed, was something more than a simple mortgagee, as he was entitled to all the surplus rents and profits of the taluk. If, for any reason, it should be held in a suit between the present Raja of Karvetnagaram and the plaintiff that the mortgagee's rights ceased on the death of the late Raja, the sum realized by the plaintiff in the present suits could not be recovered from him as it would not be part of the mesne profits that accrued after the death of the ward. I would therefore reverse the decree of the District Munsif and allow the plaintiff's claim with costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Pinhey.

1908. August 24, 25.

KRISHNAMACHARIAR (PLAINTIFF), APPELLANT,

v.

KUPPAMMAL AND OTHERS (DEFENDANTS 5, 8, 9 AND 10), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 396—Appointment of Commissioner discretionary—Decree, finality of—Conduct of parties.

It is not obligatory on the Court, in every case in which a decree is made for the partition of immoveables not paying revenue to Government, to appoint a Commissioner under section 396 of the Code of Civil Procedure; and such a decree is not, in all cases, to be considered pending till action is taken under section 396.

Where such a decree, not followed by action under section 396, is treated by the Court and the parties as a final decree in execution proceedings, it is not open to a party subsequently to contend that the decree had not become final.

THE father of the appellant brought a suit for partition, Original Suit No. 6 of 1886, in the District Court of Chingleput, and the decree in the suit directed that the plaint properties should be divided, and the plaintiff should be given a moiety of the properties. The fourth defendant, a widow, entitled to maintenance, appealed to the High Court, and the decree of the High Court, dated 7th March 1889, modified the decree of the lower Court by directing that the fourth defendant should reside in the house in Madras till her death, which took place in 5th October 1906. The original plaintiff died some time after decree and his son the present Appellant was brought on the record.

An application for execution was made in 1901, but no further action was taken till 1906, after the death of the fourth defendant, when an application for execution under section 235, Civil Procedure Code, was put in, praying for the delivery of one-half share of the house in which the fourth defendant resided, on the ground that the decree in respect of the house could be executed only after the death of the fourth defendant. On objection being taken that execution was barred by limitation the plaintiff put in

* Civil Miscellaneous Appeal No. 157 of 1907 presented against the order of V. Venugopal Chetti, Esq., District Judge of Chingleput, in Execution Petition No. 38 of 1906 (Original Suit No. 6 of 1886).

a fresh application. The nature of the later application, and the further facts necessary for this report will appear in the order of the lower Court passed on these applications.

"ORDER.—The decree of the Court of first instance was passed in 1887. There was an appeal to the High Court from it, only by the fourth defendant, who claimed maintenance from the plaintiff's share, and the High Court's decree was to the effect that the plaintiff was entitled to the half of the suit house subject to the right of the fourth defendant (appellant) to reside therein.

"The original petition put in in this matter has been superseded by a later one. Originally, it was contended that, the plaintiff could not execute until the fourth defendant's death which took place only recently. This ground is practically given up now. The High Court decree does not lay any restriction as to the time of execution. The plaintiff could have easily taken delivery of his half of the house allowing the fourth defendant to live in it. In the later petition it is argued that the decree in 1889 was only a preliminary decree, and that what is prayed for now is the appointment of a Commissioner under section 396, Civil Procedure Code.

"I cannot accede to this contention. As I understand the decree of 1887, it is a final one, and the suit was finally terminated in 1889 when the High Court passed the decree to which the respondents were not parties.

"22 Calcutta, page 425, does not apply to the facts of the present case; nor do 20 Allahabad, 311 and 29 Madras, page 46.

"The present application is clearly barred and is therefore dismissed with costs."

The plaintiff appealed to the High Court.

The main grounds of appeal were:—

(1) That the lower Court ought not to have treated the petition as being one for execution and even, if it were one for execution, it should be treated as being within time within the meaning of article 179 of the Limitation Act.

(2) That the decree in question was not a final decree, but only a preliminary decree. It was not capable of execution unless and until a Commissioner was appointed, the property divided and a final decree passed.

(3) That the District Judge ought to have held that the petitioner could apply for possession of the house in execution of

KRISHNAMACHARIAR. v. KUPPAMMAL.

the decree only after the death of Mangammal, which occurred on 5th October 1906.

T. R. Ramachandra Ayyar for appellant.

L. A. Govindaragava Ayyar and *A. Ramachandra Ayyar* for respondents.

JUDGMENT.—In this case there was a decree for partition of certain properties including a house in Madras, which, on appeal to the High Court, was, in 1889, modified by declaring the right of a widow to reside in this house. In 1901 on an application for execution Shephard, J., returned the application to the District Judge of Chingleput, but no further action was taken in that Court until 1906, when the present application was made.

The first question we have to consider is the nature of the decree. That the decree-holder treated it as final and executable is beyond doubt. He obtained possession of part of the property under it, and it is equally clear to us that the District Court of Chingleput intended the decree to be a final decree.

In 1901 no doubt, Shephard, J., expressed an opinion that a Commisssioner ought to be appointed, but that view apparently did not commend itself to the Appellant's guardian, and no action was taken upon the suggestion. It is not until 1906 that the suggestion is made that the decree is still pending, and, *that*, after an application for execution had just been made. We are not prepared to hold that in every case in which a decree is made for the partition of immoveables not paying revenue to Government it is necessary to appoint a Commissioner under section 396 of the Civil Procedure Code. That section clearly contemplates a discretion in the Court, and here, it is clear that, neither the Court nor the decree-holder thought that it was necessary to postpone the making of the decree until the house had been actually divided into halves. We do not think the decision in *Appadu* v. *Venkata Ranga Rao*(1), which was quoted to us is intended to lay down a rule that, in all cases, a partition decree is to be considered pending until action is taken under section 396 of the Civil Procedure Code, but if it is so intended, we must, with great respect, decline to accept it as correct.

We are of opinion that the decree in this case is a final decree.

(1) 18 M.L.J., 23.

KRISHNAMACHARIAR. v. KUPPAMMAL.

We cannot accept the contention, which the District Judge says was practically given up, that this appellant was unable to obtain possession of the house by reason of the widow's residence therein. He could have obtained possession under section 264 of the Civil Procedure Code. It is contended in this Court, but was not in the Court below, that the bar of Limitation is saved by the fact that the Appellant attained majority only in 1906. We are unable to entertain that contention now; it depends on a question of fact which should have been established in the Court below if the Appellant desired to rely on it.

The appeal fails and is dismissed with costs.

APPELLATE CRIMINAL.

Before Mr. Justice Munro and Mr. Justice Pinhey.

EMPEROR

v.

MAHESWARA KONDAYA AND ANOTHER.*

1908. October 29.

Criminal Procedure Code,—Act V of 1898, *s.* 253—*Order of discharge not a 'judgment'—Competency of Magistrate after discharge to take fresh proceedings.*

It is competent to a Magistrate who has discharged an accused under section 253 of the Code of Criminal Procedure to take fresh proceedings and issue process against the person discharged in respect of the same offence without such order being set aside by a higher Court:

Per PINHEY, J.—An order of discharge is not a 'judgment.' A 'judgment' is an order in a trial terminating in either the conviction or acquittal of the accused.

The principle of *autrefois acquit* can have no application where an accused is discharged under section 253, as there can be no trial when the accused is discharged.

THE facts are fully stated in the letter of reference which is as follows:—

A complaint under section 406, Indian Penal Code, was presented to the Second-class Sub-Magistrate of Palkonda against two persons. The Sub-Magistrate, after taking all the evidence

* Case Referred No. 90 of 1908 (Criminal Revision Case No. 404 of 1908) for the orders of the High Court under section 438 of the Code of Criminal Procedure by A. L. Hannay, Esq., Acting Sessions Judge of Vizagapatam, in his letter, dated 12th August 1908.

EMPEROR v. MAHESWARA KONDAYA.

adduced for the prosecution discharged one of the accused on 18th February 1908 in the following terms:—

"As there is not sufficient evidence against second accused he is discharged under section 253, Criminal Procedure Code."

On 19th February 1908, the Sub-Magistrate passed the following order:—

"On careful reconsideration, I think there is still ground to presume second accused's guilt or complicity with first accused. The order of discharge is cancelled. Second accused will be re-arrested and put on his defence."

The present petition was then filed in the Sessions Court under section 435, Criminal Procedure Code, mainly on the grounds that the second order was *ultra vires*; that the Second-class Magistrate was not entitled in law to revive the proceedings against second accused on his own motion and without notice; and that the order of discharge under section 253, Criminal Procedure Code, paragraph (1), is a judgment within the meaning of section 367, Criminal Procedure Code, which the Magistrate could not review (section 369). It was also urged that on the merits, the first order (namely, of discharge) was correct. On perusing the records I am of opinion that the second accused should not have been discharged. I have heard both parties on the case. Both rely upon the Full Bench decision (*Emperor* v. *Chinna Kaliappa Gounden* (29 Mad., 126)). In that case the question was whether a Magistrate could hear a complaint, dismissed under section 203, Criminal Procedure Code, without the order of dismissal being set aside by a higher Court. But the case of discharges under sections 253 and 259, Criminal Procedure Code, was also incidentally discussed; and while the Chief Justice expressed the view that as regards the point then under consideration no distinction could be drawn between an order, made under section 203, Criminal Procedure Code, and an order made under section 253 or 259, Criminal Procedure Code, a view in which Benson, J., seems to concur, though not specifically, Subramania Ayyar, J., and Davies, J., took the opposite view, and Moore, J., specifically refrained from giving an opinion on the point. There was therefore no decisive opinion on the question. As regards section 203, Criminal Procedure Code, a majority of the Judges held that a Magistrate can re-hear a complaint which he has dismissed, under section 203, although his order has not been set aside by a higher Court.

EMPEROR v. MAHESWARA KONDAYA.

Upon this point, the opinions of those of the Judges in Calcutta and Madras who considered the general question as apart from the particular cases which had come up for decision, were conflicting. In view of this conflict of opinion and of the fact that when the question of discharge under section 253, Criminal Procedure Code, was discussed in the case of *Emperor* v. *Chinna Kaliappa Gounden* (29 Mad., 126), no decisive opinion were arrived at, I have the honour to refer for orders under section 438, Criminal Procedure Code, the question, whether, a Magistrate, who has made an order of discharge under section 253, paragraph 1, Criminal Procedure Code, is competent to take fresh proceedings and issue process against the person discharged in respect of the same offence without such order being set aside by a higher Court?'

Dr. S. Swaminadhan for the Public Prosecutor in support of the reference.

JUDGMENT (MUNRO, J.).—I agree with the views expressed by the learned Chief Justice in *Emperor* v. *Chinna Kaliappa Gounden*(1), and would answer the question referred to us in the affirmative.

PINHEY, J.—The facts are clearly set forth in the letter of reference. The question whether an order of discharge is a judgment or not was fully considered in it. Cases cited by the Sessions Judge, and the weight of authority supports the view that such an order is not a 'judgment'. Seeing that section 253, Code of Criminal Procedure, does not require a Magistrate to record any reasons when discharging an accused unless he does so *without* taking all the evidence available for the prosecution it is difficult to see how any other decision could be arrived at. The word 'judgment' is not defined in the Criminal Procedure Code, but it is sufficiently clear from sections 366 and 367 that it is intended to indicate the final order in a *trial* terminating in either the conviction or acquittal of the accused. The principle of *autrefois acquit* can have no application, as there can be no trial when the accused is 'discharged.' A Code must be considered exhaustive on the subject with which it deals, and it is not permissible to add to its provisions. We can gather that the Legislature was not ignorant of the principle of *autrefois acquit*. It has indicated in the Code the extent to which it intended that that doctrine should be applied in this country. It is not open to us by interpretation to extend its application.

(1) I.L.R., 29 Mad., 126.

EMPEROR v. MAHESWARA KONDAYA.

When sections 253 and 437, Code of Criminal Procedure, are read together, it is clear that the Legislature never intended that a Magistrate discharging an accused should furnish him with a certificate of immunity from further molestation.

As observed above, section 253 does not require the Magistrate to give reasons for his order in ordinary circumstances. Section 437, Code of Criminal Procedure, makes no reference to an 'order' of discharge and does not suggest the existence of any 'order' that requires to be '*set aside.*' On the contrary it merely gives power to certain Courts to order further enquiry, and that too, *without even giving notice* to the persons discharged.

A discharge not operating as an acquittal leaves the matter at large for all purposes of judicial enquiry.

It is no argument to say that the powers conferred by the Code are too wide, and that Magistrates may abuse them. The framers of the Code were presumably aware of the fact. The powers conferred on Courts of Appeal and Revision provide an adequate remedy for individual indiscretions. The remedy for repeated indiscretions on the part of Magistrates is the provision of better Magistrates by Government, and not the limitation of their powers by judicial interpretation.

The question referred to us must be answered in the affirmative, and I would add that, as in the present case the Sessions Judge after a perusal of the record has formed the opinion that the Sub-Magistrate's second order (cancelling his order of discharge) is right on the merits, there is no need for us to revise it.

APPELLATE CRIMINAL.

Before Mr. Justice Abdur Rahim.

EMPEROR

v.

MADDIPATLA SUBBARAYUDU.*

1908. October 2.

Court Fees Act, Act VII of 1870, *s.* 31—*Power of Appellate Court to set aside order under s.* 31 *of Court Fees Act.*

An order under section 31 of the Court Fees Act directing the accused who was convicted of a non-cognizable offence to repay to the complainant the fee paid by him on the complaint is not part of the sentence passed on the accused for the offence.

On appeal against such conviction it is not competent to the Appellate Court to set aside the order under section 31 of the Court Fees Act.

THE facts of this case are sufficiently stated in the following letter of reference by the District Magistrate of Guntúr :—

"One Maddipatla Subbarayudu was convicted by the Stationary Sub-Magistrate, Guruzala, in Calendar Case No. 103 of 1908, of an offence punishable under section 352, Indian Penal Code, and sentenced to pay a fine of Rs. 15 with two weeks' rigorous imprisonment in default of payment of fine, and ordered under section 31 of the Court Fees Act to pay to the complainant Rs. 1-2-0 being the cost of Court fees. An appeal was preferred against this conviction and sentence before the Head Assistant Magistrate, Narasaraopet. The Appellate Court, while upholding the conviction, modified the sentence by reducing it to a fine of Rs. 5, and also cancelled the order of the lower Court as regards the payment to the complainant of costs and compensation.

"The order cancelling the order for payment of costs under the Court Fees Act seems to be wrong, since section 31 of the Court Fees Act makes the award of court and process fees to the complainant imperative in case of conviction in non-cognizable cases. The Head Assistant Magistrate says that he lost sight of this provision."

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* Case Referred No. 82 of 1908 (Criminal Revision Case No. 356 of 1908) for the orders of the High Court under section 438 of the Code of Criminal Procedure by Mr. Young, Esq., District Magistrate of Guntúr, in his letter, dated 22nd July 1908.

EMPEROR v. MADDIPATLA SUBBARAYUDU.

The Acting Public Prosecutor in support of the Reference.

ORDER.—From the language of section 31 of the Court Fees Act it is clear that the order directing the accused who was convicted of a non-cognizable offence to repay to the complainant the fee paid on the latter's petition of complaint does not form part of the sentence passed upon the accused for the offence, and in fact, the section itself says that the order levying the amount of Court fee is to be in addition to any penalty that may be imposed for the offence itself. This view has also been adopted in *Emperor* v. *Karuppana Pillai*(1) and in *Madan Mandul* v. *Haran Ghose*(2). That being so, the Head Assistant Magistrate hearing the appeal from the conviction of the accused under section 352, Indian Penal Code, was not competent to set aside the order of the trying Magistrate under section 31, Court Fees Act. The order of the Head Assistant Magistrate is therefore reversed to that extent, and that of the trying Magistrate restored.

APPELLATE CRIMINAL.

Before Mr. Justice Munro and Mr. Justice Pinhey.

1908. October 2.

EMPEROR

v.

HUSSAIN BEG.*

Criminal Procedure Code—Act V of 1898, *s.* 565 (4) *—Indian Penal Code, ss.* 176, 177*—Meaning of words "for the commission of an offence."*

The second part of section 176 of the Indian Penal Code, which provides an aggravated punishment for omitting to give notice to a public servant, when such notice is required for preventing the *commission of an offence*, applies only when the object is to prevent the commission of *a particular offence*, and not of offences generally.

The notice of residence required to be given by convicted persons under section 565 (4) is not required for preventing the commission of *any particular*

(1) I.L.R., 29 Mad., 188. (2) I.L.R., 20 Calc., 687.

* Case Referred No. 102 of 1908 (Criminal Revision Case No. 448 of 1908) for the orders of the High Court by F. D. Bird, Esq., Chief Presidency Magistrate, Egmore, Madras, in his letter, dated 27th August 1908.

EMPEROR v. HUSSAIN BEG.

offence and the failure to give such notice must be dealt with under the first part of section 176 of the Indian Penal Code.

THE facts are sufficiently stated in the following letter of reference by the Chief Presidency Magistrate, Madras :—

"I have the honour to submit copy of judgment in Calendar Case No. 19694 on the file of my Court and to request that the following question may be submitted for the orders of the Honourable the Judges and their decision communicated to me for the guidance of the Presidency Magistrates :—

"'Should cases under section 565 (4) of the Criminal Procedure Code be dealt with under the first or second part of section 176, Indian Penal Code?'

"Under section 565, Criminal Procedure Code, certain previously convicted offenders may, on re-conviction, be directed to notify their residence (to the Police) for a term not exceeding five years from the date of expiration of sentence. Under clause (4) of that section a person refusing or neglecting to comply with such an order shall be punished 'as if he had committed' an offence under section 176, Indian Penal Code.

"Under the first part of section 176, Indian Penal Code, whoever, being legally bound to give any notice to a public servant, intentionally omits to do so may be punished with one month's simple imprisonment; and (under the second part of the section) if the notice 'is required for the purpose of preventing the commission of an offence,' the punishment may extend to six months' simple imprisonment. The normal application of section 176, Indian Penal Code, is presumably to cases arising out of sections 44 and 45, Criminal Procedure Code.

"In High Court Criminal Revision Case No. 64 of 1908 a case of the nature referred to was dealt with. The late Mr. Justice Boddam passed the following order :—

'*Order.*—The accused was convicted under the first part of section 176, Indian Penal Code, and was sentenced to three months' simple imprisonment. The maximum sentence under this part of section 176, Indian Penal Code, is one month's simple imprisonment. The conviction is right but the sentence passed is illegal, and is therefore reduced to one month's simple imprisonment.'

"I submit that the point whether such cases should be dealt with under the first or the second part of section 176, Indian

EMPEROR v. HUSSAIN BEG.

Penal Code, is not definitely settled by the foregoing order, and it is desirable that it should be settled, for, at present, some Magistrates hold one view and some the other.

"I would respectfully submit that the object of the notice under section 565, Criminal Procedure Code, is that the man may be kept under the surveillance of the Police in view to preventing him from committing further offences. The law apparently assumes that a man who has been convicted twice is likely to commit further crime. The notice to the Police is therefore introduced as a deterrent, and in the majority of cases it undoubtedly acts as such. The residences of such men are frequently visited by the Police, and if they happen to be away from home at the time of occurrence of a crime in the locality they stand a fair chance of being suspected in connection with it.

"I venture to submit for consideration that such cases fall for disposal under the second part of section 176, Indian Penal Code."

The Acting Crown Prosecutor in support of the Reference.

ORDER.—We are of opinion that cases under section 565 (4) of the Code of Criminal Procedure should be dealt with under the first part of section 176 of the Indian Penal Code. We are fortified in this opinion by the ruling in *Panatulla* v. *Queen-Empress*(1), in which it was held that the aggravated penalty constituted by the second clause of section 177 of the Indian Penal Code can only be inflicted when the information required to be given relates to the commission of some particular offence, and not of offences generally. The words "for the purpose of preventing the commission of an offence" in section 176 of the Indian Penal Code, should, we think, be construed in the same way. The information required to be given under section 565 (4) of Code of Criminal Procedure, cannot be said to be required for the purpose of preventing the commission of any particular offence though it may be required for the purpose of preventing the commission of offences generally.

(1) I.L.R., 15 Calc., 386.

GENERAL INDEX

FOR

1908.

PAGE

ACTS:

ACCRETIONS, WHAT ARE:
See HINDU LAW.

1839, XXXII:
See INTEREST ACT.

1860, XLV:
See PENAL CODE.

1863, XX:
See RELIGIOUS ENDOWMENTS ACT.

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

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

1870, VII:
See COURT FEES ACT.

1871, XXIII:
See PENSIONS ACT.

1872, I:
See EVIDENCE ACT.

1872, IX:
See CONTRACT ACT.

1873, X:
See OATHS ACT.

1877, III:
See REGISTRATION ACT.

1877, XV:
See LIMITATION ACT.

1878, VI:
See TREASURE TROVE ACT.

1882, IV:
See TRANSFER OF PROPERTY ACT.

1882, V:
See EASEMENT ACT.

1882, VI:
See INDIAN COMPANIES ACT.

1882, VI:
See TRUST ACT.

1882, XIV:
See CIVIL PROCEDURE CODE.

1882, XV:
See PRESIDENCY SMALL CAUSE COURTS ACT.

PAGE

1884, IV (MADRAS):
See DISTRICT MUNICIPALITIES ACT.

1884, V (MADRAS):
See LOCAL BOARD'S ACT.

1889, IV:
See MERCHANDISE MARKS ACT.

1889, IV (MADRAS):
See SALT ACT.

1889, VII:
See SUCCESSION CERTIFICATE ACT.

1894, I:
See LAND ACQUISITION ACT.

1894, II (MADRAS):
See PROPRIETARY ESTATES VILLAGE SERVICE ACT.

1898, V:
See CRIMINAL PROCEDURE CODE.

1902, I:
See COURT OF WARDS ACT (MADRAS).
CASES:

1904, III (MADRAS):
See MUNICIPALITY ACT.

ADVERSE POSSESSION, TITLE ACQUIRED BY:
See HINDU LAW.

APPEAL, DECREE IN—*When such decree simply confirms decree of lower Court, it does not enlarge the time fixed by the original decree for the performance of conditions precedent:*

The decree of the lower Court provided that 'on the plaintiff's paying into Court the balance of consideration, Rs. 10, within a month from this date,' defendant should execute a sale-deed of the suit land. The money was not paid within the month and the defendant preferred an appeal after the expiry of the month. The Appellate Court simply confirmed the decree of the lower Court and dismissed the appeal. Within a month of the appellate decree the plaintiff deposited Rs. 10 and applied for execution of the decree:—*Held*, that he was not entitled to execute the decree, as he had not made payment within the time fixed by the original decree and as the appellate decree cannot under the circumstances be held to have enlarged the time fixed by the original decree. The appellate decree simply confirming the original decree cannot be read as giving the plaintiff one month from the date of the decision on appeal. Such an extension can be claimed only if expressly or impliedly given by the Appellate Court. *Bhup Indar Singh* v. *Bijai Bahadur Singh*, (I.L.R., 23 All., 155), distinguished.

Ramaswami Kone v. *Sundara Kone* 28

BANDHUS, PREFERENCE AMONG:—*See* "HINDU LAW."

CASES:—

Abdul Karim v. *Saliman*, (I.L.R., 27 Calc., 193), followed 215
Abdulla Naha v. *Moidin Kutti*, (17 M. L. J., 287), not followed 262
Ablakh v. *Bhagirathi*, (I.L.R., 9 All., 427), dissented from 157
Adimulam v. *Pir Ravuthan*, (I.L.R., 8 Mad., 424), not followed 164
Agra Bank v. *The Barry*, (L.R., 7 H.L., 135), referred to 8
Anandamoyee v. *Lakhi Chandra Mitra*, (I.L.R., 33 Calc., 339), followed ... 403
Annaji Rau v. *Ragu Bai*, (6 M.H.C.R., 400), followed 251
Athavulla v. *Gouse*, (I.L.R., 11 Mad., 283), referred to 12
Atma Ram v. *Balkishen*, (I.L.R., 5 All., 267), followed 443

PAGE

Bajrangi Singh v. *Manokarnika Bakhsh Singh*, (12 C.W.N., 74), followed ... 366
Balabux v. *Rukhma Bai*, (I.L.R., 30 Calc., 725), referred to 482
Banh Bai v. *Manni Lal*, (I.L.R., 27 All., 450), dissented from 33
Begu Singh v. *Emperor*, (I.L.R., 34 Calc., 551), referred to and followed ... 140
Bhup Indar Bahadur Singh v. *Bijai Bahadur Singh*, (I.L.R., 23 All., 155), distinguished 29
Bibijan Bibi v. *Sachi Bewah*, (I.L.R., 31 Calc., 863), followed 354
Chakrapani v. *Varahalamma*, (I.L.R., 18 Mad., 227), not followed 363
Chhagan Guman v. *Lakshman Dagdu*, (9 Bom. L. Rep., 728), approved and followed 33
Chundra Nath Dey v. *Burroda Shoondury Ghose*, (I.L.R., 22 Calc., 813), approved 33
Dakhina Mohan Roy v. *Saroda Mohan Roy*, (I.L.R., 21 Calc., 142), referred to. 439
Dalton v. *Fitzgerald*, (L.R., (1897), 2 Ch.D., 86 at p. 93), referred to ... 321
Damodara v. *Somasundara*, (I.L.R., 12 Mad., 429), considered and distinguished 8
Emperor v. *Muthukumara*, (I.L.R., 27 Mad., 525), followed 515
Emperor v. *Purushottam*, (I.L.R., 26 Bom., 418), followed 181
Fischer v. *Kamakshi Pillai*, (I.L.R., 21 Mad., 136), distinguished 19
Furzand Ali v. *Mohanth Lal Puri*, (I.L.R., 32 Calc., 268), followed 15
Gangadas Bhutter v. *Jogendra Nath Mitter*, (11 C.W.N., 403), dissented from ... 258
Ganga Dei v. *Shiam Sundar*, (I.L.R., 26 All., 69), dissented from 215
Ganga Prasad v. *Kura*, (I.L.R., 28 All., 408), not followed 345
Gnana Sambanda Pandara Sannadhi v. *David Nadar*, (14 M.L.J., 433), distinguished 25
Gokaldas Gopaldas v. *Puranmal Bemsukhdas*, (I.L.R., 10 Calc., 1035), referred to 439
Gopalasamy Chettiar v. *Fischer*, (I.L.R., 28 Mad., 328), distinguished 19
Gulraj Marwari v. *Sheik Bhatoo*, (I.L.R., 32 Calc., 796), distinguished ... 416
Haredas Sanyal v. *Saritalla*, (I.L.R., 15 Calc., 621), followed 133
Harish Chandra Tewary v. *Chandpore Company Ltd.*, (I.L.R., 30 Calc., 961) followed 465
Hem Chunder Sanyal v. *Sarnamoyi Debi*, (I.L.R., 22 Calc., 354), referred to and distinguished 446
In re *Baikant Kumar*, (3 C.L.R., 134), referred to 82
In re *Maddock. Llewelyn* v. *Washington*, [(1902), 2 Ch., 220)], referred to ... 188
In re *Subbaraya Vathyar*, (15 M.L.J., 489), referred to and followed 140
In the matter of the petition of Ram Prasad Hazra, (B.L.R., F.B., 426), distinguished 510
Jagan Nath v. *Ganesh*, (I.L.R., 18 All., 413), approved and followed 164
Jantoo v. *Radha Canto Doss*, (I.L.R., 8 Calc., 515), followed 90
Jogemaya Dassi v. *Thockomoni Dassi*, (I.L.R., 24 Calc., 473), referred to ... 25
Kanai Das Bairagi v. *Radha Shyam Basack*, (I.L.R., 26 Calc., 232), followed. 512
Karim Buksh v. *Queen-Empress*, (I.L.R., 17 Calc., 574), followed 506
Kedarnath Dutt v. *Harra Chand Dutt*, (I.L.R., 8 Calc., 420), followed 71
Kessowji Issur v. *Great Indian Peninsula Railway Company*, (I.L.R., 31 Bom., 381), followed 114
King-Emperor v. *Tulakhan*, (I.L.R., 30 All., 334), dissented from 515
Kishori Mohun Roy Chowdry v. *Chunder Nath Pal*, (I.L.R., 14 Calc., 644), followed 177
Kojiyadu v. *Lakshmi*, (I.L.R., 5 Mad., 149), followed 100

PAGE

Kolha Koer v. *Muneswar Tewari*, (I.L.R., 34 Calc., 840), referred to 82
Konwur Doorgunath Roy v. *Ram Chunder Sen* (L.R., 4 I.A., 52), referred to ... 47
Koyyana Chittemma v. *Doosy Gavaramma*, (I.L.R., 29 Mad., 225), referred to. 5
Krishna Ayyar v. *Muthukumarasawmiya Pillai*, (I.L.R., 29 Mad., 217), referred to and explained 419
Krishna Reddi v. *Srinivasa Reddi*, (5 M.H.C.R., 174), not followed 469
Kunja Behari Das v. *Khetro Pal Singh Roy*, (6 C.W.N., 38), distinguished ... 416
Kuthaperumal Rajali v. *Secretary of State for India*, (I.L.R., 30 Mad., 245), followed 461
Lalit Mohun Singh Roy v. *Chukkun Lal Roy*, (I.L.R., 24 Calc., 834 at p. 846), referred to 283
Lidlingappa v. *Hirasa*, (I.L.R., 31 Bom., 405), distinguished 97
Mallikarjuna v. *Pullayya*, (I.L.R., 16 Mad., 319), distinguished 86
Mallikarjunadu Setti v. *Lingamurti Pantulu*, (I.L.R., 25 Mad., 244), followed. 354
Manickka Odayan v. *Rajagopala Pillai*, (I.L.R., 30 Mad., 507), doubted ... 177
McCormick v. *Grogan*, (L.R., 4 E. & I., 82 at p. 97), referred to 188
McDowell & Co. v. *Ragava Chetty*, (I.L.R., 27 Mad., 71), distinguished ... 161, 472

Miya Vali Ulla v. *Sayad Bava Santi Miya*, (I.L.R., 22 Bom., 496), dissented from 12
Moholal v. *Bai Jivkore*, (I.L.R., 28 Bom., 472), doubted and distinguished ... 169
Mohun Chunder Koondoo v. *Azeem Gazee Chowkeedar*, (12 W.R., 45), followed. 86
Monindra Chandra Nandy v. *Troyluckho Nath Burah*, (9 C.W.N., 750), followed 8
Muthappa Chetty v. *Muthu Palani Chetty*, (I.L.R., 27 Mad., 80), not followed. 252
Muthumadeva Naik v. *Sivattamuthumadeva Naik*, (7 M.H.C.R., 160), approved. 386
Narayana Nayak v. *Karuppa Pillai*, (Refd. C. No. 18 of 1880 (unreported)), followed 77
Natasayyan v. *Ponnusami*, (I.L.R., 16 Mad., 99), followed 472
Orr v. *Rakkumarathi*, (I.L.R., 29 Mad., 83), explained 64
Phool Chund Lall v. *Raghubuns Suhoyee*, (9 W.R., 109), followed 153
Pichu Ayyangar v. *Oliver*, (I.L.R., 26 Mad., 260), distinguished 22
Queen-Empress v. *Amir Khan*, (I.L.R., 8 Mad., 337), followed 133
Queen-Empress v. *Bishamber Lal*, (I.L.R., 13 All., 577), approved 280
Queen-Empress v. *Muppan*, (I.L.R., 18 Mad., 401), followed 271
Queen-Empress v. *Ramasami*, (I.L.R., 24 Mad., 321), followed 272
Radha Nath Singh v. *Chandi Charan Singh*, (I.L.R., 30 Calc., 660), dissented from 157
Ramachandra v. *Narayanasami*, (I.L.R., 10 Mad., 229), followed 22
Ramakrishnamma v. *Bhagamma*, (I.L.R., 13 Mad., 56), followed 90
Ramaswami Ayyar v. *Vythinatha Ayyar*, (I.L.R., 26 Mad., 760), followed ... 386
Ramchandra v. *Krishnaji*, (I.L.R., 28 Bom., 4), referred to 415
Ramji v. *Bai Parvati*, (I.L.R., 27 Bom., 91), dissented from 215
Ram Pertab Jhowar v. *Madho Rai*, (7 C.W.N., 216), referred to 502
Rangammal v. *Echammal*, (I.L.R., 22 Mad., 305 at p. 307), referred to ... 338
Rangammal v. *Venkatachari*, (I.L.R., 18 Mad., 378), referred to 485
Rangappa Naick v. *Kamti Naick*, (I.L.R., 31 Mad., 366), referred to and explained 446
Rangayya Chettiar v. *Parthasarathy Naicker*, (I.L.R., 29 Mad., 120), followed. 425
Raru Kutti v. *Mamad*, (I.L.R., 18 Mad., 480), referred to 415

PAGE

Royzuddi Sheik v. *Kali Nath Mukerjee*, (I.L.R., 33 Calc., 985), followed ... 337
Sandhu Taraganar v. *Hussain Sahib*, (I.L.R., 28 Mad., 87), considered ... 177
Sankara Vadivelu Pillai v. *Secretary of State for India in Council*, (I.L.R., 28 Mad., 72), distinguished 117
Sarat Chendra Bisu v. *Tarivi Prosad Pal Chowdry*, (2 C.W.N., 487), approved. 5
Saunadanappa v. *Shivbasawa*, (I.L.R., 31 Bom., 354), not followed 251
Savarimuthu Pillai v. *Alagiam Pillai*, (12 M.L.J., 88), followed 90
Sayaji Bin Habaji Bhadvalkar v. *Umaji Bin Sadojai Ravut*, (3 B.H.C.R., app. C.J., 27), referred to 163
Seshammal v. *Munusamy Mudali*, (I.L.R., 20 Mad., 358), referred to 490
Seshamma Shettati v. *Chickaya Hegade*, (I.L.R., 25 Mad., 507), approved ... 164
Shan Maun Mull v. *Madras Building Company*, (I.L.R., 15 Mad., 268), considered and distinguished 8
Sreemutty Rabutty Dossee v. *Sibchunder Mullick*, (6 M.I.A., 1), distinguished 180
Sri Mohan Thakur v. *Narsing Mohan Thakur*, (I.L.R., 27 Calc., 259), referred to and approved 318
Srinivasa Ayyangar v. *Seetharama Ayyar*, (I.L.R., 19 Mad., 72), distinguished 502
Subrahmania v. *Secretary of State for India*, (I.L.R., 6 Mad., 361), referred to 12
Susya Pillai v. *Aiyyakannu Pillai*, (I.L.R., 29 Mad., 529), applied in principle. 25
Syamalarayudu v. *Subbarayudu*, (I.L.R., 21 Mad., 143), followed 439
Tirupati v. *Narasimha*, (I.L.R., 11 Mad., 210), followed 405
Tokhan Singh v. *Girwar Singh*, (I.L.R., 32 Calc., 494), followed 330
Umayammai v. *Muthiah Nadar*, (17 M.L.J., 99), distinguished 1
Umes Chunder Sircar v. *Zahur Fatima*, (I.L.R., 18 Calc., 164), followed ... 258
Unhamma Devi v. *Vaikunta Hegde*, (I.L.R., 17 Mad., 218), followed 262
Upendra Lal Mukerjee v. *Girindra Nath Mukerjee*, (I.L.R., 25 Calc., 565), not followed 443
Vallabha Valiya Rajah v. *Vedupuratti*, (I.L.R., 19 Mad., 40), considered ... 354
Vasudeva Shanbog v. *Narain Pai*, (I.L.R., 2 Mad., 356), followed 1
Vedachalla Gramany v. *Boomiappa Mudaliar*, (I.L.R., 27 Mad., 65), distinguished 62
Venkata v. *Rama*, (I.L.R., 8 Mad., 249), referred to 526
Venkatarama Chetty v. *Emperor*, (I.L.R., 28 Mad., 17), referred to 409
Venkoba v. *Subbanna*, (I.L.R., 11 Mad., 151), not followed 405
Yaramati Krishnayya v. *Chundru Papayya*, (I.L.R., 20 Mad., 326), referred to 485

CHARTER ACT, s. 15, and LETTERS PATENT, Cls. 28, 29—*Power of High Court to order stay of proceedings initiated under s. 476 of the Code of Criminal Procedure:*

The High Court has power, under section 15 of the High Courts Act, and under clauses 28, 29 of the Letters Patent, to stay proceedings, when action, under section 476 of the Code of Criminal Procedure, is taken by a Court subject to its powers of superintendence. Where a Court, in a Civil suit, finds a document to be a forgery and, while an appeal against its decision is pending, takes proceedings in the Criminal Courts under section 476 of the Code of Criminal Procedure, the High Court will direct further proceedings in the Criminal Court to be stayed, if, on a consideration of the circumstances, it is satisfied that such proceedings are oppressive and will prevent the party from conducting his appeal. *In the matter of the Petition of Ram Prasad Hazra*, (B.L.R., F.B., 426), distinguished.

Jogiah v. *Emperor* 510

PAGE

CIVIL PROCEDURE CODE—ACT XIV OF 1882, ss. 2, 103, 556, 558, 584, 588 (27) —*Order dismissing suit or appeal for default under section 102 or 556 respectively not a 'decree' and not appealable under s. 584:*

A decision dismissing a suit or appeal for default of plaintiff's or appellant's appearance under sections 102 and 556 of the Code of Civil Procedure respectively is not a 'decree' within the meaning of the definition in section 2 of the Code; and such decision in a suit or appeal is not appealable under the general provisions of section 540 or 584 of the Code. *Radha Nath Singh* v. *Chandi Charan Singh*, (I.L.R., 30 Calc., 660), dissented from. *Ablakh* v. *Bhagirathi*, (I.L.R., 9 All., 427), dissented from. The plaintiff or appellant has ample remedies provided in such cases by sections 103 and 588, and the Legislature could not have intended that appellants should, in addition, have the power of appealing under section 584 of the Code.

Dakshinamoorthy Pillai v. *The Municipal Council of Trichinopoly* 157

2. ——————————, s. 13, Expl. II and s. 42.—Res judicata—*Person claiming property as heir of another might and ought to set up all the kinds of relationship in one suit:*

On the question whether a person who sued to recover property as the reversionary heir of the deceased on an alleged relationship to the deceased is, when such suit is dismissed, debarred by section 13, Explanation II of the Civil Procedure Code, from bringing another suit for the same property as reversionary heir under a different kind of relationship:—*Held* by WALLIS and MILLER, JJ. (Chief Justice, dissenting) that such subsequent suit was barred. *Per* Sir ARNOLD WHITE, C.J.—The question whether a matter "ought" to have been made a ground of attack within the meaning of section 13, Explanation II of the Civil Procedure Code, will depend on the facts of each case. Were the two different kinds of heirship under which a person claims property cannot co-exist, he is not bound, in a suit based on one kind of heirship, to join the other in the alternative, when the former if proved will necessarily negative the latter. It cannot be said that a party "might and ought" to have claimed alternatively in the view that the ground of title set up was false or that he would be unable to prove it. *Per* WALLIS, J.—The question of what "ought" to be made ground of attack under section 13, Explanation II, must be determined by the provisions of section 42, Civil Procedure Code. The first question to be considered in such cases is whether the provisions of section 42 required the plaintiff to join in the former suit the ground of attack in the subsequent suit. Where a person claims as heir, the "matter" within the meaning of section 42 is his heirship, and he is bound to include in one suit all the different grounds on which he bases his heirship "as far as practicable." It will not be practicable to join in one suit the different grounds only when the evidence in support of one ground will be destructive of the other. *Ramaswami Ayyar* v. *Vythinatha Ayyar*, (I.L.R., 26 Mad., 760), followed. MILLER, J.—The construction of the word "ought" in section 13, Explanation II of the Code of Civil Procedure, must, to a great extent, depend on considerations of hardship and inconvenience caused to the parties. There is no hardship or inconvenience in requiring a plaintiff suing as heir to state all the facts on which he bases his heirship, even though it may result in the presentation of an alternative case, while great inconvenience and hardship may be caused to the defendant by allowing the plaintiff to keep a ground in reserve. *Muthumadeva Naik* v. *Sivattamuthumadeva Naik*, (7 M.H.C.R., 160), approved.

Masilamania Pillai v. *Tiruvengadam Pillai* 385

3. ——————————, s. 17, Expl. III:—*See* "JURISDICTION."

4. ——————————, ss. 26, 28—*The words 'same matter' in s. 28 wider than the words 'same cause of action' in s. 26—Suit sustainable against several defendants if in respect of 'same matter' although in respect of several causes of action:*

The words 'same matter' in section 28 of the Code of Civil Procedure have a wider scope than the words 'same cause of action' in section 26

PAGE

of the Code of Civil Procedure, and a suit against several defendants is not bad for misjoinder if the suit, although in respect of different causes of action against different defendants is in respect of the same matter. The English decisions on the scope of Order XVI, Rule 4, are not applicable to cases of joinder of defendants under section 28 of the Code of Civil Procedure. *Muthappa Chetty* v. *Muthu Palani Chetty*, (I.L.R., 27 Mad., 80), not followed. A suit by the transferee of a mortgage for sale against the mortgagor, in which is also included a claim for damages against the transferor, the original mortgagee, if it should appear that any portion of the mortgage debt had been discharged by the mortgagor before the transfer and so was not recoverable from the mortgagor, is a suit in respect of the 'same matter' within section 28 of the Code of Civil Procedure, and is not bad for misjoinder.

Aiyathurai Ravuthan v. *Santhu Meera Ravuthan* 252

5. ——————————, s. 43—*Suit for land, no bar to subsequent suit for mesne profits:*

A suit for possession of land is no bar under section 43 of the Civil Procedure Code to a subsequent suit for mesne profits of such land accruing prior to the institution of the former suit. *Tirupati* v. *Narasimha*, (I.L.R., 11 Mad., 210), followed. *Venkoba* v. *Subbanna*, (I.L.R., 11 Mad., 151), not followed.

Gutta Saramma v. *Mayanti Ramudu* 405

6. ——————————, s. 108—*Section applies to a defendant who has filed written statement:*

A defendant who had filed a written statement, but had not appeared at the hearing is entitled to apply under section 108 of the Code of Civil Procedure to set aside the decree passed against him.

Muniappan Chetti v. *Balayan Chetti* 505

7. ——————————, s. 108,—*Setting aside ex parte decree—Power of Court—Decree to be set aside only so far as it affects applicant:*

On an application under section 108 of the Code of Civil Procedure by one of several defendants, against all of whom a decree *ex parte* had been passed, the Court ought not to set aside any part of the decree, which does not affect the defendant applying, but only affects those defendants who have not applied. When a decree *ex parte* had been passed against three defendants personally and against devasam property of which they were alleged to be managers, and one of the defendants applied to have the *ex parte* decree set aside, the Court can set aside only such part of the decree as affected the applicant (*i.e.*) the decree against the devasam property and the personal decree against the applicant. *Per* MUNRO, J.—The object of section 108 of the Code of Civil Procedure is that a successful applicant should be placed in exactly the same position as if no decree had been passed in the suit and the decree must be set aside so far as is necessary to achieve this object and no further. The decree ought to be set aside only in respect of matters to which the applicant could have taken objection in the suit itself. *Per* ABDUR RAHIM, J.—Section 108 of the Code of Civil Procedure *prima facie* means that the decree, so far as it gives any relief to the plaintiff against the defendant who is able to establish that he was prevented for a sufficient cause from appearing at the time of hearing, is to be set aside and not against other defendants in the suit who have not shown good cause for not appearing. The decree against the latter cannot be set aside, except to the extent to which it is inseparable from the decree against the successful applicants.

Valia Panga Achan v. *Maruthu Veera Kavundan* 454

8. ——————————, s. 232:—*See* "LIMITATION."

PAGE

9. ——————————, ss. 232, 233—*Transfer of Property Act, Act IV of 1882, s. 99—Transferee decree-holder cannot bring to sale property which the decree-holder could not bring to sale under section 99 of the Transfer of Property Act:*

A transferee decree-holder is only entitled, under section 232 of the Code of Civil Procedure, to execute the decree in the same manner and subject to the same conditions as if the application were made by the original decree-holder, and, under section 233, he holds the decree subject to any equities which the judgment-debtor might have enforced against the original decree-holder. A transferee decree-holder cannot in execution bring to sale property, which the original decree-holder is prohibited from bringing to sale by section 99 of the Transfer of Property Act. *Chhagan Gumcu* v. *Lakshman Dagdu*, (9 Bom. L. Rep., 728), approved and followed. *Chundra Nath Dey* v. *Burroda Shoondury Ghose*, (I.L.R., 22 Calc., 813), approved. *Bank Bal* v. *Manni Lal*, (I.L.R., 27 All., 450), dissented from.

Jivarathnam Mudaliar v. *Srinivasa Mudaliar* 33

10. ——————————, ss. 232, 365, 366;—*See* "LIMITATION ACT, SCHED. II, ART. 179."

11. ——————————, ss. 234, 372—*Legal representative, execution against—Transferee, after money decree against a company, if such company's properties with liabilities, cannot be proceeded against as a legal representative:*

B sued A and Co., the proprietors of a rice mill, for moneys due in respect of contracts connected with the said mill and obtained a money decree against A & Co. While the suit was pending A & Co. sold the business with all its assets and liabilities to another company C, of which A & Co. were managing agents and the suit was defended by A & Co. on behalf of C, but the fact was not brought to the notice of the Court. After decree A & Co. became insolvent and B sought execution against C as the legal representative of A & Co.:—*Held*, that B was not so entitled. Neither section 234 nor 372 of the Civil Procedure Code (supposing the latter applicable to execution) authorised such a proceeding. *Harish Chandra Tewary* v. *Chandpore Company, Ltd.*, (I.L.R., 30 Calc., 961), followed. The fact that A & Co. after the transfer of the business defended the suit on behalf of C, made no difference as the decree was merely a personal decree against A & Co. and did not profess to bind the properties of C.

The Arbuthnot's Industrials (Ltd.) v. *Muthu Chettiar* 464

12. ——————————, s. 244—*Auction purchaser not a representative of decree-holder when the question is the right of such purchaser to possession against judgment-debtor:*

The purchaser at an auction sale, held in execution of a decree, is not the representative of the decree-holder, when the question to be decided is the right of such auction purchaser to possession as against the judgment-debtor. Section 244 of the Code of Civil Procedure is no bar to a separate suit by the auction purchaser for possession of the purchased property from the judgment-debtor. *Kishori Mohun Roy Chowdry* v. *Chunder Nath Pal*, (I.L.R., 14 Calc., 644), followed. *Manickka Odayan* v. *Rajagopala Pillai*, (I.L.R., 30 Mad., 507), doubted. *Sandhu Taraganar* v. *Hussain Sahib*, (I.L.R., 28 Mad., 87), considered. *Obiter*:—The purchaser from a decree-holder is, but the purchaser at Court sale is not, a representative of the decree-holder for the purposes of section 244.

Krishna Satapasti v. *Sarasvatula Sambasiva Row* 177

13. ——————————, s. 244—*Claim for damages by auction purchaser against judgment-debtor and others for injury done to property purchased after confirmation of sale not a question relating to execution within section 244:*

Where after confirmation of a sale of property in execution at a Court-auction and before delivery of possession to the auction purchaser, the judgment-debtor and others not parties to the decree trespass upon such property and cause injury to it, the claim of such auction purchaser for damages in respect of such injury, is not a 'question relating to the execution of the decree' within section 244 of the Code of Civil Procedure and must be enforced by separate suit and not in execution proceedings. *Obiter*: Even supposing that such a claim was one relating to execution, the auction purchaser is entitled but not bound to implead all the wrong doers in one suit and ought not to be compelled to proceed against the judgment-debtor under section 244 and against those not parties by a separate suit.

Kolintavita Mama Amma v. *Kolintavita Haji Kandi* 37

14. ——————————, ss. 244, 278—*When judgment-debtor objects as trustee, claim falls within s. 278 and the order on such claim is not appealable—Decree directing sale Waqf property valid:*

When the judgment-debtor or his representative objects to the attachment and sale of property in execution on the ground that he holds the property in trust for some third person or a charitable institution, the claim must be investigated under the provisions of sections 278—283 of the Code of Civil Procedure and not under section 244. An order passed on such claim must be challenged by a regular suit and not by appeal. A decree directing the sale of waqf property may, in certain circumstances, be valid. Such a decree is not against public policy and is not necessarily *ultra vires*.

Budrudeen Sahib v. *Abdul Rahim Sahib* 125

15. ——————————, s. 258—*Agreement discharging one of several defendants on adjustment and must be certified:*

Where, after a decree is passed against several defendants, the decree-holder enters into an agreement with some of the defendants, by which the latter are discharged from liability under the decree, such agreement is an adjustment, in part, of the decree and must be certified to the Court under section 258 of the Civil Procedure Code.

Mahomed Khan Bahadur v. *Mahomed Munawar Sahib* 467

16. ——————————, s. 266—*Attachable interest—Hindu Law—Right of residence of widow in family house is personal and cannot be attached in execution:*

The right of a widow, under the Hindu Law, to reside in her husband's family house, is a purely personal right and cannot be transferred. Such right cannot be attached in execution under section 266 of the Code of Civil Procedure.

Salakshi v. *Lakshmayee* 500

17. ——————————, ss. 278, 283—*Limitation Act, Act XV of 1877, sched. II, art. 11—Order dismissing claim for default not an order made after investigation and need not be set aside within one year under art. 11 of sched. II of the Limitation Act:*

An order dismissing a claim presented under section 278 of the Code of Civil Procedure for default is not an order made after investigation within the meaning of that section and is not conclusive under section 283 of the Code of Civil Procedure. Article 11, schedule II, of the Limitation Act does not apply to such orders; and the party against whom the order is made can maintain a suit to establish his right within the ordinary period of limitation applicable to such suit, although he has not had the order set aside within one year. *Koyyana Chittemma* v. *Doosy Gavaramma*, (I.L.R., 29 Mad., 225), referred to. *Sarat Chendra Bisu* v. *Tarivi Prosad Pal Chowdry*, (11 C.W.N., 487), approved.

Sarala Subba Rau v. *Kamsala Timmayya* 5

18. ——————————, ss. 281, 283—*See* "LIMITATION ACT, SCHED. II, ARTS. 139, 144."

PAGE

19. ——————————————————, s. 283, suit under—*Official Assignee of insolvent judgment-debtor not a necessary party to such suit—Decree in such suit cannot declare property liable to be attached but only that it is the property of the judgment-debtor :*

Section 283 of the Code of Civil Procedure gives a statutory right of suit to the unsuccessful party in claim proceedings and when the property of the insolvent judgment-debtor which was attached in execution had vested in the Official Assignee during the pendency of such claim proceedings, the latter is not a necessary party to such suit. The decree in such suit should, where property had so vested, only declare the property attached to belong to the judgment-debtor and ought not to declare it liable to attachment.

Annapurani Ammal v. *Subramanian Chettiar* 347

20. ——————————————————, ss. 295, 490, 648—*Right to rateable distribution of creditor attaching before judgment—"Realization" of assets—Attachment before judgment if property outside jurisdiction :*

Under section 490 of the Code of Civil Procedure read with section 273, the property of a judgment-debtor attached before judgment is brought into Court by stress of the attachment, and, where a decree follows the judgment, the creditor will be entitled, without a fresh attachment, to rateable distribution out of the proceeds of the sale of such property under section 295. The fact that, subsequent to realisation, he applies for attachment of the amount, will not affect his right, as no such attachment was necessary. The operation of section 295 is not confined to cases where the property actually sold and realised belongs to judgment-debtor. It is also applicable where the attached property is a decree in favour of the judgment-debtor against others, and the money is realised in execution of such decree by the sale of property belonging to such others:—*Semble*, under section 648 of the Code of Civil Procedure, property outside the jurisdiction of a Court in which a suit is pending can be attached by such Court in anticipation of its judgment. *Ram Pertab Jhowar* v. *Madho Rai*, (7 C.W.N., 216), referred to. *Srinivasa Aiyangar* v. *Seetharama Ayyar*, (I.L.R., 19 Mad., 72), distinguished.

Amara Veerayya v. *Annamala Chetty* 502

21. ——————————————————, s. 375:—*See* "RIGHT OF WORSHIP."

22. ——————————————————, ss. 386, 622:—*See* "HIGH COURT POWERS OF SUPERINTENDENCE."

23. ——————————————————, s. 396—*Appointment of Commissioner, discretionary—Decree, finality of—Conduct of parties :*

It is not obligatory on the Court, in every case in which a decree is made for the partition of immoveables not paying revenue to Government, to appoint a Commissioner under section 396 of the Code of Civil Procedure; and such a decree is not, in all cases, to be considered pending till action is taken under section 396. Where such a decree, not followed by action under section 396, is treated by the Court and the parties as a final decree in execution proceedings, it is not open to a party subsequently to contend that the decree had not become final.

Krishnamachariar v. *Kuppammal* 540

24. ——————————————————, ss. 520, 522—*Appeal against decree on fresh award made after order of remittal under s. 520 of the Civil Procedure :*

Where the Court remits an award under section 520 of the Code of Civil Procedure and the arbitrators submit a fresh award, and the Court passes a decree in accordance with such revised award under section 522 of the Code of Civil Procedure, no appeal lies against such decree on the ground that the order of remittal under section 520 was wrong and that the original award ought to have been accepted and acted upon.

Subbiah Iyer v. *Subramania Aiyar* 479

PAGE

25. ——————————————————, s. 521—*Order setting aside award under s. 521 can be questioned on appeal against the final decree :*

Where a Court sets aside an award of arbitrators on application under section 521, Civil Procedure Code, and decides on the merits, the Court of appeal can, on appeal from the final decree, inquire into the property or otherwise of the order setting aside the award. *Ganga Persad* v. *Kura*, (I.L.R., 28 All., 408), not followed.

Achuthayya v. *Thimmayya* 345

26. ——————————————————, s. 545—*Transfer of Property Act, ss. 58, 59—Security bond given under s. 545, Civil Procedure Code, mortgaging immoveable property of above Rs. 100 in value requires registration under ss. 58, 59 of the Transfer of Proverty Act—Registration Act, s. 17, exception (i) does not apply to the case :*

A security bond given to the Court under section 545 of the Civil Procedure Code was in the following terms:—Until the disposal of my appeal in the District Court I pledge my immoveable property which is described in the schedule annexed and which is free from all encumbrances, such as mortgage, etc., to others, to the Court, for Rs. 1,382-4-9 which is the amount of the decree due to the plaintiff. If the result of the appeal be against me I hereby bind myself to allow the plaintiff to recover the whole amount of the said decree which I should pay, by my immoveable property, and, if the said property be insufficient, from me. Until the whole decree amount is discharged I will not sell or make a gift of the said property to others. I thus executed this security bond. The bond was attested by two witnesses but was not registered. The order of Court "Security accepted" was endorsed on it:—*Held*, that the security bond amounted to a mortgage within the meaning of section 58 of the Transfer of Property Act and not being registered was invalid under section 59 of the Act as a mortgage and did not affect the property. The bond was also compulsorily registrable under section 17 of the Indian Registration Act. The words "Security accepted" hereby showed that the Court thought the security sufficient. The bond does not derive its validity from these words, and it cannot therefore be brought within section 17, exception (i) of the Registration Act. *Tokhan Singh* v. *Girwar Singh*, (I.L.R., 32 Calc., 494), followed.

Nagaruru Sambayya v. *Tangatur Subbayya* 330

27. ——————————————————, s. 559—*"Interested in the result of appeal"—Where defendants exonerated and no appeal against that portion of decree, they cannot be brought on record under s. 559 :*

A party, who is not made a respondent in an appeal, is not "interested in the result of the appeal" within the meaning of section 559 of the Code of Civil Procedure, unless the decree sought to be obtained against the respondents in the appeal would have the effect of prejudicing him in some way or other. The party sought to be made a respondent in the appeal under section 559 must be shown to be interested in the result of the appeal before he is brought on the record, and the interest he may acquire as a result of being added as a respondent, will not suffice. Where a defendant has been exonerated and there is no appeal against so much of the decree as exonerates him, no decree can be passed against him in an appeal by any other party as he is not a party to the appeal and cannot be said to be interested in the result of such appeal. *Atma Ram* v. *Balk shen*, (I.L.R., 5 All., 267), followed *Upendra Lal Mukerjee* v. *Girindra Nath Mukerjee*, (I.L.R., 25 Calc., 565), not followed.

Subramanian Chetty v. *Veerabadran Chetty* 442

28. ——————————————————, s. 568—*Fresh evidence admissible when inherent defect apparent on examining the evidence—Document purporting to be executed by two persons but signed by only one are not invalid :*

The legitimate occasion for the admission of additional evidence by the Appellate Court under section 568 of the Code of Civil Procedure arises only when, on examining the evidence as it stands, some defect becomes

PAGE

apparent. Where fresh evidence is discovered outside the Court, such evidence can be imported into the case on an application under section 623 of the Code. *Kessowj Issur* v. *Great Indian Peninsula Railway Company*, (I.L.R., 31 Bom., 381), followed. A deed is not invalid because one only of several parties who purported to execute it actually signed it.

Krishnama Chariar v. *Narasimha Chariar* 114

29. ——————————————————, s. 574—*Judgment of lower Appellate Court not complying with the requirements of section—Order to be made on second appeal:*

Where, on second appeal, it is found that the judgment of the lower Appellate does not fulfil the requirements of section 574 of the Code of Civil Procedure, the proper order to be made on second appeal is one setting aside the decree, and remanding the case to the lower Appellate Court to be disposed of according to law. *Krishna Reddi* v. *Srinivasa Reddi*, (4 M.H.C.R., 174), not followed. If the Judge of the Court to which the case is remanded is the Judge who heard the appeal in the first instance, he is not bound to re-hear the appeal if he considers that the case might be properly disposed of without so doing. In such a case, his writing a judgment satisfying the requirements of section 574 will be a sufficient compliance with the order to dispose of the case according to law. But where the Judge of the Court to which the case is remanded is not the Judge who heard the appeal in the first instance, as also in cases where the Judge, though the same, considers such a course necessary for a proper disposal of the case, a re-hearing is necessary for a disposal of the case according to law.

Saravana Pillai v. *Sesha Reddi* 469

30. ——————————————————, ss. 584, 591, 623, 629—*When review granted, no appeal lies against the final decree on grounds other than those mentioned in s.* 629—*Sufficiency of the reason on which review granted no ground for appeal against the final decree:*

Sections 584 and 591 of the Code of Civil Procedure do not control section 629, and do not, where a review is granted and a final decree passed, confer a right of appeal when such appeal is not based on one of the grounds mentioned in section 629. Where an application for review of judgment is granted 'for any other sufficient reason' under section 623 of the Code, the sufficiency or otherwise of the reason is not a good ground of appeal against the order and is not, notwithstanding the general provisions of sections 584 and 591, a good ground of appeal against the final decree.

Gopala Aiyar v. *Ramasami Sastrial* 49

31. ——————————————————, s. 622—*Revisional power of High Courts over Presidency Courts of Small Causes—Presidency Small Cause Courts' Act, s.* 69—*Where the Judges differ matter must be referred to High Court:*

There is nothing in the Code of Civil Procedure or in the Presidency Small Causes Courts' Act to exempt Presidency Courts of Small Causes from the revisional powers of the High Court under section 622 of the Civil Procedure Code. Where the Judges of such Court sitting together in Full Bench to dispose of a suit take different views on a point affecting the merits of the case, they are bound under section 69 of the Act to refer the matter of the opinion of the High Court and ought not to deal with the matter finally. Where the order of the Full Bench, on the application of the party for a retrial, fully deals with all the points arising for decision in the suit itself without granting a formal order for retrial, the absence of such formal order is immaterial, and the Judges must be considered to have sat together in the suit within the meaning of section 69. The substantial effect of the order and not its mere form must be considered. *Seshammal* v. *Munusamy Mudali*, (I.L.R., 20 Mad., 358), referred to.

Rangiah Naidu v. *Rungiah* 490

PAGE

COMPROMISE—*Claim not frivolous or vexatious—Right to set aside—Transfer of Property Act, s.* 6 (*a*)—*Release of Reversionary right—Succession Act, s.* 82*:*

A compromise entered into between parties, litigating on doubtful rights under a document, cannot be impeached by one of the parties to it on the sole ground that the party whose right is admitted by the compromise had in fact no such right under the document, when it is not shown that such right was set up frivolously or vexatiously or that there was misrepresentation or surprise. Where the compromise is deliberately entered into and the party admitting the right receives valuable consideration for recognising such right, he will be bound unless he can show that such compromise was illegal or void. A compromise between a widow and a reversioner, by which the latter admits that the former takes an absolute interest under the will of her deceased husband, does not effect a *transfer* by the latter of his reversionary right, as the existence of any such right is negatived by the compromise and the transaction does not fall within section 6 (*a*) of the Transfer of Property Act, as a transfer of a mere *spes successionis*. The acceptance by the widow of a release from the reversioner, in accordance with the terms of the compromise is not an acknowledgment by her of any right in the reversioner but an arrangement by which she gives something to avoid disturbance. In the case of wills by Hindus to which the provisions of section 82 of the Succession Act apply, a gift, *simpliciter*, of immoveable property by a husband to his wife will convey the whole interest of the husband, unless it appears that only a restricted interest was intended for her.

Olati Pulliah Chetti v. *Varadarajulu Chetti* 474

CONFESSION:—*See* "MISDIRECTION TO JURY."

CONTRACT ACT—ACT IX OF 1872, ss. 69, 70—*Money paid for income-tax by the person assessed and on whom demand is made cannot under these sections be recovered from a person who is alleged to be the party really liable to pay:*

When the income-tax authorities assess a person in respect of certain income alleged to be derived by him and recover the tax so assessed from him, such person cannot, under section 69 or section 70 of the Contract Act, recover the amount so paid from another person on the ground that such other was in actual receipt of the income. Section 69 cannot apply, as the latter person, not being assessed was not legally bound to pay the tax and section 70 cannot apply as the person paying the tax did so on his own account and not on behalf of another.

Raghavan v. *Alamelu Ammal* 35

2. ——————————————————, s. 74—*Bond given for the performance of public duty, but not under the provisions of any law not within exception to s.* 74 *of Contract Act—Right of suit—Civil suit maintainable in respect of act amounting to criminal offence—Limitation Act, Act XV of* 1877, *sched. II, arts.* 6, 115—*Local Board's Act* (*Madras*), *ss.* 162-*C and* 162-*D do not bar a civil suit on contract:*

An agreement between a contractor and a Local Board contained the following terms:—As I have taken over under contract for Rs. 406 the right to collect the fees on the articles brought for sale in Udipi market from 1st April 1902 to 31st March 1903, I am bound to act according to the following conditions:—I am not entitled to collect more than the undermentioned rate of fees from the persons seated and trading on the site of the fair.

Rate of fees.

	Rs.	A.	P.
Each head-load	0	0	2
„ cart-load	0	2	0

I am bound to put up a board with the rates of fees to be collected by me and my name in English and Canarese in a public place in the market. If I, my agent, or servant were to act contrary to the above regulations, I

PAGE

shall be liable to pay a fine not exceeding Rs. 50 imposed by the President of the Taluk Board, or I am not entitled to object if my gutta is put up for auction again subject to the loss that may be sustained by the Taluk Board. Under the terms of the above contract, the President of the Taluk Board imposed on the defendant a fine of Rs. 20 on 4th November 1902 in respect of illegal excessive collections made by his agent. The defendant not having paid the fine, the President instituted a civil suit for the amount of the fine on 4th January 1904:—*Held*, that the suit was maintainable although the acts of the defendant's agent amounted to a criminal offence and no criminal proceedings were taken against the agent. It is doubtful whether the doctrine that a person injured by a felonious act cannot seek civil redress without prosecuting the felon in the criminal Courts, applies in India; and the doctrine does not apply where a principal is sued in the civil Courts in respect of the wrongful acts of his agent. *Held also*, that the agreement in question was not a bail bond or recognisance within the meaning of the exception to section 74 of the Contract Act, and though given for the performance of a public duty, it was not given under the provisions of any law. The exception to section 74 did not apply and the plaintiff was entitled to reasonable damages under the section. *Held also*, that the suit was based on contract and for purposes of limitation fell within article 68 or 115 of schedule II of the Limitation Act and not under article 6 of the schedule. *Held further*, that the penal clauses of sections 162-C and 162-D of the Local Board's Act did not preclude the plaintiff from suing the defendant on his contract.

The President of the Taluk Board, Kundapur v. *Burde Lakshminarayana Kampthi* 54

3. CONTRACT ACT, s. 221;—*See* "INDIAN COMPANIES ACT, s. 149."

4. ——————, s. 251;—*See* "PARTNERSHIP."

COURT, JURISDICTION OF—*Has power to review wrong order passed by it—Civil Procedure Code, s. 622—No interference where right result has been reached:*

A Court which has dealt with a suit under a wrong section has power to review and set aside its order for sufficient reason. The High Court will not interfere under section 622, Civil Procedure Code, where the lower Court has, in so setting aside its previous order, arrived at the right result, though it purported to act under a wrong provision of the Code.

Bollapragada Narayana Row v. *Bollapragada Janaki Ramiah Garu* 414

COURT FEES ACT, VII OF 1870, s. 7, cl. (4) *c*, and art. 17 (6), sched. II—*Registration Act, s. 77—Suits Valuation Act, s. 8—Suit for registration of document under s. 77 of Registration Act does not fall for purposes of Court fees within s. 7, cl. (4) c of the Court Fees Act, but under art. 17 (6) of sched. II of the Act—Such suit to be valued for purposes of jurisdiction on the value of the property:*

A suit for registration of a document under section 77 of the Registration Act is not, for the purposes of payment of Court fees, a suit for a declaratory decree with consequential relief within section 7, clause (4) *c* of the Court Fees Act, but is a suit in which it is not possible to estimate at a money value the subject-matter in dispute, within article 17 (6) of schedule II of the Act. The Court fee payable in such cases is a fixed fee of 10 rupees. *Juntoo* v. *Radha Canto Doss*, (I.L.R., 8 Calc., 515), followed. *Savarimuthu Pillai* v. *Alagiam Pillai*, (12 M.L.J., 88), followed. The question of valuation for purposes of jurisdiction is not in such cases to be decided under section 8 of the Suits Valuation Act. The value in such cases will be the value of the interest created by such document. *Ramakrishnamma* v. *Bhagamma*, (I.L.R., 13 Mad., 56), followed.

Ramu Aiyar v. *Sankara Aiyar* 89

PAGE

2. ——————————————, s. 7, cls. 5, 11 (E)—*Suit against landlord and other persons claiming under him by lessee of melvaram rights falls under s. 7, cl. V, and not under cl. XI (E):*

A suit by the lessee of melvaram right to recover possession from his landlord and others claiming through the landlord falls within section 7, clause V of the Court Fees Act, as a suit for possession of land. Such a suit does not fall within section 7, clause XI (E), as clause XI applies to suits between tenant and landlord only, and the wording of clause XI (E) makes it applicable only to persons in actual physical occupation and not to persons having the melvaram rights only. *Furzand Ali* v. *Mohanth Lal Puri*, (I.L.R., 32 Calc., 268), followed.

Palaniappa Chetti v. *Sithravelu Servai* 14

3. ——————————— —, s. 31—*Power of Appellate Court to set aside order under s. 31 of Court Fees Act:*

An order under section 31 of the Court Fees Act directing the accused who was convicted of a non-cognizable offence to rapay to the complainant the fee paid by him on the complaint is not part of the sentence passed on the accused for the offence. On appeal against such conviction it is not competent to the Appellate Court to set aside the order under section 31 of the Court Fees Act.

Emperor v. *Maddipatla Subbarayudu* 547

COURT OF WARDS ACT (MADRAS)—*Act I of 1902 and rules 3 and 7 of rules framed thereunder—Regulation Collector, power of, to reject claims as barred:*

Where, under the provisions of the Court of Wards Act and the rules framed thereunder, a Regulation Collector and a Decree Collector have been appointed and a claim is duly presented to the former before the expiry of the period prescribed for enforcing the same by a civil suit, he cannot by keeping such claim pending before him until a suit on it would be barred, subsequently refuse to pay it on the ground that it is barred by limitation. In such cases, the claimant can obtain an adjudication of the Courts on his claim without resorting to a civil suit when the Regulation Collector is called on by the Decree Collector under rule 3 of the rules to 'furnish him with full particulars of all claims notified to him,' it is his duty to 'thereupon furnish him (the Decree Collector) with such particulars.' If the claim was disputed, it was the duty of the Decree Collector under rule 7 to refer the matter to the Civil Court and the matter that could properly be referred will be whether the claim was legally enforceable *at the time it was presented to the Regulation Collector.* If the Court decides that it was so enforceable, the Decree Collector was bound to place it on the list and proceed to discharge it according to the provisions of the Act and rules. The reference to the Civil Court is not to be regarded as the institution of a suit and section 4 of the Limitation Act will not apply:—*Semble*, where no Decree Collector is appointed, the party whose claim is disallowed by the Court of Wards, will have no remedy, but to file a civil suit. The provisions of section 4 of the Limitation Act will then apply and the exclusion of the time during which the claim was pending before the Regulation Collector cannot be claimed under section 14 of the Limitation Act.

The Regulation Collector of Uthumalai Estate v. *Subbier* 495

2. ——————————————, ss. 43, 57—*Dispossession of usufructuary mortgagee—Termination of possession of Court of Wards—Usufructuary mortgagee's right—Negotiable Instruments in the name of Manager of Court of Wards—Right of suit—Real payee:*

Where the Court of Wards assumes superintendence of the estate of a disqualified proprietor, and, in exercise of the powers conferred by section 43 of the Court of Wards Act, ousts an usufructuary mortgagee from possession, and the manager of the Court, in the course of his management, takes from the tenants of the property, promissory notes payable to himself or order for the rents and profits of the mortgaged premises, it

PAGE

is competent to such mortgagee or his heirs to maintain a suit on such promissory notes when the Court's superintendence comes to an end and it delivers to the mortgagee the promissory notes without however endorsing or otherwise assigning the same in writing. Dispossession of an usufructuary mortgagee under section 43 of the Act does not convert the usufructuary into a simple mortgage. *Per* MILLER, J.—The position of the Court of Wards on the dispossession of the usufructuary mortgagee, is analogous to that of a receiver for the collection of rents and profits, in respect of such mortgaged properties. The real payee of the promissory note is the landlord by his agent, the manager. Before dispossession the mortgagee was the landlord for the purpose of collecting rents and profits, and subsequent to dispossession, the Court of Wards to such extent was the landlord. When the Court's superintendence terminated, its receivership came to an end and the mortgagee as the landlord was the real payee entitled to sue and recover on the promissory notes.

Sowcar Lodd Govinda Doss v. *Lepati Muneppa Naidu* 534

CRIMINAL PROCEDURE CODE, ACT V OF 1898, ss. 36, 107—*Magistrate to whom person is not sent under s.* 107 (3) *cannot exercise the power of committing to custody under s.* 107 (4)—*Section* 36 *does not confer such power :*

A Magistrate has no jurisdiction to remand a person to custody under section 107 (4) of the Criminal Procedure Code when such person is not sent to him by another Magistrate under section 107 (3). Section 36 of the Code cannot, when read with section 107 (3), be construed as conferring such jurisdiction on a District Magistrate.

Chidambaram Pillai v. *Emperor* 135

2. ———————————————, **s. 117 (4)**—*Parties in conflict with one another cannot be dealt with in one enquiry—Such joinder illegal :*

Two or more persons are not 'associated together in the matter under enquiry' within the meaning of section 117 (4) of the Criminal Procedure Code when there is a conflict between them, and they cannot therefore be dealt with in the same enquiry under the provisions of that section. Such a joinder is not a mere irregularity but an illegality which will vitiate the proceedings.

Ganapathi Bhatta v. *Emperor* 276

3. ———————————————, **ss. 123, 397**—*Sentence of imprisonment on person already in prison under s.* 123 *:*

A person committed to prison under section 123 of the Code of Criminal Procedure is not undergoing a 'sentence' of imprisonment. Where such a person is convicted of an offence and sentenced to a term of imprisonment, such term cannot, under section 397 of the Code Criminal Procedure, be made to commence on the expiry of the period for which he has been committed to prison under section 123, but must commence from the date of the order. *Emperor* v. *Muthukumara*, (I.L.R., 27 Mad., 525), followed. *King-Emperor* v. *Tulakhan*, (I.L.R., 30 All., 334), dissented from.

Joghi Kannigan v. *Emperor* 515

4. ———————————————, **ss. 133, 136, 140**—*Where order under s.* 133 *not complied with, prosecution substainable under s.* 136 *without notice under s.* 140—*Order under s.* 133 *cannot direct works to be done which are not necessary for the safety of the public :*

Where an order issued by a Magistrate under section 133 of the Criminal Procedure Code is not complied with or protested against within the time fixed by the order, a prosecution of the person disobeying under section 136, is sustainable without notice under section 140. Where a well adjoining a road is dangerous to the public as well as to the existence of the road, an order under section 133 can direct the construction of such works only as are necessary for the safety of the public and not of works necessary for the safety of the road. *Queen-Empress* v. *Bishamber Lal*, (I.L.R., 13 All., 577), approved.

Aluvala Guruviah v. *Emperor* 280

PAGE

5. ———————————————, **s. 145**—*Magistrate holding inquiry under section* 145 *cannot direct Subordinate Magistrate to take evidence—Order based on such evidence void as made without jurisdiction :*

A Magistrate holding an inquiry as to possession under section 145, clause 4 of the Code of Criminal Procedure, is bound to take the evidence himself and cannot delegate to a Subordinate Magistrate the duty of recording such evidence. An order of such Magistrate based solely and substantially on evidence recorded by a Subordinate Magistrate is not an order based on legal evidence and is void as made without jurisdiction. In re *Baikant Kumar*, (3 C.L.R., 134), referred to. *Kotha Koer* v. *Muneswar Tewari*, (I.L.R., 34 Calc., 840), referred to.

Arumuga Govindan v. *Venkatasubbier* 82

6. ———————————————, **s. 145**—*Mere delivery certificates to purchaser at Court sale without proof of delivery of actual or symbolical possession of property not sufficient to prove possession :*

A purchaser at a Court sale of immoveable properties, to whom delivery certificates have been granted, but to whom possession either actual or symbolical was not delivered cannot, on the strength of such certificates alone, be declared to be in possession of such properties in proceedings under section 145 of the Criminal Procedure Code. *Gulraj Marwari* v. *Sheik Bhatoo*, (I.L.R., 32 Calc., 796), distinguished. *Kunja Behari Das* v. *Khetro Pal Singh Roy*, (6 C.W.N., 38), distinguished.

Ragava Aiyangar v. *Krishnasami Aiyar* 416

7. ———————————————, **s. 145**—*Possession by the manager of a joint Hindu family can be protected by a Magistrate by proceedings under s.* 145 *of the Code :*

The managing member of a coparcenary governed by the Mitakshara law has a recognised position of superiority with well-defined rights of management and possession independent of the consent of the other members of the coparcenary. A Magistrate has jurisdiction to protect a manager in such possession by proceedings under section 145, Criminal Procedure Code. *Sri Mohan Thakur* v. *Nersing Mohan Thakur*, (I.L.R., 27 Calc., 259), referred to and approved.

Bhaskari Kasavarayadu v. *Bhaskaram Chalapatirayudu* 318

8. ———————————————, **ss. 195, 235**—*No sanction required when the actual offence charged is not one for which sanction is necessary under s.* 195 *of the Code of Criminal Procedure, though the facts alleged disclose an offence for which no prosecution can be entertained without sanction under that section :*

The agent of a decree-holder accompanied an Amin to execute the decree and was obstructed and assaulted in endeavouring to effect execution. The agent applied to the Court for sanction to prosecute for an offence under section 186, Indian Penal Code, and on the sanction being refused, he presented a complaint against the party who assaulted him for offences under sections 323 and 355 of the Indian Penal Code :—*Held*, that no sanction under section 195 of the Code of Criminal Procedure was necessary, although the facts alleged disclosed an offence under section 186 of the Indian Penal Code. When in the course of the commission of an offence for which no prosecution can be entertained without sanction, other offences, which may form the subject of separate charges under section 235 of the Code of Criminal Procedure, and for which no sanction is required, are committed, a complaint in respect of the latter offences can be entertained without sanction being obtained for the former.

Kristna Pillai v. *Krishna Konan* 43

———————————————, **ss. 197, 537**—*No sentence of competent Court to be reversed for want of sanction under s.* 195 *:*

The words 'subject to the provisions hereinbefore contained' in section 537 of the Code of Criminal Procedure must not be construed in such a

PAGE

way as to nullify the provisions of clause (*b*) of the same section that no sentence of a Court of competent jurisdiction shall be reversed on appeal 'for want of any sanction required by section 195.' Want of sanction under section 195 is no ground on appeal for setting aside a conviction after trial for any offence mentioned in the section.

Perumalla Nayudu v. *Emperor* 80

10. ———————————————, s. 253—*Order of discharge not a 'judgment'—Competency of Magistrate after discharge to take frerh proceedings:*

It is competent to a Magistrate who has discharged an accused under section 253 of the Code of Criminal Procedure to take fresh proceedings and issue process against the person discharged in respect of the same offence without such order being set aside by a higher Court. *Per* PINHEY, J.—An order of discharge is not a 'judgment.' A 'judgment' is an order in a trial terminating in either the conviction or acquittal of the accused. The principle of *autrefois acquit* can have no application where an accused is discharged under section 253, as there can be no trial when the accused is discharged.

Emperor v. *Maheswara Kondaya* 543

11. ———————————————, ss. 257, 537—*Refusal of Magistrate to issue process to witnesses where none of the grounds mentioned in s. 257 exist is illegal:*

The refusal of a Magistrate to issue process to witnesses named by the accused, when such refusal, in regard to any particular witness, is not based on any of the grounds mentioned in section 257 of the Code of Criminal Procedure, is an illegality which cannot be cured by section 537 of the Code. A conviction under such circumstances is illegal and will be set aside. *Emperor* v. *Purushottam*, (I.L.R., 26 Bom., 418), followed.

Narayana Mudaly v. *Emperor* 131

12. ———————————————, ss. 337 (2), 339—*Accused to whom pardon tendered ought to be examined as a witness and not be put into the dock at once:*

An accused person to whom pardon has been tendered and who has accepted such pardon, ought not, when he shows an intention not to give the evidence which he has led the prosecutio nto expect, to be put back into the dock without being exam ined as a witness. He should, under such circumstances, be examined as a witness as directed by section 337 (2) of the Criminal Procedure Code, and then dealt with under section 339 of the Code. Such a person should, if tried, be tried separately and after the trial of the other accused is over. *Queen-Empress* v. *Ramasami*, (I.L.R., 24 Mad., 321), followed.

Arunachellam v. *Emperor* 272

13. ———————————————, ss. 394, 395—*Magistrate cannot award imprisonment in lieu of whipping when on certificate of the Medical officer before infliction of whipping the sentence of whipping is reduced:*

The power of a Magistrate under section 395 of the Code of Criminal Procedure to award imprisonment in lieu of whipping is confined to cases in which under section 394 a sentence of whipping is wholly or partially prevented from being executed. Such power only exists when, under section 394 (1), a Medical officer present certifies that the offender is not in a fit state of health to undergo such punishment or when under section 394 (2) during the execution of the sentence a Medical officer certifies that the offender is not in a fit state of health to undergo the remainder of the sentence. There is no provision of law which authorises a Medical officer to certify, *before the infliction* of whipping, that the prisoner is fit to undergo only a smaller number of stripes than that actually ordered. Where in consequence of such a certificate a smaller number of stripes is inflicted, the Magistrate has no power to award imprisonment in lieu of the whipping not inflicted.

The Public Prosecutor 84

PAGE

14. ———————————————, ss. 407, 428—*District Magistrate may withdraw part-heard appeals—Such Magistrate not bound to examine witnesses summoned:*

Section 407 of the Criminal Procedure Code places no restriction on the power of the District Magistrate to withdraw appeals from Subordinate Magistrate, and it is competent to him to withdraw part-heard appeals. There is nothing in section 428 of the Code which renders it obligatory on the District Magistrate so withdrawing an appeal to examine witnesses summoned by the Subordinate Magistrate from whom the appeal is withdrawn.

Alagu Ambalam v. *Emperor* 277

15. ———————————————, ss. 435, 437, 439—*District Magistrate cannot under s. 437 set aside an order of discharge on the ground that the lower Court had not appreciated the evidence properly:*

Where a District Magistrate taking action under section 437 of the Code of Criminal Procedure comes to the conclusion that the evidence for the prosecution is reliable, and that the lower Court has erred in disbelieving such evidence and discharging the accused, the proper course for him is to refer the matter for orders to the High Court, which can deal with it under section 439. It is not open to him to set aside the order of discharge himself on the ground that the lower Court had misappreciated the evidence. *Queen-Empress* v. *Amir Khan*, (I.L.R., 8 Mad., 337), followed. *Haredass Sanyal* v. *Saritulla*, (I.L.R., 15 Calc., 721), followed. When a Court competent to decide whether the accused is guilty or not holds that he is not guilty on a consideration of the evidence adduced by the prosecution, that finding should, if at all, be set aside only by a Court competent to set aside such finding of fact, that is by the High Court under section 439 of the Code of Criminal Procedure read with section 423.

Lakshminarasappa v. *Mekala Venkatappa* 133

16. ———————————————, ss. 436, 287, 288—*District Magistrate may, under the section himself, commit for trial—Committing Magistrate in ss. 287, 288 means Magistrate who held preliminary enquiry:*

Under section 436 of the Code of Criminal Procedure, it is competent to a District Magistrate to make a committal himself or to direct a Subordinate Magistrate to make a committal. The words "Committing Magistrate" in sections 287, 288 mean merely the Magistrate holding the preliminary inquiry. Where, therefore, the District Magistrate himself commits for trial, the evidence recorded by the Subordinate Magistrate who held the preliminary inquiry will be receivable as evidence under sections 287, 288 of the Code.

Sessions Judge of Mangalore v. *Malinga* 40

17. ———————————————, s. 476—*Order under section must be made during or immediately after the conclusion of the proceedings:*

On a reference to the Full Bench whether a Magistrate has jurisdiction to take action *suo motu* under section 476 of the Code of Criminal Procedure more than two months after the termination of the proceedings before such Magistrate:—*Held* (MILLER, J., dissenting), that it was the intention of the Legislature in enacting section 476 that an order under the section should be made either at the close of the proceedings or so shortly thereafter that it may reasonably be said that the order is part of the proceeding. *Begu Singh* v. *Emperor*, (I.L.R., 34 Calc., 551), referred to and followed. In re *Subbaraya Vathiar*, (15 M.L.J., 489), referred to and followed. The earlier enactments and corresponding English Acts on the subject considered and discussed.

Rahimadulla Sahib v. *Emperor* 140

PAGE

18. ——————————————, s. 488—*Magistrate has a discretionary power in granting maintenance—Refusal to grant when woman guilty of adultery with one of lower caste not a wrong exercise of such discretion:*

Under section 488 of the Code of Criminal Procedure, the Magistrate has a discretionary power to award maintenance, and such discretion is not wrongly exercised when a Magistrate refuses maintenance to a woman who for adultery with one of a lower caste, is expelled from caste and has thus made it impossible for her husband to live with her.

Ponnayee v. *Periya Mooppan* 185

19. ——————————————, s. 565 (4)—*Penal Code, ss.* 176, 177—*Meaning of words "for the commission of an offence":*

The second part of section 176 of the Penal Code, which provides an aggravated punishment for omitting to give notice to a public servant, when such notice is required for preventing the *commission of an offence*, applies only when the object is to prevent the commission of a *particular offence*, and not of offences generally. The notice of residence required to be given by convicted persons under section 565 (4) is not required for preventing the commission of *any particular* offence and the failure to give such notice must be dealt with under the first part of section 176 of the Penal Code.

Emperor v. *Hussain Beg* 548

CUSTOM:—*See* "LANDLORD AND TENANT."

DARKHAST, GRANT OF LAND ON—*Grant good if made by competent authority, unless set aside on appeal—Omission to consult one whose opinion is not binding does not vitiate the grant:*

A grant of land purporting to have been made under the darkhast rules by the officer empowered by the rules to make the grant is binding on the Crown unless it is revoked by an officer of a higher grade on appeal. The omission on the part of the officer making the grant to consult an authority whom he is directed to consult by an order of Government, which, however, does not make the opinion of such authority binding on him, is a mere irregularity which does not invalidate the grant.

Hummade Beari v. *Secretary of State for India* 264

DECREE, FINALITY OF:—*See* "CIVIL PROCEDURE CODE, s. 396."

DEFAMATION—PRIVILEGE—*An accused person is privileged in respect of questions put in good faith for the purpose of defending himself—Publication:*

The rule of English Law "that no action of libel or slander lies whether against Judge, counsel, witnesses, or parties for words written or spoken in the ordinary course of any proceeding before any Court, or tribunal, recognised by law" will also apply to an accused person in respect of questions put by him in good faith for the purpose of defending himself. A party receiving a notice entitled to reply to the notice and state his reasons, and such reply is privileged so long as it is confined to the matter in hand and is relevant, provided the reply is not published by the person making it. Where such reply is a mere acknowledgment that the party had made the imputations complained of in the notice, relief can be claimed only in respect of the original imputations.

Pachaiperumal Chettiar v. *Dasi Thangam* 400

DISTRICT MUNICIPALITIES ACT (MADRAS)—ACT IV OF 1884, ss. 3 (27), 169, 262—*License not required under s.* 169 *when verandah or other covering erected within the limits of adjacent property:*

A public street as defined in section 3 (27) of the Madras District Municipalities Act, extends only up to the boundaries of the adjacent property. The special license under section 169 of the Act which is required in the case of projections 'over pyals and payments in front of any building or land *in a public street*' is not required in the case of verandahs and other coverings *within* the limits of adjacent property.

Narasimma Chari v. *Chairman, Municipal Council, Conjeeveram* 181

PAGE

2. ——————————————, s. 26—*Power of Municipality conferred by the section wider than that conferred by Regulation VII of* 1817 *on Revenue Board—Municipality has under s.* 26 *of Act powers of actual management and can maintain suit on bonds in the name of the superseded trustee without obtaining an assignment:*

The powers conferred on Municipality in respect of charitable endowments when action is taken under section 26 of the District Municipalities Act are wider than those conferred on the Board of Revenue by Regulation VII of 1817. Under the Regulation, the Board has only powers of superintendence but Municipalities have, under the Act, powers of actual management in addition to the power of superintendence vested by theRegulation in the Board of Revenue. It is competent to a Municipality which has taken action under section 26 in respect of a charitable endowment to maintain a suit on a bond standing in the name of the superseded trustee without obtaining an assignment of such bond.

The Chairman, Municipal Council of Rajahmundry v. *Susurla Venkateswarlu.* 111

EASEMENT ACT—ACT V OF 1882, s. 4—*Right to take water through another's land when sold by Government:*

A right to take water through another person's land whenever Government should sell such water is a right of easement within section 4 of the Easement Act. It will make no difference that water was not taken for several years because Government refused to sell or because there was no water in the source of irrigation.

Tiruvenkatachar v. *Desikachar* 532

EVIDENCE ACT, ss. 27, 30:—*See* "MISDIRECTION TO JURY."

2. ——————————ACT I OF 1872, s. 91—*Oral evidence admissable to show that a contract made by a person in his own name was made on behalf of himself and his partners:*

Under English Law, in an action on a written contract, oral evidence is admissible to show that the party liable on the contract contracted for himself and as the agent of his partners. Such partners are liable to be sued on the contract, though no allusion is made to them in it. This is also the law in India as there is nothing in section 91 of the Evidence Act to show that the Legislature intended to depart from this settled rule of English Law.

Venkatasubbiah Chetty v. *Govindarajulu Naidu* 45

3. ——————————————s. 116—*Estoppel of tenant—Where deed executed in the name of the benamidar, the real owner is the landlord within the meaning of the section—Action on deed not maintainable by benamidar:*

Where a deed is executed by a tenant in favour of a person, *benami* for another, the real owner and not the *benamidar* is the landlord whose title the tenant is estopped from denying under section 116 of the Evidence Act. In a suit by such *benamidar* for rent, the tenant can deny his right to sue on the ground that he is not the person entitled. *A benamidar* as such has no right to sue unless he can show a legal right to sue under the general law. *Kuthaperumal Rajali* v. *Secretary of State for India*, (I.L.R., 30 Mad., 245), followed.

Kuppu Konan v. *Thirugnana Sammandam Pillai* 461

FRAUDULENT CONVEYANCE—*Conveyance to defraud creditors cannot be impeached if creditors have been defrauded or if conveyance held valid by decree, though collusively obtained:*

A party who conveys property to another for no consideration to shield such property from the claims of creditors, cannot set up the fraudulent nature of the transaction when creditors have been defrauded thereby. Even where no creditors have been defrauded, if, in a suit to which the

PAGE

vendor and vendee are parties, the *bonâ fides* of the transaction is alleged and upheld, the vendor cannot, in a subsequent suit, get rid of the effect of the decree collusively obtained as between himself and the vendee, when such decree had been obtained in a proceeding intended to carry out the fraud. Where the former collusive decree had proceeded on the footing that the consideration had been paid, the purchaser, in the subsequent suit, is entitled to obtain possession without payment of purchase money, even though it is shown that it was not paid, as the effect of compelling the purchaser to pay will be to enable the vendor to get rid of the effect of the former collusive decree, which neither party can be permitted to do. *Rangammal* v. *Venkatachari*, (I.L.R., 18, Mad., 378), referred to. *Yaramati Krishnayya* v. *Chunduru Papayya*, (I.L.R., 20 Mad., 326), referred to. *Per* ABDUL RAHIM, J.—It is a clear and well-established principle of law that, when the decree of a Court has been passed upholding a certain transaction between the parties to a suit, neither the plaintiff nor the defendant will be allowed afterwards to say that the decree was the result of a collusive arrangement arrived at by them in order to carry out a scheme of fraud and that it should therefore be treated as a nullity, and the state of things which existed previously to the passing of such decree be restored. And so also, when two persons have combined to defraud a third person and succeeded in their effort without obtaining the decree of a Court, the Court will not permit one of the parties to such fraud to show that the transaction between him and the other party to the fraud was not really what it purported to be and that it does not therefore bind him. In the first case the decree is regarded as a subsisting and effectual decree so that the question covered by it is treated as *res judicata*, and in the second case, the Court refuses on grounds of public policy to help a man, who, by his act, has imposed upon another, to get rid of the consequences of that act as against himself.

Kondetia Kama Row v. *Nukamma* 485

GUARDIAN AND MINOR—*Minor bound by bond of guardian for existing liability binding on minor—Civil Procedure Code, s. 622—Material irregularity :*

A bond executed by the guardian of a minor as such but which contains only a personal covenant by the guardian to pay and does not charge the minor's estate, will nevertheless be binding on the minor, if it is executed for a pre-existing debt which is binding on him. A mistaken view of law by the lower Court is no ground for the interference of the High Court under section 622 of the Code of Civil Procedure. But where the case has not been properly heard by the lower Court and the mistake of law was probably the result of such defective trial, the High Court will interfere on the ground that the lower Court had acted with material irregularity within the meaning of section.

Duraisami Reddi v. *Muthial Reddi* 458

HIGH COURT POWERS OF SUPERINTENDENCE UNDER s. 15 OF CHARTER ART—*Civil Procedure Code, Act XIV of* 1882, *ss.* 386, 622—*High Court can interfere under s.* 15 *of Charter Act when lower Court issues commission to examine a witness on grounds other than those mentioned in the Code :*

An order, under section 386 of the Code of Civil Procedure for the examination of a witness on commission, can only be made on one of the grounds mentioned in the Code and a Court usurps a jurisdiction not vested in it by law when it orders such examination in the absence of any such ground. The High Court has power to interfere with such an order under section 15 of the Charter Act. *Obiter :* The High Court may also interfere with such an order under section 622 of the Code of Civil Procedure, although the order is only interlocutory.

Somasundaram Chettiar v. *Manicka Vasaka Desika Gnana Sammanda Pandara Sannidi* 60

PAGE

HINDU LAW—*Bandhus, preference among—Male Bandhus entitled to preference over female Bandhus, though nearer in degree—Accretions, what are—Accretions pass with estate—Adverse possession, title acquired by—Party holding under a deed or will which is invalid cannot set up a higher right than that claimable under the deed or will :*

It is settled law in this Presidency that a male Bandhu is entitled to preference over a female Bandhu even though the latter is nearer in degree. Where additions are made to an estate by a limited owner with the intention that they should form part of the estate such additions pass with the estate and not to the heirs of such owner though made with funds over which such owner has absolute powers of disposal. Where a female, having the limited interest of a daughter or widow in an estate, spends the income which is her absolute property in the erection of buildings on lands belonging to the estate, it must be presumed that she intented the buildings to be an accretion to the estate and to devolve, as such, on the persons who would be entitled to succeed to the estate. A person holding land under a deed or will, which, however, does not operate in law to pass the land in question, cannot, by such possession for more than twelve years, acquire an interest in the property different from that which he would have taken if the deed or will had been valid and operative. *Dalton* v. *Fitzgerald*, (L.R., (1897), 2 Ch.D., 86 at p. 93), referred to. A, who was entitled to an estate and to the management of a temple as hereditary trustee or dharmakarta, gave his widow B, by will, the estate 'because according to the law (Dharma Sastra) the kartaship (heirship) vests in my wife,' and he further directed her to conduct the dharmakartaship of the temple. B gave, by deed, both the estate and dharmakartaship to her daughter C 'as according to Hindu Law, you are the *chief heir* after me' : *Held*, that B, under the terms of the will of A and C, under the terms of the deed of B, took no more than a woman's limited estate under the Hindu Law both in the estate and in the dharmakartaship; and that neither B nor C could acquire by possession an interest in the property higher than that which they would have taken if the property had passed by deed or will.

Rajah Venkata Narasimha Appa Rao v. *Rajah Surenani Venkata Purushothama Jagannadha Gopala Row* 321

2. ———— ——*Conveyance by a widow to reversioner of whole life estate, validity of—Conveyance not invalid by reason of contemporaneous agreement between the widow and reversioner :*

Where a widow conveys the whole of her limited estate to the next reversioner in consideration of an undertaking by such reversioner that he would reconvey a portion of such property to a person named by the widow, the conveyance is valid and is not vitiated by such agreement. The title of such reversion and that of the person to whom the property is reconveyed in pursuance of such agreement cannot be impeached by other reversioners. *Rangappa Naick* v. *Kamti Naick*, (I.L.R., 31 Mad., 366), referred to and explained. *Hem Chunder Sanyal* v. *Sarnamoyi Debi*, (I.L.R., 22 Calc., 354), referred to and distinguished. *Per* SANKARAN NAIR, J.—The validity of the renunciation by the widow is independent of the validity of the agreement as to the subsequent disposal of the property by the alienee. The surrender by the widow of her life estate to the next reversioner is analogous to the case of a widow divesting herself of her estate by adoption; and as an adoption cannot be questioned on the ground of improper motive in the widow, so the validity of the surrender cannot be affected by her motives or by any conditions that may be imposed by her.

Challa Subbiah Sastri v. *Palury Pattabhiramayya* 446

3. ————*Gift to widow, construction of :*

When a suit brought by a Hindu widow against her deceased husband's co-parceners for possession of her divided husband's share was compromised and certain lands were given to her and another donee in equal

PAGE

shares as full owners and the instrument recited that the gift was made out of motives of generosity :—*Held*, *per* Sir ARNOLD WHITE, C.J., and MILLER, J., (WALLIS, J., dissenting), that the widow took an absolute and alienable interest in her share of the lands given. The gift being made in the same terms to the two donees, there was no reason to suppose that the gift to the widow alone was restricted. Although the suit was brought to recover only a widow's estate, it was competent to the defendant by way of compromise to convey an estate in full ownership, and where the instrument in clear words conveys such an interest, no presumption in favour of a restricted gift ought to be made from the nature of the suit. *Sreemutty Rabutty Dossee* v. *Sibchunder Mullick*, (6 M.I.A., 1), distinguished.

Sambasiva Ayyar v. *Venkataswara Ayyar* 179

4. ———————*Maintenance—Right of wife who had lived apart from her husband during his life-time to claim maintenance after his death—Father-in-law having ancestral property bound to maintain under such circumstances :*

A wife living apart from her husband without any justifying cause, is not entitled to claim maintenance from him, as in so doing she commits a breach of duty to him. After his death, however, she is entitled though she lives apart to claim maintenance from her father-in-law who has taken her husband's estate as there is no duty on her part to live with him, provided she does not live apart for corrupt purposes. *Per* WALLIS, J.—A wife living apart from her husband for no improper purpose, may, at any time, return and claim to be maintained. Her right is not forfeited but only suspended during the time she commits a breach of duty by living apart and is revived when at his death such duty ceases to exist. The Court may, under the circumstances, be justified in awarding her maintenance on a less liberal scale than it otherwise would. *Per* SANKARAN-NAIR, J.—The father-in-law is under a moral obligation to maintain his daughter-in-law, which ripens into a legal obligation against the assets in the hands of his heirs. *Pangammal* v. *Echammal*, (I.L.R., 22 Mad., 305 at p. 307), referred to. The husband is under a moral obligation to support a wife when she is living apart from no corrupt motive; and this moral obligation ripens into a legal obligation on the father-in-law when, on the death of the son, he takes ancestral property. The rights of a wife and widow respectively to maintenance, rest entirely on different grounds. The former is a personal obligation on the husband based on the identity arising from marriage relations and is not dependent on the possession of property. The right of a widowed daughter-in-law to claim maintenance from her father-in-law is based on the possession of ancestral property by the latter and cannot be defeated by any breach of duty on her part towards her husband which might disentitle her to enforce a distinct claim in respect of a different relation and on account of considerations peculiar to that relation.

Surampalli Bangaramma v. *Surampalli Brambaze* 338

5. ———————*Mother, party to murder of her son cannot succeed as heir to such son—Unchastity of mother no bar to her succeeding as heir to her son—Degradation does not involve loss of proprietary rights :*

A mother who has been a party to the murder of her son, cannot succeed by inheritance to the property of such son. Under the Mitakshara Law, female heirs other than the widow are not precluded from inheriting by reason of unchastity. *Kojiyadu* v. *Lakshmi*, (I.L.R., 5 Mad., 149), followed. Degradation, without exclusion from caste does not involve loss of proprietary rights; neither has aggravated unchastity that effect. *Per* WALLIS, J.—The unchastity of the widow is expressly laid down as a ground of exclusion in numerous texts, but there is no such authority in favour of excluding other females. Degradation does not affect proprietary rights of the degraded person since the passing of Act XXI of 1850. *Per* SANKARAN-NAIR, J.—The mother's claim to succession

PAGE

rests on consanguinity and not on religious merit and incapacity to inherit due to inability to perform sacrifices cannot therefore be presumed. Texts of Hindu Law considered.

Vedammal v. *Vedanayaga Mudaliar* 100

6. ———————, *Partition, proof of—Presumption of general division from the separation of one :*

Separate residence is not, of itself, conclusive or even strong evidence of partition. There is no presumption of a general division among all the members of a co-parcenary from the fact that one of its members has separated. *Balabux* v. *Rukhma Bai*, (I.L.R., 30 Calc., 725), referred to.

Ranganatha Rao v. *Narayanasami Naicker* 482

7. ———————, *Reversioner—Consent given* bonâ fide *and for valuable consideration by the nearest reversioner to an alienation by a widow binds actual reversioner claiming through him :*

Where the widow and the nearest reversioners execute a document by which such reversioners, *bonâ fide*, and, in consideration of the widow conveying to them a portion of the property inherited by her from her husband, give up all their right to the remaining properties, and consent to the widow dealing with such properties as she chooses, the actual reversioners after the widow's death who claim through such nearest reversioners are bound by such consent, and are estopped from questioning alienations made by the widow subsequent to such agreement. *Bairangi Singh* v. *Manokarnika Bakhsh Singh*, (12 C.W.N., 74), followed. *Per* Sir ARNOLD WHITE, C.J., and SANKARAN-NAIR, J.—A surrender by a widow in favour of the next reversioner of her interest in the estate inherited from her husband is not valid unless the widow's whole estate is extinguished. The same is the law in regard to alienations made with the consent of nearest reversioners. *Per* Sir ARNOLD WHITE, C.J.—The document in this case cannot be construed as extinguishing the widow's estate. The reversioners cannot by a general release of their reversionary right prospectively enable the widow to give an absolute title to property inherited from her husband. *Per* WALLIS, J.—The document in the present case is a conveyance by way of release by the reversioners and cannot operate to vest the property in the widow. Next reversioners cannot confer an unrestricted prospective power of alienation on the widow. The power of accelerating the reversioner's estate cannot be used by the widow as a means of enlarging her own estate or effecting alienations to strangers as it will be an abuse of the limited power vested in her. The reversioner's right to validate alienations is not derived from the power to surrender. The former is analogous to the power of sapindas to consent to an adoption; the latter is based upon the application of the English doctrine of merger. Partial alienations made by the widow will be valid if made with the consent of the next reversioners. *Per* SANKARAN-NAIR, J.—The document in this case must be construed as extinguishing the whole life estate of the widow. It amounts to a surrender of the whole to the reversioners and a reconveyance of part to the widow. A widow may alienate for necessary or for religious or charitable purposes, and in such cases, where reversioners consent, the consent is only evidence of necessity or fairness of the transaction, and it is not the consent but the existence of facts evidenced by such consent that validates the transaction. In cases not justifiable on the above grounds, an alienation made with the consent of reversioners is valid. In the last case it is the consent which validates. As however in such cases, the alienations are upheld as a logical consequence of the recognition of the widow's right of surrender, they can be upheld only where a surrender will be valid, *i.e.*, where it extinguishes the life estate. The assent of sapindas necessary to validate an alienation which does not extinguish the whole life estate of the widow, must be such consent as will suffice to validate an adoption made by the widow, *i.e.*, consent which will raise the presumption that the transaction was a fair one, justified by Hindu Law. Such consent, however, must have reference to the particular alienations sought to be impeached.

Rangappa Naick v. *Kamti Naick* 366

PAGE

8. ———————— **REVERSIONER**—*When sale by limited owner for purposes binding on the reversion, sale not to be set aside unless purchase money refunded —Right of presumptive reversioner to set aside such sale—Widow not trustee for reversioners:*

Where a Hindu widow, with a limited interest in property, sells the property under circumstances which render the purchase money binding on the revision, the actual reversioner after her death or the presumptive reversioner during her lifetime, cannot have the sale set aside without refunding the purchase money. *Obiter*, a suit to set aside such sale will be liable to be dismissed if the plaint does not contain an offer to refund. Where a presumptive reversioner sues to set aside such a sale during the lifetime of the widow without offering to refund the purchase money, it is not competent to the Court to pass a decree that, upon the widow's death, the sale should be set aside on the person then entitled to the reversion refunding the purchase money. *Phool Chund Lall* v. *Raghubuns Suhayee*, (9 W.R., 109), followed. A widow is not a trustee for the reversioner, and, in the absence of other ways of paying off debts binding on the property, is not bound to raise money on her personal security to discharge such debts, neither is she bound to mortgage the property for that purpose, if such a course would be more prejudicial to her than a sale.

Singam Setti Sanjivi Kondaya v. *Draupadi Bayamma* 153

9. ———————— :—See "CIVIL PROCEDURE CODE, s. 266."

10. ————————*Son's liability for father's debt incurred in transaction amounting to criminal offence:*

Where an undivided Hindu father acting as the administrator of a certain estate was made liable in respect of monies received by him and not properly accounted for, the undivided son cannot escape liability for such claim on the ground that the debt was the result of a criminal act of the father, unless he shows that, in respect of the particular amounts claimed, the father had made himself amenable to the Criminal Law by doing or omitting to do anything. Proof of mere omission to account, without anything more, will not suffice to exempt the son from liability. *McDowell & Co.* v. *Ragava Chetty*, (I.L.R., 27 Mad., 71), distinguished. *Natasayyan* v. *Ponusami*, (I.L.R., 16 Mad., 99), followed.

Erasala Gurunatham Chetty v. *Addepally Raghavalu Chetty* 472

11. ———————— *Son's liability for father's debts—Son liable for father's misappropriation when such misappropriation amounts only to a breach of civil duty:*

Where an undivided Hindu father misappropriates money received by him for the purpose of being paid to others in the course of a transaction entered into by him for the benefit of the family, and under circumstances which constitute such misappropriation a mere breach of civil duty and not a criminal act, the undivided son's interest in the joint family property is liable for the repayment of the monies so misappropriated to the person entitled to be paid. *McDowell & Co.* v. *Raghava Chetty*, (I.L.R., 27 Mad., 71), distinguished.

Kanemar Venkappayya v. *Krishna Chariya* 161

12. ————————*Will, construction of—Legatee must be in existence at the date of the testator's death—Appointed daughter, custom relating to—Indian Succession Act, s. 100:*

The will of a Hindu testator, to which the provisions of the Hindu Wills Act did not apply, contained, *inter alia*, the following paragraph:—"We have no male issue. As a suitable boy could not be found among the *gnatis*, no adoption has been made till now. If our wife Lakshmi Devemma Row finds a suitable boy among our *gnatis*, she shall make an adoption according to her will and in accordance with the law. If no boy is found and if our daughter Venkata Chinnayya has a son, that boy becomes a 'Douhitra karta' (heir as daughter's son) according to the law: so, that boy alone should become the 'karta' for the entire property belonging to me. According to the law the 'kartaship' rests in our wife. So, our funeral rites as well as the acts (rites) to be done subsequently should be caused to be done through our wife alone." At the testator's death his daughter was five years old. Subsequently, she had sons, all of whom predeceased her. The testator's widow died in 1893 and the daughter in 1902. The present suit was brought by the daughter's husband claiming as the heir of his eldest son, who was living in 1893 and who, it was contended, took the estate on the widow's death under the will. The plaintiff contended that under the will the daughter's son had all the rights of an adopted son:—*Held*, on the construction of the will—(1) That the testator's daughter was not 'appointed' by him to raise a son for him. The practice of 'appointing' a daughter is now generally reputed to be obsolete and it lies on the person who alleges that she was so appointed by the will to prove that such a custom exists, as the words of the will do not warrant the inference that the testator intended to revive a dead custom. (2) That the daughter's sons, not having been born at the testator's death, took nothing under the will. Section 100 of the Succession Act contemplates a power of disposition extending further in time than that allowed by the Hindu Law and the principle enacted by that section does not apply to the case.

Sri Raja Venkata Narasimha Appa Row v. *Sri Rajah Suraneni Venkata Purushothama Jaganadha Gopala Row* 310

13. ————————*Will, construction of gift to female—Gift for maintenance may be of an absolute estate—Where testator gives a female immoveable property for maintenance and makes several devises of other properties to others and adds a clause declaring the gifts to be absolute, the gift for maintenance will be an absolute gift—Devisee in possession of land under an invalid will must be presumed to prescribe for the estate given by the will:*

An absolute gift of immoveable property to a widow for maintenance is not unknown to Hindus or repugnant to their ideas of propriety. In construing a will, every portion of it must be given the full effect which, on a natural and grammatical construction of the will, must be allowed to it, and no portion of it ought to be rejected unless such a construction makes the provisions of the will inconsistent with each other or leads to results which must be repugnant to the testator's ideas of propriety. Where a Hindu testator by his will gave immoveable property to a widow stating it to be for her maintenance and, after making various other gifts, added a clause by which he declared that all the gifts under the will should be absolute, there is no such inconsistency or repugnancy in giving the clause its natural and grammatical construction by making it applicable to the gift to the widow, and she will accordingly take an absolute interest in the property. By so construing the will, the subsequent clause only removes the ambiguity in the case of all the gifts and does not alter any material portion of the will. The statement by the testator that he gave such property 'out of sympathy' will not affect the absolute nature of the estate given if there was no legal obligation on him to provide for such widow's maintenance in his will. Where a person takes possession of property under a will, which cannot legally operate to convey such property, the person so entering on possession must be presumed to prescribe for the interest which the will purports to give him; and the burden of proving that he prescribed for something less will be on the party alleging it.

Ramachandra Naiker v. *Vijayaragavulu Naidu* 349

HINDU WILLS ACT, s. 3 (paragraph 4):—See "WILL, CONSTRUCTION OF."

INDIAN COMPANIES ACT, ACT VI OF 1882, s. 61—*Contributory liable in respect of unpaid portions of calls even when the company's right to recover them is barred by limitation:*

Section 61 of the Indian Companies Act creates a new liability in the share-holders in respect of unpaid calls; and such calls can be recovered though barred by limitation before the order for winding up was made.

Vaidiswara Ayyar v. *Siva Subramania Mudaliar*... 66

PAGE

2. ——————————————————s. 149—*Contract Act, Act IX of* 1872, *s.* 221—*Lien of agent under s.* 221 *of the Contract Act not affected by winding up order under s.* 149 *of the Companies Act :*

An agent who is in possession of properties belonging to a company under an agreement by which he was to advance monies for working expenses has, in the absence of a contract to the contrary, a lien on such properties under section 221 of the Contract Act for the amounts disbursed by him and section 149 of the Companies Act does not authorise the Court to deprive the agent of his possession of the security. The making of a winding up order will not affect his right to continue in possession and make the necessary disbursements as long as his possession continues; and as regards such disbursements also he will have the same lien and stand in the position of a secured creditor against the properties of which he was in possession as agent when dispossessed by order of Court.

Chidambaram Chettiar v. *The Tinnevelly Sarangapani Sugar Mills Company, Limited* 123

INDIAN SUCCESSION ACT, s. 100 :—*See* "HINDU LAW."

2. ——————————————, ss. 101, 102 :—*See* "WILL, CONSTRUCTION OF."

INSOLVENT ACT, 11 AND 12 VICT., CAP. 21, s. 7—*All property of insolvent at date of petition vests in Official Assignee :*

Where, prior to sale of a judgment-debtor's property in execution of a simple decree for money, the judgment-debtor becomes insolvent and the vesting order under section 7 of the Insolvent Act is made, the purchaser at such sale acquires no interest in the property sold. When the vesting order under section 7 of the Insolvent Act is made :—*Held*, that the insolvent ceases to have any saleable interest in the property.

Sundarappaiyar v. *Arunachella Chettiar* 493

2. ——————, **ACT XXXII OF 1839**—*Interest not claimable where no agreement and no demand in writing—Hindu Law not applicable in cases of payment of interest :*

Interest is not claimable where there is no agreement to pay interest and no demand in writing so as to bring the case within the provisions of the Interest Act. Hindu Law does not apply in such matters as the payment of interest and the rule of law above stated applies in cases in which the parties are Hindus. *Sannaddanappa* v. *Shivbasawa*, (I.L.R., 31 Bom., 354), not followed. *Annaji Rau* v. *Raju Bai*, (6 M.H.C.R., 400), followed.

Subramania Aiyar v. *Subramania Aiyar* 250

JURISDICTION—CIVIL PROCEDURE CODE, s. 17, Expl. III—*Cause of action arises only where money is expressly or impliedly payable under the contract and not under any general rule of law :*

The rule of general law that where a contract is silent as to the place of payment, it is the duty of the debtor to seek out his creditor and pay him does not control the express provisions of section 17, explanation III of the Code of Civil Procedure, and cannot be applied in determining where, for the purposes of the section, the cause of action has arisen. The place where the cause of action arises under section 17, explanation III, is the place where money is payable, expressly or impliedly, under *the contract itself*, and not under any *general rule of law*. When a promissory note payable on demand is made at T and no place is fixed expressly, or impliedly, for payment, the mere fact that the creditor is described as residing at K which is within the jurisdiction of a Court different from that exercising jurisdiction at T does not, by virtue of the general rule of law stated above, make K the place of payment for the purposes of section 17, explanation III of the Civil Procedure Code, and the Court at K has, in the absence of evidence that the money was payable at K in the ordinary course of business, no jurisdiction to entertain a suit against the debtor who is not resident within the local limits of its jurisdiction.

Raman Chettiyar v. *Gopalachari* 223

PAGE

2. ——————*Where suit instituted against a deceased person, Courts have no jurisdiction to allow the pluint to be amended by substituting the names of the representatives of the deceased :*

There is nothing in the Code of Civil Procedure to authorise the institution of a suit against a deceased person and the Courts have no jurisdiction to allow the plaint in such a case to be amended by substituting the names of the representatives of the deceased, even when the suit is instituted *bonâ fide* and in ignorance of the death of the defendant. *Mohun Chunder Koondoo* v. *Azeem Gazee Chowkeedar*, (12 W.R., 45), followed. *Mallikarjuna* v. *Pullayya*, (I.L.R., 16 Mad., 319), distinguished.

Veerappa Chetty v. *Tindal Ponnan* 86

LAND ACQUISITION ACT—ACT I OF 1894, ss. 25, 27, 54—*Appeal lies against an award of costs under s.* 25—*Section* 27 *does not allow a pleader's fee to be fixed arbitrarily—Fees to be allowed on the valuation as laid down in the Civil Rules of Practice or according to the rules applicable to the particular Court :*

Under section 25 of the Land Acquisition Act, an award of costs is a part of the award and is appealable as such under section 54 of the Act. Section 27 does not authorise the Court to allow any amount for pleader's fee at its discretion. Where the subject-matter is capable of being valued, pleader's fees must be allowed on the scale laid down in the Civil Rules of Practice or on such other scale as may be in force for the particular Court.

Ekambara Gramany v. *Muniswamy Gramany* 328

LANDLORD AND TENANT—*Distraint for larger amount than what is due not void, but will be good for amount actually due :*

An attachment under the Rent Recovery Act by the landlord for a larger amount than is actually due is not when the patta claiming the larger amount is not altered by the Court, altogether invalid, but will hold good for the amount actually due. It may be different in the case of actual sale because by a sale the property of the tenant passes away from the tenant altogether, while in the case of an excessive attachment the aggrieved tenant can apply to the Collector for redress. ***Pichu Ayyangar*** **v.** ***Oliver*****, (I.L.R., 26 Mad., 260), distinguished.** ***Ramachandra*** **v.** ***Narayanasawmy*****, (I.L.R., 10 Mad., 229), followed.**

Periakaruppa Pillai v. *Manager of the Lessees of the Sivaganga Zamindari* 22

2. ——————————————*Forfeiture—Landlord not showing intention before suit to determine lease on the ground of forfeiture is not entitled to maintain suit for possession :*

A landlord is not entitled to maintain a suit for possession of the lands leased to a tenant on the ground of forfeiture under the terms of the lease when he does not allege or prove that, prior to bringing the suit, he did any act to show that he intended to avail himself of the forfeiture and determine the lease. *Anandamoyee* v. *Lakhi Chandra Mitra*, (I.L.R., 33 Calc., 329), followed.

Venkâtramana Bhatta v. *Gundaraya* 403

3. ——————————*No charge for second crop on dry land allowable without proof of its propriety by the landlord—Custom—Isolated transactions extending over a few years note sufficient proof of custom :*

An additional charge for a second crop grown on dry land without the aid of water supplied by the landlord is unusual, and it lies on the landlord seeking to impose it, to establish its propriety. A customary right to impose such a charge is not proved when all the evidence in support of such custom is the testimony of a single witness who says he paid it and accounts extending back to 25 years which show that demands for the additional charges were made on certain tenants, but which do not show that they were ever paid.

Kumaru Reddi v. *Nagayasami Thambichi Naicker* 17

PAGE

4.——————————*Notice determining tenancy—Denial of landlord's title after suit does not render previous notice unnecessary :*

A tenant is entitled to reasonable notice before ejectment, and fifteen days' notice to a cultivating tenant in the middle of the cultivating season is not sufficient notice. A landlord in a suit for ejectment against a tenant is bound to prove a complete cause of action when the suit was instituted, and the tenant, who for the first time denies the landlord's title in his written statement, is not by such denial disentitled to set up want of proper notice before the institution of the suit. *Abdulla Naha* v. *Moidin Kutti*, (17 M.L.J., 287), not followed. *Unhama Devi* v. *Vaikunta Hedge*, (I.L.R., 17 Mad., 218), followed.

Peria Karuppan v. *Subramanian Chetti* 261

5.——————————*Patta, grant of— Where tenant's interest is transferred to another, the transferee is entitled to a grant of patta if his transfer is in proper order and if the old tenant, after notice from the Zamindar, does not object :*

A person who claims to have a patta granted to him as transferee from a tenant is bound to produce the transfer for the inspection of the landlord, if so desired. When such transfer is in proper order and the old tenant, to whom the landlord is bound to and did give notice, does not appear to contest the validity of the transfer, it is the duty of the landlord to grant a patta to the new tenant. *Orr* v. *Rakkumarathi*, (I.L.R., 29 Mad., 83), explained.

Vadlamannati Venkatramiah Pantulu v. *Sri Rajah Venkata Rangiah Appa Row* 64

6.——————————**RENT RECOVERY ACT (MADRAS), ACT VIII OF 1865, s. 11**—*Agreement to pay special rate for particular crops is not on enhancement of rent and is not invalid under s. 11 :*

Where the landlord and tenant, in commuting the waram into a money rate, agree that the latter should pay an increased rate for certain cultivation, such agreement, even if it secures to the landlord an increased rent in consequence of improvements effected by the tenant, is not an enhancement within the implied prohibition of section 11, proviso 1 of the Rent Recovery Act, as it only secures to the landlord the benefit he would have under the waram system, to which he could revert in the absence of a contract. A custom by which an increased rate is payable on betel cultivation even when carried on by improvements effected by the tenant is not illegal or unenforceable as opposed to the policy of section 11 of the Rent Recovery Act. *Fischer* v. *Kamakshi Pillai*, (I.L.R., 21 Mad., 136), distinguished. *Gopalaswamy Chettiar* v. *Fischer*, (I.L.R., 28 Mad., 328), distinguished.

Suppa Pillai v. *Nagayasami Thumbichi Naicker* 19

7.—— ——————— —— :—*See* "LIMITATION ACT, SCHED. II, ARTS. 139, 144."

LIEN OF PURCHASER OF LAND PAYING OFF MORTGAGE—*Purchaser in possession paying off mortgage subrogated to the right of the original mortgagee, when purchase found invalid :*

A purchaser of land, who, while in possession of the land purchased, pays off an encumbrance on it, is entitled, when his purchase is found invalid, to stand in the shoes of the mortgagee whom he has paid off. *Syamalarayudu* v. *Subbarayudu*, (I.L.R., 21 Mad., 143), followed. The American Courts, when equity requires it, allow persons, paying off mortgages on properties not belonging to them, to be subrogated to the rights of the original mortgagees ; and subrogation is allowed as a matter of right for the benefit of a purchaser who has extinguished an encumbrance on the property purchase. This is the right principle to be applied in India. *Gokaldas Gopaldas* v. *Padrammal Bemsukhdas*, (I.L.R., 10 Calc., 1035), referred to. *Dakhina Mohan Roy* v. *Saroda Mohan Roy*, (I.L.R., 21 Calc., 142), referred to.

Ohama Swami Padala Anandu 489

PAGE

LIMITATION—*Adverse possession, elements of—Party wall :*

Where two adjoining houses belonging to a single owner are sold to two different persons *A* and *B*, and the partition wall between the two houses which is included in the sale to *A* is, at the time of sale, used as a support for the rafters of the house sold to *B*, the wall passes to *A* subject to such easement right. The plastering and repairing by *B* of his side of the wall do not amount to adverse possession and can be referred to the easement right. To constitute dispossession there must, in every case, be positive acts which can be referred only to the intention of acquiring exclusive control. Where the acts do not amount to dispossession of the true owner, possession follows the title.

Sundarasastrial v. *Govinda Mandarayan* 528

2. **LIMITATION ACT, Sched. II, art. II** :—*See* "CIVIL PROCEDURE CODE, SS. 278, 282."

3. **LIMITATION ACT, ACT XV OF 1877, Sched. II, arts. 6, 155** .—*See* "CONTRACT ACT, S. 74."

4 —— ——————————————————— arts. 29, 49, 62, 120—*Suits to recover proceeds of sale of moveable property wrongfully attached and sold, governed by art. 29 or 49 of sched. II of Limitation Act :*

A, *B* and *C* brought a suit against *D* and on the 10th December 1899 attached before Judgment certain paddy. *E* put in a claim petition in respect of the paddy which was dismissed on 8th March 1900. *E* then brought a suit under section 283 of the Code of Civil Procedure on 26th March 1900 against *A*, *B* and *C* for a declaration of his title to the attached property and his title was finally declared on appeal on 7th February 1903. In the meanwhile the attached property was sold and on 15th May 1900 the proceeds were distributed between *A*, *B*, *C* and also *F* who claimed rateable distribution. In a suit brought by *E* on 1st June 1903, against *A*, *B*, *C* and *F* for a refund of the sale-proceeds :—*Held* (SANKARAN-NAIR, J., dissenting), that limitation began to run from the date of the wrongful seizure ; that the suit for purposes of limitation fell within article 29 or 49 of schedule II of the Limitation Act and that it was accordingly barred by limitation. *Per* SANKARAN-NAIR, J.—The suit was not barred, as the article which applied was either article 62, or 120 of the second schedule to the Limitation Act. The wrong complained of was the payment to the defendants of the sale-proceeds to which the plaintiff was entitled. Article 29 did not apply, because so long as the property remained in the custody of the Court, it was not lost and plaintiff could not claim any compensation for its loss. The loss of the property was not a necessary consequence of the attachment, as the Civil Procedure Code contains provisions which enable the party to establish his right and recover the property attached. Article 29 only applied when the loss complained of was directly due to the seizure. Article 49 did not apply as the suit was not for any specific moveable property and the defendants had not wrongfully taken, injured or detained such property. *Per* Sir ARNOLD WHITE, C.J.—Article 29 of the second schedule which is specific in its terms applied to the suit and not the general provisions of article 62 or 120. Article 29 should not be construed as limited to claims for consequential damages and not applicable to cases where the plaintiff seeks only to recover the value of the property seized or the sale-proceeds if the property had been sold. The provision of section 283 of the Code by which a claimant may establish his right to property attached, cannot have the effect of postponing the time when limitation begins to run or of suspending time when limitation has begun to run. *Per* PINHEY, J.—The cause of action is the original wrongful seizure and article 29 or 49 applies. The time spent in proceedings under section 283 of the Code of Civil Procedure cannot be excluded in computing the period of limitation.

Damaraju Narasimha Rao v. *Thadinada Gangaraju* 491

PAGE

5. ——————————————————————arts. 62, 95, 97—*Suit to recover money obtained by deceitful misrepresentation does not fall within art.* 62 *or* 97, *but within art.* 95—*Starting point of limitation :*

A, by fraudulently representing to *B*, to whom he was indebted that a sum of money was due to *A* from *C*, induced *B* to take an assignment of the alleged debt due from *C* in satisfaction of the debt due from *A* to *B*. In a suit by *B* as assignee, against *C*, the latter in his written statement denied the existence of any debt due to *A*, and *B*'s suit was dismissed after trial on the ground that *C* owed nothing to *A*. In a suit by *B* to recover from *A* damages on the ground that *A* had, by deceitful representations, induced *B* to take the assignment :—*Held*, that the suit as regards limitation did not fall within article 62 or 97 of schedule II of the Limitation Act, but within article 95, and that the fraud must be held to have been discovered only when the Court found that no debt was due from *C* to *A* and not when *C* in the written statement denied the existence of any such debt. When it is uncertain when the fraud was discovered, the onus is on the defendant to show that the suit is out of time.

Moidiyan's son Punnayil Kuttu v. *Raman Nair* 230

6. ——————————————————————, arts. 83, 113, 166—*Suit to recover money on a covenant in a registered document not a suit for specific performance, but for damages and falls within art.* 116 *and not* 113 *of the Limitation Act :*

A and *B* exchanged lands under a registered deed which contained the following clause : "There is no dispute in respect of the said lands. If disputes should so arise, the respective party should be answerable to the extent of his private property." *A* was deprived of some of the lands he got by the exchange and he sued *B* on the above covenant for the value of the lands of which he was dispossessed. The suit was brought more than six years after the exchange and more than three but less than six years after the date of deprivation :—*Held*, that the suit was not a suit for specific performance, but a suit for compensation for breach of a contract in writing registered and for purposes of limitation, fell within article 116 and not 113 of schedule II of the Limitation Act. The rule that in actions for damages for breach of covenant of title in a sale, the breach must be held to have occurred as and from the date of sale, does not apply when there is a special contract. The provision in the deed above stated was a special contract to indemnify when deprivation took place and the period of limitation ought to be computed from such date. As the suit was brought within six years of such date, it was not barred by limitation.

Sinivasar Raghava Dikshadar v. *Rangasami Aiyangar* 542

7. ——————————————————————, arts. 139, 144—*Landlord and tenant —Transfer of Property Act, s.* 116—*Representative of a tenant by sufferance a trespasser and cannot, without his consent, be converted by the lessor into a yearly or monthly tenant—Suit for possession against such representative governed by art.* 144 *and not art.* 139 *of sched. II of the Limitation Act—Civil Procedure Code, ss.* 281, 283—*Order passed under s.* 281 *is not binding on judgment-debtor under s.* 283 *unless he is a party to the proceedings in which the order was passed :*

A tenant holding over after the expiry of his term becomes a tenant on sufferance and the landlord's assent alone will suffice to convert such a tenancy into a tenancy from year to year or from month to month according to the nature of the original case. The provisions of section 116 of the Transfer of Property Act indicate the rule which is *primâ facie* applicable in cases not coming under the Act. *Sayaji Bin Habaji Bhadvalkar* v. *Umaji Bin Sadoji Ravut*, (3 B.H.C.R., App. C.J. 27), referred to. The representatives of a tenant, on sufferance, are however mere trespassers, and the lessor cannot, by his assent alone, convert such representatives into tenants without their concurrence. English and American cases on the point referred to and considered. In a suit by a lessor to recover possession from a tenant for a term of years, time begins to run under article 139 of the Limitation Act from the expiry of the term, when the tenancy is determined within the meaning of the article.

PAGE

Adimulam v. *Pir Ravuthan*, (I.L.R., 8 Mad., 424), not followed. *Seshamma Shettati* v. *Chickaya Hegade*, (I.L.R., 25 Mad., 507), approved. Article 139 deals only with the case of persons who have been tenants and whose tenancy has determined. The representatives of a tenant on sufferance who enter on possession at his death are not tenants within the meaning of article 139 and a suit for possession against them will fall under article 144. An order made on a claim under section 281 of the Code of Civil Procedure is not conclusive against or in favour of the judgment-debtor under section 283 of the Code unless the judgment-debtor was a party to the proceedings in which the order was passed. *Jagan Nath* v. *Ganesh*, (I.L.R., 18 All., 413), approved and followed.

Vadapalli Narasimham v. *Dronamraju Seetharamamurthy* 163

8. ——————————————————————, art. 144—*Suit for possession under an arthamulgeni lease governed by art.* 144 *:*

A suit to recover possession of land leased under an *arthamulgeni* lease is not based on the *contract* to deliver possession contained in the lease deed, but on the completed *title* to possession acquired under the lease. The period of limitation applicable to such a suit is that provided in article 144 of schedule II of the Limitation Act.

Mogera Nandi v. *Parameswara Udpa* 51

9. ——————————————————————, arts. 178, 179—*No limitation as long as proceedings initiated by decree-holder are pending—Fresh application barred if presented more than three years after removal of bar :*

Where the bar to execution proceedings is removed by the order of a lower Court, the fact that an appeal is preferred against such order will not, when execution is not stayed in consequence of such appeal, prevent limitation from running against the execution-creditor until the disposal of the appeal. A fresh application for execution presented more than three years after the date of the order of the lower Court will be barred by limitation. The dismissal of an execution-petition without notice to the parties and without removing the attachment made thereunder, is a mere direction to the officers of Court to remove the application from the pending list. The execution proceedings are not closed thereby and must be considered pending. The decree-holder's right to apply for their continuance accrues from day to day and will not be barred till three years have elapsed after such proceedings cease to be pending. When an execution application is dismissed as aforesaid, a subsequent application, in so far as it asks for the sale of properties already attached under the former application is one for continuance of proceedings and not a fresh application for execution. *Kedarnath Dutt* v. *Harra Chand Dutt*, (I.L.R., 8 Calc., 420), followed.

Chalavadi Kotiah v. *Poloori Alimelammah* 71

10. ——————————————————————, arts. 178, 179—*Revenue Recovery Act (Madras) Act VIII of* 1865, *ss.* 36, 38, 40—*Applications under s.* 40 *of the Revenue Recovery Act to Civil Courts are for purposes of limitation governed by art.* 178 *of sch. II of the Limitation Act :*

Where the purchaser of immoveable property sold under section 36 of the Revenue Recovery Act, obtains a certificate as provided by section 38 of the Act, and applies to a Civil Court for delivery of possession under section 40 of the Act, such application, for purposes of limitation, is governed by article 178 and not 179 of the Limitation Act, and will be time-barred if not presented within 3 years from the time when the right to apply accrues. The effect of section 40 of the Revenue Recovery Act is to place the purchaser in the position of a decree-holder for the purpose of putting the machinery of the Court in motion to give effect to the certificate of the Revenue authority. Section 40 does not, however, by implication make the law of limitation with reference to the execution of decrees or orders of Civil Courts applicable to proceedings taken under its provisions. The grant of certificate under section 38 cannot be considered as a decree or order of a *Civil Court*, although for the purposes of section 40 it may be regarded as a decree or order. An application under

PAGE

section 40 of the Revenue Recovery Act is an application within the meaning of article 178 of schedule II of the Limitation Act. *Gnana Sambanda Pandara Sannadhi* v. *David Nadar*, (14 M.L.J., 433), distinguished. *Jogemaya Dassi* v. *Thockomoni Dassi*, (I.L.R., 24 Calc., 473), referred to. *Susya Pillai* v. *Ayyakannu Pillai*, (I.L.R., 29 Mad., 529), applied in principle.

Sambasiva Mudaliar v. *Panchanada Pillai* 24

11. ——————————————————, Art. 179—*'Application in accordance with law'—Application by representative of decree-holder whose name is not brought on record is an application in accordance with law—Civil Procedure Code, Act XIV of* 1882, *ss.* 232, 365, 366 :

A decree, dated 26th March 1898, in a certain *suit* ordered 'that *plaintiff* do recover the sum of . . . . against defendants Nos. 1, 2 and 3 and the hypothecated property' and it further ordered 'that the plaintiff is not entitled to execute the decree till fifth defendant's hypothecation is discharged by him.' The decree-holder having died, his widow who was not brought on the record applied on the 12th February 1901 to execute the decree. The application was dismissed as the fifth defendant's hypothecation was not then discharged, but was only satisfied on the 29th October 1901. The question arising in subsequent execution proceedings whether the application of 12th February 1901 was one 'in accordance with law' within the meaning of article 179 of schedule II of the Limitation Act :—*Held*, that the application was in accordance with law. The terms of the decree only precluded recovery of the decree amount from defendants Nos. 1, 2 and 3 and the hypothecated property before the fifth defendant's debt was discharged and such discharge was not a condition precedent to an application for a conditional order directing a sale on plaintiff paying off such debt. On the death of the decree-holder the right to execute the decree devolved on his widow, who was entitled, without being brought on the record, to apply under section 232 of the Code of Civil Procedure for execution, as sections 365 and 366 of the Code of Civil Procedure apply only to the case of a plaintiff dying before judgment. *Narayana Naick* v. *Karuppa Pillai*, (Referred Case No. 18 of 1880), followed.

Alagiriswami Naidu v. *Venkatachalapathy Ayyar* 76

12. ——————————————————, art. 197, cl. (4)—*Civil Procedure Code, s.* 232—*Application by transferee decree-holder to be recognised is such as a step in aid of execution in accordance with law :*

An application purporting to be under section 232, Civil Procedure Code, by the transferee of a decree, praying to be recognised as assignee plaintiff in the suit and, stating that when so recognised, he would file an execution petition, i.e., when the Court passed an order as prayed for, and the defendant does not appeal against such order, is a step in aid of execution, and an application in accordance with law within the meaning of article 179, clause (4) of schedule II of the Limitation Act.

Annamalai Mudaliar v. *Ramier* 234

13. ——————Sched. II, art. 179.—*See* "TRANSFER OF PROPERTY ACT, s. 89."

LOCAL BOARDS ACT (MADRAS)—ACT V OF 1884, s. 95—*Act throws on Local Boards the duty of making necessary improvements in roads by necessary implication—Board not liable for damage caused by such works, when not negligently carried out :*

The duty imposed on District Boards by section 95 of Madras Act V of 1884 to construct and maintain roads casts on them by necessary implication the duty of constructing and maintaining the necessary culverts and tunnels under them. This implied power to construct and maintain such culverts and tunnels is not merely permissive, to be exercised only when no injury will be caused to others thereby, but an imperative duty cast on the Board by the Act. No suit for injunction or damages will lie against

PAGE

the District Board for any injury caused by the construction or improvement of such works, when such works or improvements are necessary in the interests of the public for the maintenance of the road and there is no negligence in the carrying out of the work. *Sankara Vadivelu Pillai* v. *Secretary of State for India in Council*, (I.L.R., 28 Mad., 72), distinguished.

Aiyasami Aiyar v. *The District Board, Tanjore* 117

2. ——————————————————, ss. 162-C and 162-D :—*See* "CONTRACT ACT, s. 74."

MAINTENANCE :—*See* "HINDU LAW."

MARUMAKKATTAYAM LAW—*Gift to woman governed by such law, effect of :*

A gift of property to a woman governed by Marumakkatayam law and to her children, by their father does not of itself constitute the mother and her children a separate tarwad, but the donees take such property with the incidents of tarwad property. Where the *gift is made by a* Muhammadan husband governed by Makkattayam law to his wife, who is also governed by Marumakkattayam law, and to her children the property becomes the exclusive property of the donees with the incidents of tarwad property subject to Marumakkattayam law, and on the death of the mother it does not pass to her heirs under the Muhammadan law.

Pattatheruvath Pathumma v. *Mannamkunniyil Abdulla Haji* 228

MERCHANDISE MARKS ACT, ACT IV OF 1889—*Books are goods within the meaning of the Act—Penal Code, s.* 482—*Ingredients of offence under :*

Books are 'goods' within the meaning of the Merchandise Marks Act of 1889. *Kanai Das Bairagi* v. *Radha Shyam Basack*, (I.L.R., 26 Calc., 232), followed. Where a spurious publication by *K* of a book by *A* is identical with the genuine publication of *A*, the description in the title page of the former that it is the book of *A*, is not, if it is a trade description, untrue in a *material respect* as regards the goods to which it is applied. To constitute an offence under section 482 of the Indian Penal Code, it must be shown that the goods were marked in a manner, reasonably calculated to cause it to be believed that they were the manufacture or merchandise of, or that they belonged to a person whose manufacture or merchandise they were not or to whom they did not belong. If this is shown it will be on the accused to show that it was not done to defraud any one.

Raghavalu Naidu v. *Sundramurthi Mudali* 512

MERGER :—*See* "WILL."

MISDIRECTION TO JURY—*Confession—Evidence Act, ss.* 27 *and* 30—*Confession of an accused person, which is not the immediate cause of the discovery of stolen property in the house of another accused cannot, under s.* 30 *of the Evidence Act, be considered as against such other accused—Statement made by a witness to a Police Inspector or to an investigating Magistrate who is not the Committing Magistrate, though in the presence of the accused, not admissible as evidence :*

Under sections 27 and 30 of the Evidence Act, a confession made by one accused can be taken into consideration against another accused when such confession is the immediate cause of the discovery of some fact relevant as against such other accused; and a direction to the jury to take such confession into consideration, when it is not the immediate cause of any such discovery, is a misdirection. It is also a misdirection to ask the jury to take into consideration against the accused a statement made by a witness before a Police Inspector or before a Magistrate, who, though an investigating Magistrate, is not the Committing Magistrate, when such statement is withdrawn before the Committing Magistrate and before the Court of Session.

Sankappa Rai v. *Emperor* 127

PAGE

MORTGAGE, DECREE, FORM OF—*Decree for sale subject to prior usufructuary mortgage of plaintiff :*

A person having a usufructuary and two subsequent simple mortgages on the same property is entitled in a suit on the two latter mortgages to decree for sale of the property subject to the prior usufructuary mortgage.

Radhakrishna Iyer v. *Muthusawmy Sholagan* 530

MORTGAGE INTEREST ON—*Rate fixed by Court in suit by prior mortgagee not binding in a subsequent suit by puisne mortgagee to redeem :*

When in a suit by a prior mortgagee a decree for sale is passed which fixes the rate of interest after the date for redemption, the rate so fixed is not binding as between the prior mortgagee and a puisne mortgagee, who was not made a party to the suit. In a suit by such puisne mortgagee, for redemption against the prior mortgagee, the mortgage will be considered as subsisting and interest will be awarded on the footing of the mortgage without reference to the decree in the prior suit. *Umes Chunder Sircar* v. *Zahur Fatima*, (I.L.R., 18 Calc., 164), followed. *Gangadas Bhutter* v. *Jogendra Nath Mitter*, (11 C.W.N., 403), dissented.

Thenappa Chettiar v. *Marimuthu Nadan* 258

MORTGAGOR AND MORTGAGEE—*Puisne mortgagee, right of, to sell subject to prior mortgage—Decree in suit by puisne mortgagee—Transfer of Property Act, ss.* 51, 75, 85, 96—*Right of purchaser from first mortgagee to improvements on redemption by puisne mortgagee :*

In a suit brought on a mortgage, where all the parties interested are before the Court, it is the duty of the Court if it can to make a decree which will deal finally with all the questions raised in the suit and preclude further litigation to enforce rights arising out of the mortgage or mortgages in question in the suit. This is the obvious intention of section 85 of the Transfer of Property Act. Under section 75 of the Transfer of Property Act the prior mortgagee has the right to require the second mortgagee to redeem him or submit to a sale of whatever interest he has in the property. In a suit brought by the puisne mortgagee, to which the prior mortgagee who has also become the owner of the equity of redemption is made a party, the decree must direct the redemption by the second mortgagee and then for sale, if the prior mortgagee as owner of the equity of redemption does not redeem the second mortgage. The second mortgagee must show sufficient reason for departing from this rule and is not entitled to a decree for sale subject to the first mortgage, in the absence of special circumstances. The second mortgagee on redeeming is bound to pay the full amount due on the first mortgage, though the first mortgagee had sold his right for a smaller sum. Section 96 of the Transfer of Property Act does not support the view that the puisne mortgagee is not required to redeem the prior mortgagee when the latter is a party to the suit. Where the prior mortgagee sues for and obtains a decree for sale without making the second mortgagee a party and himself purchases the property in execution, a purchaser of the property from him cannot claim the value of improvements from the second mortgagee under section 51 of the Transfer of Property Act in a suit by the second mortgagee to enforce the rights under his mortgage. A mortgagee of property has the right to bring to sale all buildings on such property, whether erected before or subsequent to the mortgage. *Rangayya Chettiar* v. *Parthasarathi Naicker*, (I.L.R., 20 Mad., 120), followed.

Cangayam Venkataramana Iyer v. *Henry James Colley Gomperts* ... 425

MUNICIPAL ACT (MADRAS), ACT III OF 1904, s. 176, and Sched. V—*The word "capital" does not mean nominal capital but only paid-up capital—Construction of statutes—Reference under s.* 176 *of Act must state all necessary facts :*

On a reference by the Magistrate under section 176 of the Madras Municipal Act III of 1904 as to the meaning of the word "capital" in

PAGE

schedule V of the Act :—*Held*, that in the absence of any statutory definition of the word applicable in construing the Act, the word must be taken to be used in its ordinary and popular meaning, and so construed, it means the amount of money actually used in the business, *i.e.*, the paid-up capital. The fact that the word, in the Indian Companies Act, is used in the sense of nominal capital is no argument for so construing it in the Municipal Act, as the two Acts are not in *pari materia*. The underlying principle of schedule V of the Act is that taxation should be roughly proportionate to the professional incomes of individuals. The word "capital" is used in the same sense in schedule V of Act III of 1904 and in schedule A of Act I of 1884. In construing fiscal Acts, the construction most beneficial to the subject ought to be adopted. Maxwell on the 'Interpretation of Statutes,' 4 ed., pp. 2, 56, 430, referred to. *Venkatarama Chetti* v. *Emperor*, (I.L.R., 28 Mad., 17), referred to. In making references under section 176, the Magistrate ought to state all the facts necessary for the decision of the particular case.

Mylapore Hindu Permanent Fund v. *The Corporation of Madras* 408

MUTT, HEAD OF—*Power to bind mutt property—Income of mutt in the hands of successor liable for debts properly contracted :*

The position of the head of a mutt in reference to the mutt is analogous to that of the manager of an infant heir. *Konwur Doorgunath Roy* v. *Ramchunder Sen*, (L.R., 4 I.A., 52), referred to. Where debts are contracted by the head of a mutt for purposes binding on the mutt, a decree in respect of such debts may be passed against his successor charging the income of the mutt property though such debts were not expressly charged on the income of the mutt.

Srimath Daivasikamani Pandarasannidhi v. *Noor Mahomed Routhan* 47

NEGOTIABLE INSTRUMENTS ACT, s. 84 (2) :—*See* "PRESIDENCY SMALL CAUSE COURTS ACT, s. 69."

OATHS ACT—ACT X OF 1873, ss. 11, 12—*Where plaintiff agreeing to take oath subsequently refuses, Court cannot dismiss suit but must record the fact of refusal under s.* 12 *and proceed with the suit :*

The defendant in a suit agreed in the course of the trial to be bound by the statement on oath of the plaintiff as to certain facts. By an agreement in writing between the parties the plaintiff agreed to take the oath as required on a certain date ; that if he failed to do so the suit should be dismissed ; and that if the defendant prevented the taking of the oath, there should be a decree for plaintiff. Before the appointed day, the plaintiff applied to withdraw from the agreement, but the Court refused the application. The plaintiff failed to take the oath and the Court declined to allow the plaintiff to adduce further evidence and dismissed the suit :—*Held*, that the Court ought not to have dismissed the suit, but should have recorded the refusal and the reasons therefor under section 12 of the Oaths Act and proceeded with the trial. The agreement did not amount to an adjustment of the suit so as to bar further proceedings in the trial. *Umayammi* v. *Muthia Nadar*, (17 M.L.J., 99), distinguished. *Vasudeva Shambog* v. *Narain Pai*, (I.L.R., 2 Mad., 356), followed. *Per* MILLER, J., *obiter* : If by the act of the party refusing to take the oath, the other party has lost evidence which was available to him, the Court may be justified in refusing to allow the former to adduce evidence.

Moyan v. *Pathukutti* 1

PARTNERS—RIGHT OF SUIT—*One partner taking a promissory note from other members, in respect of sums advanced to the partnership can sue on the promissory note :*

Where one of several partners takes a promissory note from other members in repayment of an advance made by him to the partnership, it is competent to him to bring a suit on the note against the members executing it. It is no answer to such a suit that the general accounts of the

PAGE

partnership were not taken at the time the promissory note was given and that if such account were taken, it would appear that nothing was due to plaintiff. Such a defence amounts to a set off of an unliquidated amount, which is not allowable.

Vallamkondu Subbiah v. *Malupeddi Venkataramiah* 343

PARTNERSHIP—*Partner, power of single, to mortgage partnership property—Contract Act, s.* 251—*A single partner by objecting cannot vary articles of partnership—Transfer of Property Act, s.* 53—*Transfer cannot be impeached by any but the creditors :*

Where one of several partners has, under arrangement with the other partners, the sole management of the business, he has the power of borrowing as incidental to the power to trade, and the power to pledge partnership assets as incidental to the power of borrowing : *Obiter.*—The English doctrine that a single partner cannot mortgage the immoveable property of the firm does not apply in India. It is not competent to a single partner to take objection to the exercise of any power conferred by the articles of partnership. Where a partner has power to borrow or mortgage for the purpose of trade, he has power to give a mortgage for an antecedent debt. An objection that a transfer of property was made with intent to defeat or delay creditors must be taken by the creditors and it is not open to others to object to the transfer on that ground.

Asan Kani Ravuttar v. *Somasundaram Chettiar* 206

PATTAH, GRANT OF :—*See* "LANDLORD AND TENANT."

PENAL CODE, ss. 176, 177 :—*See* "CRIMINAL PROCEDURE CODE, 565 (4)."

PENAL CODE ACT XLV OF 1860, s. 211—*False charge must be to one having authority to set criminal law in motion—Criminal Procedure Code, s.* 162—*Statement made under, cannot be the basis of prosecution for false charge :*

A statement made under section 162 of the Code of Criminal Procedure in answer to questions put by a police officer making an investigation under section 161 of the Code of Criminal Procedure cannot be made the basis of a prosecution under section 211 of Indian Penal Code. Information of an alleged dacoity was given to a village munsif who sent a report to the police. The police thereupon investigated the case and rejected it as false. The informant was prosecuted under section 211 of the Penal Code :—*Held*, that there was no institution of criminal proceedings by the informant, as the village munsif had no power to investigate in cases of dacoity. The informant had made no 'false charge' within the meaning of section 211 as it was not made to one having power to investigate and send up for trial. The subsequent investigation was not the result of the information given but of the report sent by the village munsif. *Karim Buksh* v. *Queen-Empress*, (I.L.R., 17 Calc., 574), followed.

Chinna Ramana Gowd v. *Emperor* 506

PENAL CODE, ACT XLV OF 1860, s. 225-B—*Offence under section committed when a prisoner escapes while the peon having custody of him is asleep :*

A man legally arrested for an offence must submit to be tried and dealt with according to law. A prisoner who escapes, after he is arrested and before he is delivered by due course of law, owing to the neglect or consent of the person having him in custody, is guilty of an offence under section 225-B of the Penal Code. *Queen-Empress* v. *Muppan*, (I.L.R., 18 Mad., 401), followed.

The Public Prosecutor v. *Ramaswami Konan* 27

PENAL CODE, s. 482 :—See "MERCHANDISE MARKS ACT."

PAGE

PENSIONS ACT—ACT XXIII OF 1871, s. 4—*Act does not apply to endowments for pious or religious purposes :*

Endowments for religious or pious purposes do not fall within the purview of section 4 of the Pensions Act and Civil Courts have jurisdiction to entertain suits in respect of such grants made by Government. *Subrahmania* v. *Secretary of State for India*, (I.L.R., 6 Mad., 361), referred to, *Athavulla* v. *Gouse*, (I.L.R., 11 Mad., 283), referred to. *Miya Vali Ulla* v. *Sayad Bava Santi Miya*, (I.L.R., 22 Bom., 496), dissented from.

Venkateswara Aiyar v. *The Secretary of State for India in Council* 12

PLEADINGS—*Declaratory decree—Suit on title—No relief on the ground of adverse possession :*

A declaration cannot be given on a title neither stated in the plaint nor raised on the issues. A plaintiff who comes into Court alleging title without more, cannot be allowed to succeed on the basis of title by adverse possession.

Somasundarum Chetty v. *Vadivelu Pillai* 531

PRESIDENCY SMALL CAUSE COURTS ACT—ACT XV OF 1882, s. 69—*Negotiable Instruments Act, s.* 84 (2)—*Question whether cheque was presented within reasonable time is a question of fact and cannot be referred to the High Court by Presidency Court of Small Causes :*

The Presidency Court of Small Causes referred to the High Court, under section 69 of the Presidency Small Cause Courts Act, the question whether a cheque was presented within a reasonable time :—*Held*, that, under section 84 (2) of the Negotiable Instruments Act, the question must be determined with regard to the nature of the instrument, the usage of trade and of bankers and the facts of the particular case. The question is one of fact and not of law and is not one which can be referred to the High Court under section 69 of the Presidency Small Cause Courts Act.

D'Sena v. *Dr. T. M. Nair* 363

PRESIDENCY SMALL CAUSE COURTS ACT, s. 69 :—*See* "CIVIL PROCEDURE CODE, s. 622."

PRIVILEGE—*See* "DEFAMATION."

PRIVY COUNCIL, FINAL DECREE OF, DIRECTING LOWER COURT TO FRAME RULES, s. 244, CIVIL PROCEDURE CODE—*Lower Court in framing such rules acts in execution and its order is appealable under s.* 244 *of the Code of Civil Procedure :*

An Order in Council discharged the decrees of the High Court and District Court and referred it to the latter to frame rules for carrying out a scheme of management directed by the said Order in Council :—*Held*, that the Order in Council disposed of the same finally, and it was not intended to make a reference to the District Court under section 17 of the Privy Council Act, 3 and 4 Will. IV, Cap. 41. If such a reference was contemplated, the referee would have to report and the case would have been adjourned pending the receipts of such report. The judgment and order clearly did not contemplate such a report but disposed of the case finally. The District Judge, in framing the rules, did not act as referee but in execution of the final decree in the case and his order framing the rules was appealable under section 244 of the Code of Civil Procedure.

Prayaga Doss Jee Varu v. *Tirumala Purisa Sriranga Charyulu* 406

PROPRIETARY ESTATES VILLAGE SERVICE ACT (MADRAS), ACT II OF 1894, s. 13—*Enfranchisement of lands forming part of emoluments of office, right to :*

Mere registration of a minor as the heir of a Kurnam, under section 13 of Madras Act II of 1894, does not give him any right to object to the enfranchisement of lands, forming the emoluments of the office, in the name of one who is the actual heir of the deceased office-holder in respect of his other properties. *Venkata* v. *Rama* (I.L.R., 8 Mad., 349), referred to.

Devaguptapu Peda Satyanarayana v. *Gogulapati Narasamma* 526

PAGE

PUBLICATION :—*See* "DEFAMATION."

REAL PAYEE :—*See* "COURT OF WARDS ACT (MADRAS), SS. 43, 57."

REGISTRATION ACT, s. 17, EXCEPTION (*i*) :—*See* "CIVIL PROCEDURE CODE, s. 545."

REGISTRATION ACT, s. 77 :—*See* "COURT FEES ACT, s. 7, CL. (4) (C) AND ART. 17 (6), SCHED. II."

RELIGIOUS ENDOWMENTS ACT, ACT XX OF 1863, s. 14—*Court may, by Decree, direct appointment by competent person of new trustee in lieu of the one removed and order the trustee removed to surrender possession to the trustee so appointed —Trustee to be removed when he keeps no proper accounts and makes false claims :*

It is competent to the Court when in a suit brought under section 14 of the Religious Endowments Act, it directs the removal of a trustee, to order a person competent to appoint a new trustee to make such appointment and to direct the trustee removed to surrender possession of property and pay any damages decreed to the new trustee to be appointed. A trustee ought not to be detained in the trusteeship when he does not keep proper accounts and misappropriates monies, and further makes false claims against the trust property.

Miyaji v. *Sheik Ahmed Sahib* 212

RENT RECOVERY ACT (MADRAS) s. 11 :—*See* "LANDLORD AND TENANT."

RES JUDICATA—*Finding of Revenue Court that there was no proper tender of patta is not* res judicata *in a civil suit for rent for the fasli :*

A landlord tendered patta twice to his tenant, the second tender being made two months after the first. In an action by the landlord in the Revenue Court to enforce acceptance of the second patta, the Revenue Court held that the second tender made more than a month after the first with a view to taking proceedings under section 9 of the Madras Rent Recovery Act, was not legal. In a suit in the Civil Court by the landlord under section 7 of the Rent Recovery Act to recover rent for the fasli on proving the second tender :—*Held*, that the decision of the Revenue Court even if it amounted to a decision that there was no proper tender of patta, would not operate as *res judicata*, as the Revenue Court had no jurisdiction to decide the suit brought in the Civil Court. *Vedachella Gramany* v. *Boomiappa Mudaliar*, (I.L.R., 27 Mad., 65), distinguished.

Kidambi Venkatachariar v. *Lakshmi Doss* 62

REVENUE RECOVERY ACT (MADRAS), ss. 36, 38, 40 :—*See* "LIMITATION ACT, SHED. II, ARTS. 178, 179."

RIGHT OF SUIT :—*See* "CONTRACT ACT, s. 74."

2. ———— :—*See* "COURT OF WARDS ACT (MADRAS), SS. 43, 57."

RIGHT OF WORSHIP—*Claim to worship in particular temple—Nadar or Shanar caste—Caste who climb palmyra and cocoanut trees and manufacture toddy—Proof of custom to exclude such caste men—Compromise of suit by trustee of temple after obtaining decree—Breach of trust—Civil Procedure Code (XIV of 1882), s. 375 :*

The respondent as hereditary trustee of a Hindu temple, dedicated to the worship of Siva, at Kamudi, a village in his Zamindari, sued the appellants, who were of the Nadar or Shanar caste and represented that community, and who, alleging immemorial usage claimed a right to enter and worship in the temple, to exclude them from such entrance and worship, on the grounds that the presence of persons belonging to the appellants' caste was repugnant to the religious principles of the Hindu worship of Siva, and to the sentiments of the caste Hindus who worshipped in the temple, and that it was contrary to custom for them to enter and worship there. The appellants had a temple of their own in the village where they worshipped :—*Held*, by the Judicial Committee (affirming the decrees of the Courts in India) that the facts that the

PAGE

appellants worshipped by themselves in a temple of their own, and that their evidence completely failed to prove any resort by persons of their caste to the temple in dispute, entirely negatived the case of the appellants so far as the assertion of immemorial usage was concerned, and also strengthened the respondent's contention that the separation in worship between the two classes was not accidental or voluntary but rested on a deeper ground. The respondent, moreover, had succeeded in proving that by custom the appellants were not among the people for whose worship the temple in suit existed. The respondent after obtaining a decree in the first Court compromised the suit and asked that a decree should be made in favour of the appellants :—*Held*, that the High Court, on an application to make a decree in accordance with the compromise, had acted properly in adding as plaintiffs' members of the temple community who opposed the application (as the respondent also himself then did), and in refusing the application on the ground that the compromise was a breach of trust on the part of the respondent, and therefore unlawful under section 375 of the Code of Civil Procedure.

Sankralinga Nadan v. *Rajeswara Dorai* 236

SALT ACT (MADRAS), ACT IV OF 1889, ss. 84, 87—*Immunity from action—Period of limitation provided in the section does not apply when the suit is based on contract :*

Section 87 of the Madras Salt Act does not apply to a case where the act complained of was neither done nor purported to be done under any section of the Act. The plaintiff brought the suit for recovery of an amount ordered to be deducted by the Commissioner of Salt in virtue of the provisions of a contract entered into between the parties in respect of certain transport of salt :—*Held*, that neither section 84 nor section 87 of the Madras Salt Act applied to the case.

Muthya Chettiar v. *The Secretary of State for India* 522

SECOND APPEAL—*Evidence not placed before lower Appellate Court not receivable in second appeal :*

A party cannot, on second appeal, let in evidence which was not placed before the lower Appellate Court. *Ramachandra v. Krishnaji*, (I.L.R., 28 Bom., 4), referred to. *Raru Kutti* v. *Mamad*, (I.L.R., 18 Mad., 480), referred to.

Secretary of State for India v. *Manjeshwar Krishnaya* 415

SUCCESSION ACT, s. 82 :—*See* "COMPROMISE."

2. ————, **s. 187** :—*See* "WILL."

SUCCESSION CERTIFICATE ACT—ACT VII OF 1889, s. 19—*Section 3 of Act XXIV of* 1839 *and rule X of rules framed thereunder—General Clauses Act of* 1868, *s.* 2 (12)—*Agent to the Governor, Vizagapatam, is a District Judge within s.* 19 *of Succession Certificate Act and an appeal lies to the High Court against his order—Scope of inquiry in proceedings under Succession Certificate Act :*

Section 2 (12) of the General Clauses Act of 1868 defines a District Judge as the Judge of a Principal Civil Court of Original Jurisdiction. Under section 3 of Act XXIV of 1839 and rule X of the rules framed thereunder, the Agent is the Judge of the Principal Court of Civil Jurisdiction within the Agency. The Agent is therefore a District Judge within the definition in section 2 (12) of the General Clauses Act of 1868. The General Clauses Act of 1868 was in force in 1889, when the Succession Certificate Act was passed and the Agent to the Governor, Vizagapatam, is a District Judge and the Court presided over by him is a District Court as defined in section 9 of the Succession Certificate Act. An appeal therefore lies to the High Court under section 19 of the Succession Certificate Act from the order of the agent as from an order of the District Court. *Chakrapani* v. *Varahalamma*, (I.L.R., 18 Mad., 227), not followed. In inquiries under the Succession Certificate Act, the Court may decline to decide points which will involve a lengthy and complicated inquiry.

Babubalendruni Guruvaraju v. *Chandrasekararaju* 362

PAGE

SUITS VALUATION ACT, s. 8 :—*See* "COURT FEES ACT, S. 7, CL. (4) (c) AND ART. 17 (6), SCHED. II."

TRANSFER OF PROPERTY ACT, s. 6 (a) :—*See* "COMPROMISE."

2. ——————————, ACT IV OF 1882, s. 52—Lis pendens *exists until the final decree in appeal is passed :*

The functions of an Appellate Court are not the same in India as in England and America. In India, the decree of the Appellate Court is, under the Code of Civil Procedure, the final decree in the case, and the proceedings in appeal must, for the purposes of section 52 of the Transfer of Property Act, be treated as a continuation of the proceedings in the lower Court. A transfer of property, which is the subject-matter of contentious litigation, by a party thereto *after* the date of the decree of the lower Court and *before* an appeal is preferred against such decree, will be affected by the principle of *lis pendens* under section 52 of the Transfer of Property Act.

Settappa Goundan v. *Muthia Goundan* 268

3. ——————————, s. 53 :—*See* "PARTNERSHIP."

4. ——————————, ACT IV OF 1882, ss. 56, 67, 81, 88—*Marshalling—Purchaser of portion of mortgaged property has no right to marshal :*

A *bonâ fide* purchaser, who purchases for value a portion of a mortgaged property without notice of such mortgage has no right, in a suit by the mortgagee to enforce his mortgage, to insist that the portion not sold to him must be proceeded against first and the portion purchased by him must be sold only for the balance if any due. Under sections 67 and 68 of the Transfer of Property Act, the mortgagee is entitled to an order that the mortgaged property or a sufficient part thereof should be sold on default of payment. The purchaser cannot claim such a right under section 81 or 56 of the Transfer of Property, as the former applies only to second mortgagees and the latter confers such right only "as against the seller." *Krishna Ayyar* v. *Muthukumarasawmiya Pillai*, (I.L.R., 29 Mad., 217), referred to and explained. It is competent to the Court under section 88 of the Transfer of Property Act to order a *sufficient portion* of the mortgaged property to be sold ; and if the portion not sold by the mortgagor is sufficient and if the mortgagee will not be prejudiced, the Court may by its decree direct such unsold portion to be sold first; and if the decree directs the sale of the whole property, the Court in execution may first bring to sale the portion unsold and if the sale-proceeds be sufficient stop the sale of the portion sold by the mortgagor.

Kommineri Appayya v. *Mangala Rangayya* 419

5. ——————————, ss. 58, 59 :—*See* "CIVIL PROCEDURE CODE, s. 545.

6. ——————————, ACT IV OF 1882, s. 59—*Provisions of section not sufficiently complied with when witnesses not present at execution, but attest on executant's acknowledgment of signature :*

A mortgage deed is "attested" by witnesses within the meaning of section 59 of the Transfer of Property Act only when such attesting witnesses are actually present at the time of execution. The provisions of the section are not complied with when the witnesses are not present at the execution of the document but attest it subsequently, on the acknowledgment by the mortgagor of his signature. *Abdul Karim* v. *Saliman*, (I.L.R., 27 Calc., 193), followed. *Ramji* v. *Bai Parvati*, (I.L.R., 27 Bom., 91), dissented from. *Ganga Dei* v. *Shiam Sundar*, (I.L.R., 26 All., 69), dissented from. *Per* WALLIS, J.—The provisions of section 50 (clause 3) of the Indian Succession Act prescribing the manner in which wills must be attested and allowing attestation by witnesses on the testator's acknowledgment of his signature, cannot be regarded as a statutory definition of an attestation applicable to other Indian Acts. *Per* SANKARAN-NAIR, J.—The absence in section 59 of the Transfer of Property Act of the provision as to attestation on acknowledgment of signature contained in section 50 (3) of the Succession Act, shows that, under section 59 of the Transfer of Property Act, attestation of the actual signature is necessary.

Shamu Patter v. *Abdul Kadir Ravuthan* 215

7. ——————————, ss. 59, 100—*Mortgage-deed not attested as required by s.* 59 *cannot created charge under s.* 100 :

An instrument, which is invalid as a mortgage for want of attestation under section 59 of the Transfer of Property Act, cannot operate to create a charge under section 100 of the Act. *Royzuddi Sheik* v. *Kalinath Mukerjee*, (I.L.R., 33 Calc., 985), followed.

Samoo Patter v. *Abdul Sammad Saheb* 337

8. ——————————, s. 78—*Gross negligence—Failure to get possession of title-deed does not necessarily amount to gross negligence where system of registration exists—Delay, effect of, in a registration of documents :*

A mortgaged property to *B* on 21st December 1896 and subsequently mortgaged the same property to *C* on 20th January 1897. *A* wilfully delayed the registration of the mortgage-deed to *B*, which was finally registered on the 21st April 1897. The title-deeds of the property were not given to *B*, but were given to *C* when the property was mortgaged to him. The mortgage was executed outside Madras and was in respect of property in the mofussil. In a suit by *C* to recover the amount due on his mortgage-deed, *C* claimed priority over *B* on the ground that *B* was guilty of gross negligence in not obtaining possession of the title-deeds :—*Held*, that the failure on *B's* part to obtain the title-deeds from *A* did not, under the circumstances, amount to gross negligence within the meaning of section 78 of the Transfer of Property Act and did not postpone his mortgage to that of *C*. *Held further*, that the delay in the registration being due to the default of *A* which *B* could not have anticipated, did not make *B's* failure in obtaining the title-deeds amount to gross negligence. What amounts to gross negligence must be determined according to the circumstances of each case; and one of the circumstances to be taken into consideration in this country is that a universal system of registration is established by law. As registration puts subsequent incumbrancers, in a position, with the exercise of reasonable care, to find out prior encumbrances, failure on the part of the prior mortgagee to get possession of the title-deeds must not be imputed to him as gross negligence. The system of registration having caused mortgagees to attach little importance to the possession of title-deeds, the existence of a practice by which the title-deeds are left with the mortgagor must also be taken into consideration. Another fact to be considered is that the possession of title-deeds in the Presidency towns where mortgages may be created by depositing them is of greater importance than in the mofussil. *Damodara* v. *Somasundara*, (I.L.R., 12 Mad., 429), considered and distinguished. *Shan Maun Mull* v. *Madras Building Company*, (I.L.R., 15 Mad., 268), considered and distinguished. *Monindra Chandra Nundy* v. *Troyluckho Nath Burat*, (2 C.W.N., 750), followed. *The Agra Bank* v. *Barry*, (L.R., 7 H.L., 135), referred to.

Rangasami Naiken v. *Annamalai Mudali* 7

9. ——————————, s. 85—*Mortgagee releasing part of mortgaged property cannot enforce entire claim against the other properties—Section* 85 *of the Transfer of Property Act does not necessitate the dismissal of a suit where no relief claimed against persons not joined as parties :*

"A mortgagee cannot release a part of the mortgaged land and then seek to enforce his entire claim upon another portion in which third parties have become interested as assignees of the equity of redemption." A suit is not liable to be dismissed under section 85 of the Transfer of Property Act for non-joinder of persons interested in portions of the mortgaged property when no relief is claimed against them. The

PAGE

plaintiffs ought, in such cases, to be allowed to recover what is due to them not exceeding the amount rateably due on the property they proceed against.

Ponnusami Mudaliyar v. *Srinivasa Naicken* 333

10. ——————————————————, s. 88—*Decree for sale—Mortgagor can pay decree amount at any time after decree and before sale completed—Right to make such payment not lost at the expiry of the period limited, s. 244, Civil Procedure Code—Court executing may put mortgagor so paying in possession under s. 244, Civil Procedure Code—Interest rate of, to be allowed to mortgagee :*

A decree for sale under section 88 of the Transfer of Property Act is a final decree, and all subsequent proceedings are proceedings in execution of that decree; and the provisions of the Code of Civil Procedure apply to them so far as they are applicable. In the absence of anything to the contrary in the decree, the judgment-debtor is entitled to stop execution by payment of the debt at any time after the decree is passed, and before the sale in execution is complete; and it is not finally complete until he has had an opportunity of obtaining its rescission under section 310 (A) of the Code. *Mallikarjunadu Setti* v. *Lingamurti Pantulu*, (I.L.R., 25 Mad., 244), followed. *Bibijan Bibi* v. *Sachi Bewah*, (I.L.R., 31 Calc., 863), followed. The provision in a decree for sale at the suit of a mortgagee for delivery of possession in the event of payment within time, need not, to that extent, be necessarily considered as a decree or order in favour of the mortgagor, with all the incidents of a decree for redemption in a suit brought by the mortgagor himself. The provision may well be regarded as laying down the conditions on which the mortgagee is to receive payment. Even if regarded as a decree in favour of the defendant-mortgagor it is a decree forced on him by the mortgagee. It is not easy to see why the mortgagee by forcing this decree on the mortgagor should be enabled to convert his decree for sale into one for foreclosure. The mortgagor as decree-holder may waive the benefit of the decree thus forced on him; his right as judgment-debtor to pay the debt into the execution Court and have satisfaction entered up will remain unaffected. *Vallabha Valia Rajah* v. *Vedupuratti*, (I.L.R., 19 Mad., 40), considered. The rule of law laid down that a mortgagor who has obtained a decree for redemption cannot apply for execution of the decree after expiry of the time limited, must be confined to decrees for redemption passed at the suit of the mortgagor. The right of the mortgagor to possession on payment of the decree amount raises a question relating to the satisfaction of the decree within the meaning of section 244 of the Code, and must be determined by the Court executing the decree. He is not bound to bring a separate suit for possession. The deed of usufructuary mortgage on to which the suit was brought provided for redemption in the month of May. The decree contained no restrictions as to the date of payment and the mortgagor paid the money into Court in November and ousted the mortgagee. In determining the amount to which the mortgagee was entitled as interest:—*Held*, that the original contract to take the usufruct in lieu of interest was determined when the mortgagee sued for and obtained a decree for sale and that the mortgagee was not entitled to the melwaram for the whole year but might, in the agreement of the parties, be given a proportionate share for the six months after May. The parties not agreeing, the Court on further consideration awarded interest at the Court rate of 6 per cent. after the period fixed for redemption.

Adipuranam Pillai v. *Gopalasami Mudali* 354

TRANSFER OF PROPERTY ACT, ACT IV OF 1882, s. 89—*Limitation Act, Act XV of* 1877, *sched. II, art.* 179—*Application under s.* 89 *of the Transfer of Property Act is an application for execution and s.* 235 *of the Code of Civil Procedure applies to it—Unverified application substantially in accordance with law sufficient to save limitation :*

An application for an order absolute under section 89 of the Transfer of Property Act, is an application for execution of the decree and is subject to the provisions of section 235 of the Code of Civil Procedure and falls

PAGE

within article 178 or 179 of schedule II of the Limitation Act. Such an application, when defective, cannot be treated as a mere step in aid of execution, neither can it, when no notice is prayed for or issued, be treated as an application for issue of notice under section 248, which, as a step in aid of execution, will save the bar of limitation. When such an application unverified but filed with the decree does not fully comply with the requirements of section 235 of the Code of Civil Procedure, and is defective only in minor particulars which can be easily gathered from the decree filed therewith, it may be treated as substantially an application for execution in accordance with law, sufficient to save limitation under article 179 of schedule II of the Limitation Act.

Ramayyan v. *Kadir Bacha Sahib* ... ... 31 Mad., 68

TRANSFER OF PROPERTY ACT, s. 99:—*See* "CIVIL PROCEDURE CODE, SS. 232, 233."

2. ——————————————————, s. 116:—*See* "LIMITATION ACT, SCHED. II, ARTS. 139, 144."

TREASURE TROVE ACT—ACT VI OF 1878, s. 3—*Property not hidden is not treasure trove and belongs to the owner of the land on which it is found :*

Section 3 of the Indian Treasure Trove Act defines treasure trove as anything of value hidden in the soil or in anything affixed thereto. Property not hidden is not treasure trove and is not governed by the provisions of the Act. Unclaimed articles not found hidden are the property of the person on whose land they are found unless they are found in a public place, in which case they belong to finder. Under the English law the possession of land carries with it possession of everything which is attached to or under that land and in the absence of a better title the right to possess it also, except in the case of articles found in a public place. This is also the law in India. In England where the article is hidden, the fact of its being so hidden is taken to show that the owner did not intend to abandon it, and when it is subsequently found hidden, and the owner is not forthcoming, the law gives it as *bonum vacuum* to the Crown.

Manager of Hampi Sri Virupaksha Swami Temple v. *Lambani Golya* ... 397

TRUST ACT, ss. 5, 81:—*See* "WILL."

TRUST ACT, ACT VI OF 1882, s. 84—*Benami sale to defraud creditors—Where no creditor defrauded, vendee holds property for the benefit of vendor :*

Where a benami sale is effected to defraud creditors but no creditor is actually defrauded thereby, the transferee, under section 84 of the Trust Act, holds the property for the benefit of the transferor. A suit for the specific performance of a contract to sell made by the transferee can be successfully resisted by the transferor. Section 84 of the Trust Act embodies the principles recognised by English Courts at the time the Act was passed; and the fact that English Courts subsequently doubted the soundness of these principles will not justify the Courts in India in departing from the rule of law laid down by the section. Judgment of Benson, J., in *Yaramati Krishnayya* v. *Chundru Papayya*, (I.L.R., 20 Mad., 326), not followed. *Lidlingappa* v. *Hirasa*, (I.L.R., 31 Bom., 405), distinguished.

Munisami Mudaliar v. *Subbarayar* 97

WATER, DAMAGE CAUSED BY RETENTION OF—*Liability of owner of land for damage caused by storage of water :*

An owner of land is not liable for damage caused to other lands by the retention of water on his land in the natural and usual course of enjoying his property. The retention of water by a person on a portion of his land to prevent its passing on to other portions of his land is not an act done in the natural and usual course of enjoyment and the person so doing is liable for damage caused thereby. *Mohalal* v. *Baijivkore*, (I.L.R., 28 Bom., 472), doubted and distinguished.

Ramanuja Chariar v. *Krishnasawmi Mudali* 169

PAGE

WATER, RIGHT TO—*Infringement of water right, whether contractual or proprietary, when likely to cause damages may be restrained by injunction though no evidence of actual damage is given :*

Ryotwari lands belonging to the plantiff had been irrigated for a period of more than 60 years by a channel without any interference on the part of Government. The defendant without any justifying cause blocked up the mouth of the channel cutting off the entire supply of water. The plaintiff without claiming any damages but stating in a general way that he had been damnified by the act of the defendants sued to restrain the defendants by injunction from interfering with the channel :—*Held*, that the plaintiff was entitled to the injunction sued for whether his right to the water was based on a contract with Government or whether his right was a proprietary right appurtenant to his ownership of land. In either view of the case, the plaintiff is entitled to succeed without an express finding as to damage. It is enough if the act is such as to be likely to cause damage to the plaintiff and the stoppage of the entire supply of water is such an act. The interference with contractual relations without sufficient justification is a violation of legal right which gives a right of action to the party whose rights are infringed. The observation of Lord Macnaghten in *Quinn* v. *Leathem*, ([1901] A.C., 495 at p. 510), referred to.

Rama Odayan v. *Subramania Aiyar* 171

WILL, CONSTRUCTION OF—INDIAN SUCCESSION ACT, ss. 101, 102—*Hindu Wills Act, s. 3, para. 4 :*

A power to distribute property conferred by a testator under his will, which is exercisable " when my grandsons may attain their age " is void under sections 101 and 102 of the Indian Succession Act, as extending the period beyond the limit allowed by section 101, whether the point of time referred to is taken to be the attaining of age by the grandsons in existence at the date of the testator's death or such attaining of age by all his grandsons. If the intention of the testator to benefit *all* his grandsons is clear from the will, the latter view ought to be adopted, and a secondary intention to benefit such grandsons at least as should be in existence at his death ought not to be assumed. The rule applicable to such cases in India is that, " if the exercise of a power is made contingent on the happening of an event, which, may, by possibility happen beyond the limits of the rule, the mere fact that the contingency has happened earlier and has rendered the exercise of the power practicable within the prescribed limit does not validate the power." Section 3, paragraph 4 of the Hindu Wills Act, has not the effect of making section 101 of the Succession Act inapplicable to Hindu Wills when section 2 makes it applicable in terms. Section 3 may have the effect of invalidating a disposition which may be valid under section 101, but it cannot have the effect of validating a disposition invalid under section 101.

Sivasankara Pillai v. *Soobramania Pillai* 517

WILL CONSTRUCTION OF GIFT TO FEMALE :—*See* " HINDU LAW."

WILL, CONSTRUCTION OF—*Technical words to have their legal effect unless intention to contrary apparent on the face of will—The words ' in trust ' do not always create a trust—Merger—Where trust in favour of party in whom legal estate vested, equitable estate merges in the legal estate—General disposition of whole estate will not be cut down unless intention so to cut down is clear—Will must be construed as a whole—The words ' as she may require ' mean ' as may be necessary ' :*

In construing wills, the test to be applied is what did the testator mean, having regard to the words used. ' Technical words or words of known legal import must have their legal effect even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical terms in their proper sense.' *Per* Lord DAVEY in *Lalit Mohan Singh Roy* v. *Chukkun Lal Roy*, (I.L.R., 24 Calc., 834 at p. 846), referred to. The words ' in trust ' do not invariably create a trust. The principle

PAGE

that a trustee cannot take *beneficially* has no application where the trust is in terms in favour of the party in whom the legal estate is vested. Where both the legal and equitable estate are given to the same person, the two estates merge and the person to whom they are given, takes the legal estate. Where a testator devises *all* his property, the generality of the disposition will not be cut down unless the intention so to cut down is clear. The will must be construed as a whole and in a manner consistent with the intentions of the testator and its general tenor. The words ' as to her may seem best ' mean ' as she may think fit.' Where a person is authorised to draw money for certain purposes ' as he may require,' he can draw only such amounts ' as may be necessary ' for the purpose and not any amount ' as he may think fit.' A will contained the following *inter alia* clauses :—(I) " I will and bequeath to my dear wife Annie in trust and for her maintenance and support during her life all the money, property, goods and chattels of which I may die possessed whatsoever and wheresoever situated and I appoint my dear wife Annie sole administratrix of this my last will and testament." (X) " I further will that my dear wife Annie as sole executrix of this my last will and testament shall draw from current deposit accounts whether here or in Great Britain such sum or sums of money as she may require for her maintenance and for the working and maintenance of my property, and that she shall receive and dispose of all proceeds, rents and profits from the said property as to her may seem best in the interest of the property and I empower her to sell all or any part of the property at any time when it may appear to her that a favourable opportunity occurs." On the question whether the widow of the testator took an absolute life estate or whether the words ' in trust,' in clause (1) read with the words ' she shall receive and dispose of . . . in the interest of the property ' in clause (X) constituted her a trustee in respect of such portion of the income as was not required by her for her maintenance and support :—*Held* (1), that the words ' in trust ' in clause (I) were not intended to create any trust but only to indicate the nature of her estate and that she should enjoy only the income for her life and should not deal with the corpus except as authorised by the will. (2) That clause (X) did not create any trust, and that the words ' she shall receive and dispose . . . in the interests of the property ' were simply enabling words, which authorised her to apply, as she thought fit, the income of the property upon the property. The testator intended that she should have an unfettered discretion in the maintenance and development of the property, without being questioned by any one interested in the reversion. (3) That a life estate was given to the widow by the words ' during her life ' and such estate was not cut down by the words ' for her maintenance and support ' which were simple words of description or motive, and that if a trust was intended it was for her benefit only, in which case the legal and equitable estate merged and she took the legal estate. (4) The words ' as she may require ' in clause (X) did not authorise the widow to draw any amount ' as she thought fit ' but only such amount ' as should be necessary for the purposes stated.' (5) That there was nothing in clause (X) which showed a clear intention on the part of the testator to cut down the estate given by clause (I) and the widow accordingly took a life estate.

Mary Harriett Annie Wilson v. *George Oakes* 283

WILL—TRUSTS ACT, ACT VI OF 1882, ss. 5. 81—*Bequest to legatee with oral directions in testator's life-time for the disposal of the property—Rule of English Law that such legatee is bound by the trusts so declared by testator applies in India under s. 5 of the Trusts Act—Section 81 of the Trusts Act does not apply to such cases—Maintainability under s. 187 of Succession Act of a suit by the beneficiary for the benefit conferred in the absence of Probate or Letters of Administration :*

Under English Law, where a testator disposes of property in favour of a legatee, and, at the time of such disposition or at any subsequent period during his life-time, the testator informs the legatee that the disposition in his favour, although apparently for his benefit, was so made in order that

he may carry into effect certain wishes of the testator which are communicated to him, and the legatee expressly, or impliedly, undertakes to carry out the wishes so expressed to him by the testator, the legatee will be treated as a trustee, and will be compelled to carry out the instructions so confided to him. The reason for this rule is that it would be a fraud on the part of the legatee not to give effect to the testator's intentions, and the law will not permit him to benefit by his own fraud. The legislature in enacting section 5 of the Indian Trusts Act and the provison thereto intended to make this rule of equity applicable in India. Section 50 of the Indian Succession Act does not apply to such cases. The instructions of the testator are given effect to under the English Law, and under section 5 of the Trusts Act, not, as a part of the will, but by fastening on the conscience of the legatee a personal obligation to carry into effect the wishes of the testator, in order to prevent the perpetration of fraud. The title of the beneficiaries is one *dehors* the will and not under the will. *Per* WALLIS, J.—The provisions of section 81 of the Indian Trusts Act do not apply to such cases. *Per* SANKARAN-NAIR, J.—Section 81 applies where the testator intending to dispose of the beneficial interest to others leaves the estate to the devisees. This section has reference to the disposal of the beneficial interest by transfer or will. Where such a legatee, to whom the testator has confided his intention suppresses such secret instructions with the intention of retaining the estate himself and applies for Letters of Administration as universal legatee, the Court will refuse the grant. *McCormick* v. *Grogan* (L.R., 4 E, & I., 82 at p. 97), referred to. In re *Maddock Llewelyn* v. *Washington*, [(1902) 2 Ch., 220], referred to. *Per* WALLIS, J.—The beneficiary entitled under the secret trust communicated to and accepted by the legatee claims through the legatee named in the will; and as no right as legatee can be established without a grant of probate or letters of administration under section 187 of the Indian Succession Act, the beneficiary cannot maintain a suit to recover the benefit intended for him when there is no grant of Probate or Letters of Administration. *Per* SANKARAN-NAIR, J.—(*contra*). —Section 187 of the Succession Act is no bar to such a suit, as the beneficiary does not sue to establish any claim as *legatee* but to enforce the trust imposed on the legatee, as far as he is concerned. The suit is to enforce an *obligation* against the legatee and not to establish *any right* of the legatee as such. If the legatee is in possession of a substantial portion of the property he is an *executor de son tort* with all the liabilities of an executor and universal legatee and he cannot plead want of Probate or Letters of Administration.

Manuel Louis Kunha v. *Jnana Coelho* ... ...