THE INDIAN LAW REPORTS,

MADRAS SERIES,

CONTAINING

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

REPORTED BY

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JUDGES OF THE HIGH COURT.

1st January—31st December 1910.

CHIEF JUSTICE:

The Hon'ble Sir Charles Arnold White, *Kt.* (Bar.-at-Law).

PUISNE JUDGES:

The Hon'ble Sir R. S. Benson, *Kt.*, M.A., LL.B. (Bar.-at-Law), I.C.S. (*On furlough from 18th July to 14th October* 1910.)

The Hon'ble Mr. J. E. P. Wallis, M.A. (Bar.-at-Law).

The Hon'ble Mr. L. C. Miller, I.C.S. (*On privilege leave from 18th July to 12th August* 1910 *and furlough from 11th October* 1910.)

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The Hon'ble Mr. Abdur Rahim, M.A. (Bar.-at-Law).

The Hon'ble Mr. V. Krishnaswami Ayyar, B.A., B.L.

The Hon'ble Mr. W. B. Ayling, I.C.S. (*Officiating as Judge from 18th July* 1910.)

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The Hon'ble Mr. P. S. Sivaswami Aiyar, B.A., B.L., C.I.E.

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ADVERSE POSSESSION, TITLE BY, AGAINST CROWN—*Burden of proof—What facts prove adverse possession—Entry as poramboke not sufficient to prove title of Crown:*

In mirasi tracts, the gathering of wild flowers and fruits from poramboke lands and the gathering of fish from small tanks will not indicate ownership, as such acts are permitted by Government. It is otherwise where large sums are spent on tanks by mirasidars in clearing silt and in constructing masonry dams. Such acts are indicative of ownership and when they are proved to have been done for 30 or 40 years, the presumption will be that they have been done for more than the statutory period and the burden will be on the Crown to explain such acts and prove possession within the statutory period. Mere entry as poramboke in the pymash and settlement registers is insufficient to prove the title of Government, without proof of acts of ownership.

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ADVERSE POSSESSION:—*See* "HINDU LAW" 366

BANKER—*Payment to, with instructions as to disposal, effect of:*

When *A* paid money into a bank with instructions to pay over the same to *B* who had no account with the bank and the bank wrote to *B* stating that they had received the money and held the same in suspense account pending instructions from *B*:—*Held, per* MUNRO, J.—That the bank became the debtor of *B* in respect of such money. *Per* ABDUR RAHIM, J.—That the relationship between the bank and *B* was not that of debtor and creditor and that the bank held the money in a fiduciary capacity as bailee or agent. *Official Assignee of Madras* v. *Smith*, [(1909) I.L.R., 32 Mad. 68], dissented from.

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BURDEN OF PROOF—*Evidence of possession necessary to prove title against Government—Nattam poramboke, classification as effect of:*

Where in a suit for declaration of title against Government, the plaintiff proves possession for a period of more than 12 years, the Government must prove that it has a subsisting title. When the Government fails to prove such title or possession within 60 years, the plaintiff is entitled to a declaration of title and not merely to a declaration that he is lawfully in possession of such land. The clasification of land as nattam poramboke is no legal evidence of title in the Government. At the most, it is evidence only of an assertion of title. *Kattai Mahomed Meera Moideen* v. *Secretary of State for India* [(1903) 13 M.L.J., 269], explained. *Ganga Ram Chinna Patel* v. *Secretary of State for India* [(1896) I.L.R., 20 Bom., 798] distinguished. *Hanmanta Rau* v. *Secretary of State for India* [(1901) I.L.R., 25 Bom., 287], distinguished.

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A consigned certain cotton by railway from *E* station to *K* station. Under the terms of the risk note signed by the consignor, the company was exempted from liability for any loss *before, during or after transit over the Railway*. Under the train arrangements made by the Railway Company, goods consigned from *E* to *K* were carried beyond *K* to *C*, and then back from *C* to *K*. The goods were damaged while at *C*. In a suit to recover compensation for the loss so caused:—*Held*, that the loss occurred during transit from *E* to *K* and that the company was protected by the terms of the risk note. Every customer dealing with a company is bound not only by the ordinary route but also by the ordinary train arrangements according to which it professes to carry. *Tobin* v. *London & North-Western Railway Company*, (2 *Ir.* Rep., 22 at p. 35), referred to.

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Kunj Bihari v. *Keshavlal Hiralal*, [(1904) I.L.R., 28 Bom., 567], dissented from 452

Mangalathammal v. *Narayanaswmi Aiyar*, [(1907) I.L.R., 30 Mad., 461], referred to 102

Manian Patter v. *The Madras Railway Company*, [(1906), I.L.R., 29 Mad., 118], referred to 376

Manikyamala Bose v. *Nandkumar Bose*, [(1906) I.L.R., 33 Calc., 1306], referred to 228

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Muthu Vijaya Raghunatha Udayana Thevar v. *Thandavaraya Tambiran* [(1899) I.L.R., 22 Mad., 214], not followed 102

Narasimhulu v. *Narasimhulu*, [(1906) 16 M.L.J., 336], referred to 209

Narayana v. *Shanunni*, [(1892) I.L.R., 15 Mad., 255], followed 452

Official Assignee of Madras Smith, [(1909) I.L.R., 32 Mad., 68], dissented from. 299

Parameshvaram Nambudiri v. *Vishnu Embrandiri*, [(1904) I.L.R., 27 Mad., 478], dissented from 323

Puthiandi Mammed v. *Avalil Moiden*, [(1897) I.L.R., 20 Mad., 157], considered 62

Radha Mohan Dhas v. *Ram Das Dey*, [(1869) 3 B.L.R., 362], referred to ... 473

Ramakrishnha v. *Shamrao*, [(1902) I.L.R., 26 Bom., 526], referred to ... 228

Ramakrishna Ayyar Subbrahmania Ayyar, [(1906) I.L.R., 29 Mad., 305], distinguished 447

Ramalinga Muppan v. *Pavadai Goundan*, [(1902) I.L.R., 25 Mad., 519 at p. 521], approved 226

Raman Chetty v. *Kadirvelu*, [(1898) 8 M.L.J., 148], referred to and approved 257

Ramasamy v. *Venketasan*, [(1893) I.L.R., 16 Mad., 440], distinguished ... 165

Ramasamy Chettiar v. *Orr*, [(1903) I.L.R., 26 Mad., 176], approved 323

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Ramchandra Narayana v. *Narayana Mahadev*, [(1887) I.L.R., 11 Bom., 216 at p. 220, referred to and followed 112

Ranjit Singh Naubat, [(1902) I.L.R., 24 All., 504], dissented from 308

Reference by the Collector and Superintendent of Stamps, Bombay, [(1896) I.L.R., 20 Bom., 210 at p. 214], referred to 304

Secretary of State for India v. *Vira Rayan*, [(1886) I.L.R., 9 Mad., 175], explained 1

Seshamma v. *Chinnappa*, [(1897) I.L.R., 20 Mad., 467], referred to 115

Shankarbhai v. *Somabhai*, [(1901) I.L.R., 25 Bom., 417], approved 323

Sheo Narain Singh v. *Khurgo Koery* and *Sheo Narain Singh* v. *Bishu Prasad Singh*, [(1882) 10 C.L.R., 327], dissented from 473

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The Public Prosecutor v. *Sarabu Chennayya*, [(1910) I.L.R., 33 Mad., 413], followed 416

The Queen v. *Gyngull*, [(1893), 2 Q.B.D., 232 at p. 248], referred to 288

Tobin v. *London & North-Western Railway Company*, (2 Ir. Rep., 22 at p. 35), referred to 129

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Vasudeva v. *Narasimma*, [(1882) I.L.R., 5 Mad., 6 at p. 8], referred to ... 160

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Venkatappa Nayanim v. *Thimmappa Nayanim*, [(1895) I.L.R., 18 Mad., 410], not followed 402

Vidyapurna Thirthaswami v. *Vidyanidha Thirthaswami*, [(1904) I.L.R., 27 Mad., 435], referred to 265

Webb v. *Macpherson*, [(1903) 30 I.A., 238], referred to 446

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William Brandt's Sons & Co. v. *Dunlop Rubber Co.*, [(1905) A.C., 454], referred to 123

Young v. *Bank of Bengal*, [(1836) 1 Moo., I.A., 87], referred to and explained. 53

CASTE USAGE:—*See* "DEFAMATION" 67

CITY MUNICIPAL ACT (MADRAS), III OF 1904, s. 120—*'Exercising a trade,' what amounts to:*

Where a person has a servant at A, who purchases piece-goods there and forwards them to B, where they are sold and the profits are earned, such person 'exercises his trade' within the meaning of section 120 of the Madras City Municipal Act at B and not at A. There may be kinds of business in which the buying of goods is the most important part of the business and in such cases it cannot be said that the profits are earned elsewhere.

Hajee Shaik Mesra Rowther v. *The President of the Corporation of Madras* ... 82

CITY POLICE ACT (MADRAS), III OF 1888, s. 75—*Arrack shop is a place of "public resort" within section:*

The public have a right, under the terms of the license granted to arrack shopkeepers, to resort to such shops and such shops are places of public resort within the meaning of section 75 of the Madras City Police Act III of 1888.

The Crown Prosecutor v. *Moonoosamy* 83

CIVIL COURTS ACT (MADRAS), III OF 1873, s. 16—*Hindu Law—Marriage—Validity of marriage of Hindu with Christian women converted to Hindu religion—Such marriage valid if recognised by the usage of the particular caste, though opposed to orthodox Hindu tenets—Suit, abatement of—Suit by reversioner for declaration on behalf of all reversioners does not abate on death of plaintiff:*

A marriage contracted according to Hindu rites by a Hindu with a Christian woman who, before marriage, is converted to Hinduism, is valid when such marriages are common among and recognised as valid by the custom of the caste to which the man belongs, although such marriage may not be in strict accordance with the orthodox Hindu religion. Under the Hindu system of Law, clear proof of usage will outweigh the written text of the Law. Under section 16 of Madras Act III of 1873 any proved custom concerning marriage must be upheld. Apart from custom, such a marriage between parties who do not belong to the twice-born classes, is valid under Hindu Law. It is only persons who belong to the twice-born classes that are enjoined to marry in their own class. All other persons must be treated as Sudras and marriages between members of different classes of Sudras are valid. Where a caste accepts a marriage as valid and treats the parties thereto as members of the caste, the Court will not declare such a marriage null and void. A declaratory suit by a reversioner brought not only on his own behalf but on behalf of the body of reversioners does not abate on the death of the plaintiff.

Muthusami Mudaliar v. *Masilamani* 342

CIVIL PROCEDURE CODE, ACT XIV OF 1882, ss. 2, 474—*Order dismissing interpleader suit as not maintainable appealable as a decree within the meaning of s. 2—Under what circumstances a tenant can bring an interpleader suit against his landlord:*

An order dismissing an interpleader suit is a decree within the meaning of section 2 of the Code of Civil Procedure (Act XIV of 1882) and is as such appealable. The prohibition in section 474 of the Code of Civil Procedure against a tenant bringing a suit against his landlord and compelling him to interplead with another person, not claiming through him does not apply where the title of the landlord to grant the lease is not disputed but it is alleged by such other person that the landlord only acted as trustee in granting such lease. *A* granted a lease of certain villages in favour of his wife *B*. *B* sub-leased them to *C*. After *A*'s death, his son *D*, alleging that the lease to *B* was colourable and was for *A*'s benefit, gave notice to *C* claiming the rents of the villages. The assigns of *B* also claimed the rents from *C*. *Held*, that *C* was entitled to maintain an interpleader suit against the assigns of *B* and *D*. *Dungey* v. *Angove*, [(1794) 30 E R., 644], referred to. The title of *B* and her assigns was derivative from *A* and consistent with it. Neither *C* nor *D* denied the title of *B* to grant the lease, the only question being whether *B* acted in her own right or as trustee for *A*—a question with which *C* had no concern. *Held*, that *D* claimed through *B* within the meaning of section 474 of the Code of Civil Procedure, as his claim was to stand in the shoes of *B*.

Orr v. *Chidambaram Chettiar* 220

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2. ———————————, **s. 13**—*Person claiming under, who is—Test to determine interest represented—Landlord does not represent interest of mulgeni tenant—Estoppel—No estoppel where party not misled:*

The mulgeni tenure is a permanent heritable tenure and mulgeni interest is not an interest subordinate to that of the lessor. In order to estop a party in a subsequent suit by the decision in a former suit against another party on the ground that the former claims under the latter within the meaning of section 13 of the Civil Procedure Code it must be shown that the party in the former suit represented the interest claimed in the latter suit. A party represents all interests owned by him at the time of the action as also interests belonging to others which are subordinate to his. A decision against him will bind interests acquired from him subsequently and all subordinate interest whensoever acquired. A mulgeni tenant will not be bound by a decision against his lessor as his interest is not subordinate to that of the lessor. To estop a party, it must be shown that his acts or representations misled the party setting up estoppel.

Seshappaya v. *Venkatramana Upadya* 459

3. ———————————, **ss. 13, 30**—*Decree in suits under s. 30—Order in execution not binding on persons not actually brought on record*—Res judicata—*When judgments obtained in one capacity binding on the same persons in another capacity:*

Where a party to a suit is allowed to represent others under section 30 of the Civil Procedure Code, the decree will be binding on those whom he is allowed to represent. But an injunction is personal on its nature, and where such a party disobeys an injunction and is proceeded against in execution for such disobedience, an order in such proceedings will not be binding on those whom he was allowed to represent in the suit. Where a trustee is a member of a sect and his rights as trustee are linked with and subordinate to the rights of the sect, a decision on the rights of his sect fairly obtained in a suit between his sect and a rival sect will be binding on him in his special capacity as trustee in a subsequent suit between him in such capacity and the rival sect. Judgments *in personam* in general bind only parties and their privies. But the relation established between them by a judgment is, in the absence of fraud or collusion, conclusive against third parties.

Srinivasa Aiyangar v. *Aryar Srinivasa Aiyangar* 483

4. ———————————, **ss. 30, 375**—*Subsequent suit filed after breach of condition on which permission to withdraw previous suit given—Right of one not a tenant to sue for himself and others, tenants under s. 30, Civil Procedure Code:*

Where permission to withdraw from a suit with leave to bring a fresh suit was given to a party, on condition of costs being paid within a certain time, such party, on failing to fulfil the conditions, is precluded from bringing a fresh suit. *Abdul Aziz Molla* v. *Ebrahim Molla*, [(1904) I.L.R.,

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31 Calc., 965], distinguished. A person who is not a tenant, cannot maintain a suit on behalf of tenants under section 30, Civil Procedure Code.

Robert Fisher v. *Nagappa Mudaly* 258

5. ———————————————, s. 43—*Contract Act, s. 43—Omission of part of cause of action in a suit against a joint promisor—Effect of such omission in subsequent suit against other promisors:*

The omission in a previous suit against one of several joint promisors of a part of the cause of action is no bar under section 43 of the Civil Procedure Code to a subsequent suit against another joint promisor for the portion so omitted. The subsequent suit will not be barred by the rule laid down in *King* v. *Hoare*, [(1844) 13 M. & W., 494], as that rule is based on the merger of the cause of action in the judgment. There can be no such merger when the cause of action has not been sued upon. The effect of section 43 of the Indian Contract Act on the rule laid down in *King* v. *Hoare*, [(1844) 13 M. & W., 494], that a judgment against one of several joint promisors is a bar to a suit against the others, considered.

Ramanjulu Naidu v. *Aravamudu Aiyangar* 317

6. ———————————————, ss. 102, 157, 158—*Circumstances under which ss. 157 and 158 are applicable—On party's default to appear, Court must proceed under s. 157 and not under s. 158:*

Sections 157 and 158 of the Code of Civil Procedure are independent and mutually exclusive and neither can be treated as an exception to the other. When a case is set down for hearing on the original or adjourned date, the first question for the Court is "Are the parties in attendance." If both or either of the parties be not present, the Court is bound to deal with the case under Chapter VII or under that chapter read with section 157, as the case may be, whether or not there has been default of the kind referred to in section 158. *Shrimant Sagaji Rao* v. *Smith*, [(1896) I.L.R., 20 Bom., 736], referred to. *Marianissa* v. *Ramkalpa Gorain*, [(1907) I.L.R., 34 Calc., 235], referred to.

Chandramathi Ammal v. *Narayanasami Aiyar* 241

7. ———————————————, s. 103—*Section not applicable where plaintiff in former suit is not the plaintiff in the latter suits—Limitation Act, XV of 1877, sched. II, art. 120—Right to sue for declaration accrues when cause of action complete:*

Section 103 of the Code of Civil Procedure bars a subsequent suit only when the plaintiff in the latter suit actually was, or represented by the plaintiff in the former suit. Where the plaintiff in the latter suit was a contesting defendant in the former, section 103 does not bar the latter suit. The right of junior members of a tarwad to sue for a declaration that an alienation by the karnavan is not binding on the tarwad accrues the moment the document is completed and not when the plaintiff obtains knowledge of the alienation and in the absence of fraudulent concealment a suit for such declaration will be barred under schedule II, article 120 of the Limitation Act at the expiry of six years from such date.

Ottappurakkal Thashate Soopi v. *Cherichil Pallikkal Uppathuma* 31

8. ———————————————, s. 232—*Transfer of portion of decree valid—Decree for maintenance, assignability of:*

The transferee of a portion of a decree is a transferee of the decree within the meaning of section 232 of the Code of Civil Procedure of 1882. The transfer of a decree for maintenance to the extent of the arrears, that had accrued due up to the date of transfer, is valid and may be recognised by the Court if the judgment-debtor will not be prejudiced by such recognition.

Endoori Venkataramaniah v. *Venkatachainulu* 80

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9. ———————————————, s. 252—*Decree against assets of deceased in the hands of representative is a decree against representative—Such decree executable only against such representative or his representative:*

In a suit brought against *A* the widow of a deceased person as his representative, a decree was passed directing the recovery of the sum sued for from the estate of the defendant's deceased husband in her hands. Another person *B* brought a suit against *A* to establish his title to the property of the deceased and having obtained a decree in his favour took possession of the estate. The decree-holder sought to execute the decree against *B* under section 252 of the Code of Civil Procedure:—*Held*, that the decree was not against the estate but against *A*, the legal representative and was capable of execution only against *A* and her representatives. *Subbanna* v. *Venkatakrishnan*, [I.L.R., 11 Mad., 408], followed.

Kaliappan Servaikaran v. *Varadarajulu* 75

10. ———————————————, s. 276:—*See* "MORTGAGE" ... 429

11. ———————————————, s. 295—*Rateable distribution under several decrees. "Same judgment debtor"—Decree against judgment debtor; subsequent decree against his legal representatives to be satisfied out of his estate:*

A obtained a decree against one Maruthamuthu Pillai; subsequently, *B* obtained a decree against the legal representatives of Maruthamuthu Pillai and his estate in their hands. *B* applied under section 295, Civil Procedure Code, to share rateably in the proceeds of property sold in execution of *A*'s decree:—*Held*, that *B* was not entitled to do so. *Govind Abaji Jakhadi* v. *Mahonivaj Vinayak Jakhadi*, [(1901) I.L.R., 25 Bom., 404], followed. When a decree is obtained against the legal representatives of a deceased person, they are the judgment-debtors. *Kaliappan Servaikaran* v. *Varadarajulu*, [(1909) 19 M.L.J., 651], referred to.

Srinivasa Aiyangar v. *Kanthimathi Ammal* 465

12. ———————————————, ss. 366, 371, and Act V of 1908, Order XXII, Rules 2, 9—*Judgment passed after death of party not absolute nullity—Such judgment not liable to collateral attack but must be set aside only by proper proceedings and unless so set aside bars a fresh suit:*

A decree was passed in favour of a deceased plaintiff on the day of his death, which occurred before the case was taken up for disposal and heard. In a suit brought by the representative of the plaintiff on the same cause of action and for the same relief, it was urged that the decree so passed was a nullity and that the subsequent suit was maintainable:—*Held*, that the suit was barred. It is only when the representative of a deceased plaintiff fails to apply within the time allowed by law that a suit abates under order XXII, rule 2 of Act V of 1908 or that the Court could have passed an order under section 366 of Act XIV of 1882 that the suit shall abate. A decree passed after death is not therefore an absolute nullity. The intention of the Legislature in enacting section 371 of Act XIV of 1882 and order XXII, rule 9 of Act V of 1908 is clearly that where a suit has abated, no fresh suit shall be brought on the same cause of action, and that any remedy which the representative of a deceased plaintiff may have is by application to the Court in which the suit was pending.

Gooda Coopooramier v. *Soondarammall* 167

13. ———————————————, s. 375—"*Relates to the suit,*" *construction of*—Res judicata—*Wrong decision on question of law, no bar to subsequent decision—Registration Act, ss. 3, 17—Provisions of Act do not relate to judicial proceedings—Provisos, effect of—Transfer of Property Act, ss. 107, 108 (b)—Possession of right to recover rent, how given:*

The words "relates to the suit" in section 375 of the Code of Civil Procedure mean "relates to the matter of the claim in the case" and there is nothing in the section to restrict the relief granted in the compromise to what is prayed in the plaint or less. Where the parties to a suit litigate as lessor and lessee for the ownership and possession of land, it is open to the parties to provide by compromise in what manner

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such land should be owned and enjoyed and such provision, although different from and even inconsistent with the plaint, "relate to the suit" within the meaning of section 375 of the Code. *Venkatappa Nayanim* v. *Thimmappa Nayanim*, [(1895) I.L.R., 18 Mad., 410], not followed. *Muthu Vijaya Raghunatha Udayana Thevar* v. *Thandavaraya Tambiran*, [(1899) I.L.R., 22 Mad., 214], not followed. *Joti Kuruvetappa* v. *Isari Sirusappa*, [(1907) I.L.R., 30 Mad., 478], followed. An order or decree based on a mistake of law does not operate as *res judicata* in a subsequent proceeding in which the operation of such decree or order is not called in question. *Mangalathammal* v. *Narayanaswami Aiyar*, [(1907) I.L.R., 30 Mad., 461], referred to. The provisions of the Registration Act do not apply to proper judicial proceedings whether consisting of pleadings filed by the parties or orders made by the Court. A compromise petition is a pleading filed by the parties and can be sued on although not registered. *Bindeseri Naick* v. *Ganga Surani Sahu*, [(1898) I.L.R., 20 All., 171], followed. Cases which are clearly outside the scope of an enactment cannot be brought within it by any inference drawn from the terms of a proviso. Decrees and orders generally are outside the scope of sub-section 1 of section 3 of the Registration Act. Decrees and orders relating to leases, which are governed by clause (*d*) of sub-section (1) to section 17 cannot be brought within sub-section (1) of section 3 merely because sub-section 2 of section 17, which is in the nature of a proviso, expressly exempts certain orders and decrees relating only to clauses (*b*, and (*c*) of sub-section (1) to section 17 of the Act. When the subject-matter of a lease is the rents and profits of land, the possession which a lessor, under section 108 (*b*) of the Transfer of Property Act, is bound to give the lessee, is sufficiently given by giving notice of the lease to the ryots or other persons in occupation and requiring them to attorn and pay rent to the lessee. Attornment by the tenants and actual receipt of rent is not necessary to give the transferee possession of the rent. Such notice will amount to delivery of possession, only where the transfer or himself has possession to give and not where he is himself out of possession.

Natesa Chetti v. *Vengu Nachiar* 102

14. ——————————————, s. 622—*Religious Endowments Act XX of 1863, s. 18—District Judge may, in disposing of petitions under s. 18, make inquiries:*

An order of a District Judge under section 18 of Act XX of 1863 is not open to revision under section 622 of Act XIV of 1882, unless he acts illegally in the exercise of his jurisdiction. *In re Venkataswara*, [(1887) I.L.R., 10 Mad., 98], referred to. A District Judge acting under section 18 of Act XX of 1863 has power to make enquiries before disposing of the application for leave to sue and is not bound to decide on a bare perusal of the application.

Ramanathan Chettiar v. *Ananthanarayana Aiyar* 412

CIVIL PROCEDURE CODE, ACT V OF 1908, s. 99—*Misjoinder includes non-joinder—What parties necessary in suit against karnavan of tarwad to enforce contract of previous karnavan—When act of karnavan impeachable:*

In a suit to enforce against the karnavan of a tarwad in his capacity as such karnavan a contract made by a previous karnavan on behalf of the tarwad, it is not necessary to add the other members of the tarwad as parties. 'Misjoinder' in section 99 of the Civil Procedure Code of 1908 includes 'non-joinder.' A contract made by the karnavan of a tarwad, if prudent and fair at the time it was made, is binding on his successor in office.

Yakkanath Eacharawnni Valia Kaimal v. *Manakkat Vasuni Elaya Kaimal* ... 436

COMPROMISE AFTER DECREE, EXECUTION OF—*Adjustment of mesne profits after decree enforceable by execution—When decree becomes incapable of execution:*

Where, in a suit for land and mesne profits, the decree leaves the amount of mesne profits undetermined, the suit to that extent remains undisposed of and it is open to the parties to adjust that portion of the

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suit by a lawful compromise; and a decree made in accordance with the terms of such compromise can be enforced by execution. Where such compromise provides that the amount of mesne profits must be recovered by execution first against certain land, execution cannot be taken against the person of the judgment-debtor, merely because the land is not immediately available for sale in execution. It must be shown that the obstacle is one which cannot be removed.

Vythinada Aiyar v. *Vythinada Aiyar* 78

CONSEQUENTIAL RELIEF:—*See* "SPECIFIC RELIEF ACT, ss. 9, 42" 452

CONSTRUCTION OF CONTRACT:—*See* "CARRIER, LIABILITY OF" 190

CONSTRUCTION OF DOCUMENT—*Test to determine whether document is testamentary—No will when there is no power to revoke:*

One of the invariable tests in coming to a conclusion as to the testamentary character of a paper is whether the paper is revocable. If it is not revocable, the document is not a will. The fact that the paper is drawn in the form of an agreement and that it is registered, are circumstances to be taken into consideration, though they do not *per se* amount to much. Where the document contains provisions which are not of an ambulatory character, the presumption will be against the testamentary nature of the document and the fact that such provisions are expressed to operate in the future will not affect the nature of the document. The intention of the party will be given effect to, though it is expressed in inappropriate language. The reservation of a life interest does not of itself suffice to make the document testamentary. In the matter of "*Reference by the Collector and Superintendent of Stamps, Bombay*," [(1896) I.L.R., 20 Bom., 210 at p. 214], referred to. *In the goods of Robinson*, [(1867) L.R.I.E. and D., 384], referred to.

Rajammal v. *Authiammal* 304

CONTRIBUTION, RIGHT TO, OF PURCHASE OF MORTGAGED PROPERTY—*Mode of calculating amount as between purchasers of different items of mortgaged property:*

M mortgaged 3 items of property to one *S* for 1,300 rupees. Two of these items were sold to two persons for Rs. 1,200, and the deeds of sale provided that the amounts for which the profits were sold should be paid to the mortgagee. The sale of the third item was for cash, but the property was not sold free of encumbrance and there was no contract between *M* and the third purchaser that the lands sold to the other purchasers should be liable for the 1,200 rupees of the mortgaged money. *S* assigned his mortgage and the assignee obtained a decree for the full amount due on the mortgage and in execution the properties sold to the third purchaser were brought to sale and the third purchaser paid up the amount to avoid the sale. In a suit by the third purchaser for contribution, it was contended by the third purchaser, that the amount of 1,200 rupees should be borne by the other two purchasers and the rateable contribution on all the properties should be only in respect of the balance left after deducting such amount:—*Held*, that the contribution must be calculated on the footing that all the properties were liable for the full amount. The benefit of the covenants in the sale-deeds to the other two purchasers did not run with the land and the third purchaser could claim the benefit of such covenants only on a contract with the mortgagor giving him such benefit.

Seshagiri Aiyar v. *Vythilinga Pillai* 211

CONTRACT ACT IX OF 1872, s. 25, cl. (3)—*Not necessary that the agreement should in terms refer to the barred debt:*

A promissory note purported to be executed for cash received, but the real consideration was proved to be a debt, the recovery of which was barred by the Statute of Limitations:—*Held*, that the promissory note

was a contract enforceable under section 25, clause (3) of the Indian Contract Act. A party to a contract may prove that the actual consideration was something different from that recited in the document and effect must be given to the real consideration. A contract falling within section 25, clause (3) of the Indian Contract Act is no exception to this rule. The agreement will be enforced if the real consideration is shown to be a barred debt, though no reference is made in the document to such debt. *Appa Rao* v. *Suryaprakasa Rao*, [(1900) I.L.R., 23 Mad., 94], considered. *Vasudeva* v. *Narasimma*, [(1882) I.L.R., 5 Mad., 6 at p. 8], referred to. *Kumara* v. *Srinivasa*, [(1888) I.L.R., 11 Mad., 213 p. at 215], referred to.

Ganapathy Moodelly v. *Munisawmi Moodelly* 159

2. ——————————, s. 43:—*See* "CIVIL PROCEDURE CODE, s. 43". 317

3. ——————————, ss. 55, 64, 73, 74—*Right of party to recover deposit, forfeited by terms of contract:*

A entered into a contract with *B* for the purchase of lands belonging to the latter for Rs. 41,000. Of this amount Rs. 4,000 was paid in advance, Rs. 20,000 was agreed to be paid by means of a mortgage and the balance before the 24th May when the conveyance was to be executed. The contract provided that the Rs. 4,000 was to be forfeited if there was any delay on the part of the vendee. It was also stipulated that the vendor was to execute the conveyance either in favour of the purchaser or those nominated by him. In part performance of this contract, a sale of a portion of the lands was effected in favour of *M* on the 28th March. Just before the day of payment, *B* gave notice to *A* that if the sale was not completed on or before the agreed date, the contract would be avoided, *A* failed to perform the contract before that date. Subsequently *B* sold the lands to third parties and realised Rs. 1,500 in excess of the price stipulated by *A*. *A* brought a suit for specific performance of the contract or, in the alternative to recover the Rs. 4,000 paid by him. The Subordinate Judge disallowed the claim for specific performance but decreed the return of the deposit of Rs. 4,000 to *A*. On appeal by *B* against this decree: *Held*, per *Wallis, J.*, that *A* was not entitled to a return of the deposit. Time was of the essence of the contract and *B* was justified in avoiding it under section 55 of the Indian Contract Act. *A* was not therefore entitled to specific performance or to damages. A deposit is primarily a security or guarantee for the performance of the contract. The provisions of section 64 of the Contract Act requiring a party who avoids a contract to restore any benefit derived thereunder do not extend to such deposits. Sections 73 and 74 of the Act do not apply to such cases. The distinction drawn by Courts of Equity between stipulations for liquidated damages and those for penalty have no bearing on such cases. A stipulation for forfeiture of deposit is not a stipulation for a penalty and it is not agreed upon as liquidated damages, though it goes in reduction of damages. *Manian Patter* v. *The Madras Railway Co.* [(1906) I.L.R., 29 Mad., 118], referred to. *Srinivasa* v. *Rathnasabapathy* [(1893) I.L.R., 16 Mad., 474], referred to. Per *Sankaran-Nair, J.*—*A* was entitled to return of the deposit. To entitle a vendor to retain the deposit, there must be acts by the purchaser which not only amount to delay sufficient to deprive him of the remedy by specific performance but which would make his conduct amount to a repudiation of the contract. A purchaser may recover damages if he shows his readiness and willingness to complete the contract within a reasonable time after the stipulated date; and the vendor rescinding the contract before the lapse of such reasonable time, cannot retain the deposit, though his rescission may be lawful. A contract does not go off merely by non-payment before the stipulated time. The vendor becomes entitled to damages under sections 73 and 74 of the Contract Act, but the contract itself is not at an end. The stipulation as to forfeiture in this case must be treated as a penalty. The rule that the distinction between penalty and liquidated damages do not apply to pecuniary deposits, holds good only when there is no means of accurately ascertaining the damages.

Where they can be ascertained and are below the deposit amount, the presumption will be that the parties intended it as a penalty and the deposit will not be forfeited. Sections 73 and 74 of the Contract Act apply to pecuniary deposits and "penalty" includes deposits. Where a person at whose option a contract is voidable rescinds it under section 55 of the Contract Act, before the contract is determined by the default of the other party, he will be entitled to recover damages under sections 73 and 74 of the Act. He must however return the deposit as a "benefit" within the meaning of section 64 of the Act.

Natsa Iyer v. *Appavu Padayachi* 375

4. ——————————, s. 69—*'Interested in paying'—Meaning of—When payment not voluntary:*

A person is interested in making a payment within the meaning of section 69 of the Contract Act, when there is an apprehension of any loss or inconvenience or of any detriment capable of being assessed in money. A person whose immoveable property is attached for a debt due by another is 'interested' in paying the debt to save the property and can recover from the person by whom it is due. Payment under such circumstances is not a voluntary payment.

Subramania Iyer v. *Rungappa Reddi* 232

5. ——————————, s. 69:—*See* "REVENUE RECOVERY ACT, ss. 3, 35" 41

6. ——————————, ss. 69, 70—*S. 70 of the Contract Act does not apply where the party sought to be made liable, though benefited, had no option but to enjoy the benefit:*

In the order to enable a party to recover money paid by him from another under section 70 of the Indian Contract Act, it is necessary that the party sought to be made liable must not only have benefited by the payment but must also have had the opportunity of accepting or rejecting such benefit. Where no such option is left to him and the circumstances do not show that he intended to take such benefit, he cannot be said to have "enjoyed such benefit" within the meaning of the section. When the person paying is interested in making the payment, he cannot be presumed, in the absence of evidence to show that he intended to act for the other party also, to have acted for such other party. Section 70 of the Contract Act reproduces the English Law as laid down in *Lampleigh* v. *Brathwait*. *Abdul Whid Khan* v. *Shaluka Bibi* [(1894) I.L.R., 21 Calc., 496 at p. 504], followed. *Damodra Mudaliar* v. *Secretary of State for India*, [(1895) I.L.R., 18 Mad., 88], considered. A person paying money into Court under section 310-A of the Civil Procedure Code of 1882 to set aside a sale in execution cannot recover such money from the defendant who has obtained possession of the property, when he has made the payment to protect his own interest and the circumstances do not show that he would not have made the application if the defendant had not consented.

Yogambal Boyee Ammani Ammal v. *Naina Pillai Markyar* 15

7. ——————————, ss. 134, 151:—*See* "HINDU LAW" 306

CONTRACT OF MARRIAGE ACTION FOR PROCURING BREACH OF—*Parent or guardian procuring breach maliciously or by false representations liable:*

An action is maintainable against a person for inducing a party to break a contract of marriage entered into by such party. A parent or guardian inducing a child or ward, to break such a contract is liable when such parent or guardian does so maliciously or by false representations. Although malice is not the gist of the action in such cases, it may, if alleged and proved, displace the protection or privilege which arises from the relation between the party procuring the breaking of the contract and the party breaking it.

Irene Fanny Colquhoun v. *Fanny Smither* 417

COURT FEES ACT VII OF 1870, s. 19-I (1) and III sched.—*"Property held in trust not beneficially"—Undivided share of deceased coparcener not "property held in trust not beneficially" Surviving coparcener applying for Letters of Administration liable to pay court-fees on the value of share of deceased coparcener:* PAGE

Under the Mitakshara Law as administered in this part of India, an undivided coparcener has power to mortgage or alienate his undivided share and he can at any time enforce partition of his own share. He cannot therefore be said to hold *his own* share of the undivided property "as trust property," not beneficially or with general power to confer a beneficial interest in it, within the meaning of these words as used in Annexure B of the form for valuation in Schedule III of the Court Fees Act, although, as regards the shares of others, he may be said to so hold them. Where a surviving coparcener governed by the Mitakshara Law, applies for Letters of Administration in respect of property standing in the name of a deceased coparcener, which was joint family property of the applicant and the deceased, is bound to include in the valuation of the property, the value of the share to which the deceased was entitled at the moment of his death and he cannot under section 19 I (1) of the Court Fees Act, obtain Letters of Administration to the joint family property, unless he includes such share in the valuation and pays the proper *ad valorem* court fees upon it. *In the goods of Pokermull Augurwallah*, [(1896) I.L.R., 23 Calc., 980], referred to—not followed. *In the goods of Brindabun Ghose*, [(1873) 11 B.L.R., App. 39], followed.

In the matter of Desu Manavalla Chetty 98

CURRENCY NOTES, DELIVERY OF HALVES OF—*Such delivery does not pass the property in the notes—Creditor receiving halves if notes from debt or not entitled to insist on delivery of the other halves:*

The delivery by a debtor of halves of currency notes to his creditor with the intention of paying off the debt by remitting the other halves, does not pass the property in the notes to the creditor so as to enable him to claim delivery of the other halves. *Smith* v. *Mundy*, (29 L.J.Q.B., 172), followed. The debtor does not by simply sending the first halves, without anything more, become a trustee or bailee in respect of the other halves of the notes. *Per* ABDUR RAHIM, J.—Section 92 of the Indian Contract Act does not apply to money or currency notes, although the definition of goods in section 76 of the Contract Act is wide enough to cover coins and currency notes + *Per* BAKEWELL, J.—The delivery of the half notes to the creditor was only one step towards or preparatory to the actual delivery of the notes and indicates only an intention to transfer and does not constitute a delivery of the notes.

Koti Venkata Ramiah v. *Official Assignee of Madras* 196

CRIMINAL PROCEDURE CODE—ACT V OF 1898, s. 195—*Superior Court has no jurisdiction to order further inquiry by Subordinate Court:*

A superior Criminal Court to which an appeal has been preferred under section 195 of the Criminal Procedure Code against an order of an inferior Criminal Court granting sanction, has no power to take or call for further evidence. The power to do so given by section 428 is limited to appeals under that chapter.

Krishna Reddy v. *Emperor* 9

2. ——————————, s. 235—*"Same transaction" what is—Community of purpose or design and continuity of action necessary:*

In order that a number of acts may be so connected together as to form part of the same transaction within the meaning of section 235, Criminal Procedure Code, community of purpose or design and continuity of action are essential elements. To constitute community of purpose, the mere existence of some general purpose or design will not be sufficient. The purpose in view must be something particular and definite. There is no continuity of action where each act is a completed act in itself and the original design accomplished so far as that act is concerned. Where a company is formed with the object of defrauding the public, it cannot be said that distinct acts of embezzlement committed in the course of several years form part of the same transaction by reason of such general object.

Choragudi Venkatadri v. *Emperor* 502

3. ——————————, ss. 237, 238, 423—*Person convicted of an offence cannot on appeal be convicted of abetment of such offence:*

The power of an Appellate Court under section 423 of the Code of Criminal Procedure to alter a finding must be used in accordance with the provisions of sections 237 and 238 of the Code. Where a person who has been convicted of an offence has appealed, the Appellate Court cannot, after acquitting him of such offence, convict him of the abatement of such offence.

Padmanabha Panjikannaya v. *Emperor* 264

4. ——————————, s. 250—*In appeals under s. 250 notice to accused not imperative:*

In appeals under section 250 of the Criminal Procedure Code, it is not imperative that notice should be given to the accused.

Ambakkagari Nagi Reddi v. *Basappa of Medimakulapalli* 89

5. ——————————, ss. 337, 339—*No true and full disclosure where witness subsequently recants his previous statement—On trial after withdrawal of pardon, if pardon pleaded in bar, jury to determine whether pardon forfeited:*

A person who has accepted a tender of pardon under section 337 of the Criminal Procedure Code and made a true and full disclosure before the inquiring Magistrate, may be recalled and examined by such Magistrate; and his pardon will be forfeited if he resiles from such former statement. It is not necessary in order to forfeit the pardon that he should be examined as a witness in the Court of Sessions. He is examined in the case when he is examined by the Magistrate and the prosecution is not bound to examine before the sessions an untrustworthy witness. When such person is tried after withdrawal of pardon for the original offence and pleads the pardon as a bar, the jury must determine whether the pardon was forfeited or not. In default of such determination, a conviction will be bad. *Kullan* v. *Emperor*, [(1909) I.L.R., 33 Mad., 173], referred to. *Emperor* v. *Kothea*, [(1906) I.L.R., 30 Bom., 611], referred to.

Alagirisami Naicken v. *Emperor* 514

6. ——————————, ss. 437, 119—*Power to order further inquiry under s. 437 does not extend to order of discharge under s. 119:*

The power conferred by section 437 of the Criminal Procedure Code to order further inquiry cannot be exercised in the case of orders of discharge under section 119 of the Code, where the Magistrate before making the order of discharge, has called upon the person, into whose conduct the inquiry is made, to establish his defence. The word 'discharged' in section 437 must be read as equivalent to 'discharged within the meaning of sections 209, 253 and 259 of the Code'.

Velu Tayi Ammal v. *Chidambaravelu Pillai* 85

7. ——————————, ss. 439, 476, 200—*Power of High Court to interfere under s. 439 with proceedings of Subordinate Criminal Court under s. 476:*

The High Court has power under section 439 of the Criminal Procedure Code to interfere on grounds other than want of jurisdiction, when a Criminal Court has taken action under section 476, Criminal Procedure

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Code. The words "as if upon complaint made and recorded under section 200" introduced in the Code of 1898 were not intended to effect any change in the revisional power of the High Court. *Eranholi Athan* v. *King Emperor*, [(1903) I.L.R., 26 Mad., 98], overruled.

Ottupura Narayanan Somayajipad v. *Emperor* 48

DECREE, EXECUTION OF—*Who ought to be made representative—Person with the best* prima facie *title sufficiently represents estate:*

A decree-holder who has to apply for execution against the legal representative of the deceased judgment-debtor, may select, from among several rival claimants, as legal representative, the one whom he believes honestly to have the best *prima facie* title and the representation, in the absence of fraud or collusion, will be sufficient, even though it is subsequently found out some other person is the true legal representative. *Khirajmal* v. *Daim*, [(1905) I.L.R., 32 Calc., 296], explained.

Ramaswami Chettiar v. *Oppilamani Chetti* 6

DECREE, MORTGAGE OF :—*See* "MORTGAGE" 429

DECREE, SUIT ON :—*See* "EXECUTOR DE SON TORT, LIABILITY AS" 428

DECREE, TRANSFER OF—*Transfer takes effect from date of transfer and not from date of its recognition by Court :*

Where a decree is transferred by an instrument in writing, such transfer takes effect from the date of such instrument and not from the date of its recognition by the Court. *Puthiandi Mammed* v. *Avalil Moidin*, (I.L.R., 20 Mad., 157), considered. The transfer of a decree may, in the absence of a contract to the contrary, be regarded as conditional upon the Court granting the transferee permission to execute. The transferee, before repudiating the transfer, is bound to do all that is reasonably necessary to obtain such permission.

Sadagopa Chariar v. *Raghunatha Chariar* 62

DEFAMATION—*Words imputing loss of caste, when actionable—Privilege—Caste usage :*

It is open to one member of a caste to refuse to associate with another for what he considers to be an infringement of caste rules; and no Court can call upon him to assign a reason for not associating. It is not however open to one member to call another an outcaste. The caste or the majority of them may expel a member from the caste. The Courts will interfere if he is so expelled without being given a proper opportunity for explanation. Words which impute unworthiness to remain a member of the caste are defamatory and give rise to a cause of action; and where the words used are ambiguous, it must be decided on evidence whether they were intended to bear a libellous meaning. Where a libellous communication is made regarding a member of a caste, the mere fact that the person making such communication is a member of the caste, will not of itself suffice to make the communication privileged.

Coopoosami Chetty v. *Duraisami Chetty* 67

EASEMENT ACT V OF 1882, s. 13—*Right to channel cut subsequent to severance of tenements :*

Land belonging to Government was granted to *A*, who dug and used a channel across other Government land. The lands across which the channel was dug was subsequently granted to *B*. *B* thereupon filled up the channel, which had been in existence for 16 years. In a suit by *A* to establish his right to such channel :—*Held*, that *A* had no claim to an apparent and continuous easement under section 13 of the Easements Act and had not acquired a prescriptive right by user of the channel.

Kuttath Krishnan v. *Chathu Menon* 207

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2.——————————, **ss. 13, 28, 33**—*Right of way not apparent and continuous easement—Air and light, extent of prescriptive right acquired in—When action for compensation for obstruction will lie—What relief appropriate to be granted :*

A right of way is not an apparent and continuous easement within the meaning of section 13 of the Indian Easements Act. The extent of prescriptive right to the passage of light or air to a certain window is the quantity of light or air which has been accustomed to enter that opening during the prescriptive period under section 28 of the Easements Act; no invasion of such right will give a right to compensation unless substantial damage is caused within the meaning of section 33 of the Act. Where the injury caused by the invasion of the right is not small and a mandatory injunction will not cause serious loss or damage to the defendant, an injunction and not merely compensation will be the appropriate relief to be granted. The fact that the owner of the dominant tenement has acquired light from other sources will not justify an interference with the prescriptive right acquired by him. *Dyers Company v. King.* [(1870) I.R., 9 Eaq., 438 at p. 442], referred to.

Esa Abbas Sait v. *Jacob Haroon Sait* 327

ESTOPPEL :—*See* "CIVIL PROCEDURE CODE, s. 13" 459

EVIDENCE ACT I OF 1872, s. 30—*Confession of co-accused not to be acted upon without corroboration—Misdirection to jury :*

The confession of a co-accused is on an even lower footing than the evidence of an accomplice and a conviction based on such a confession alone is bad in law. Section 30 of the Evidence Act only provides that such a confession is to be an element in the consideration of all the facts of the case, but it does not do away with the necessity for other evidence. It is the duty of the Judge, when there is no other evidence than the confession of a co-accused to direct the jury accordingly and tell them to acquit the accused; and his omission to do so is a misdirection which will vitiate a conviction.

Giddigadu v. *Emperor* 46

2.——————————, **s. 91**—*Oral evidence admissible to prove what took place at time of search :*

Where a search has been conducted under the Criminal Procedure Code, the search-list is not the only evidence admissible as to the matters dealt with therein. Section 91 of the Evidence Act does not exclude oral evidence of what took place at the time of search. *Abdul Khadir and others* v. *Queen-Empress*, (Weir's "Criminal Rulings," 4th edition, volume 2, page 515), dissented from. *Public Prosecutor* v. *Sarabu Chennayya*, [(1910) I.L.R., 33 Mad., 413], followed.

Elamathan v. *Emperor* 416

3.——————————, **s. 91**—*Search-list does not exclude oral evidence of matters stated therein—Confession not recorded in compliance with orders of Government—Such confession admissible if voluntary :*

Section 91 of the Evidence Act has no application when the writing is not evidence of the matter reduced to writing. A search-list is not evidence of the matter stated therein and it does not therefore exclude oral evidence of such matter. G.O., No. 2883, Judicial, paragraph 5 (dated 17th December 1887), directs that no magistrate may record any confession or statement under section 167, Criminal Procedure Code, until he has first recorded in writing his reasons for believing that the accused is going to make such statement voluntarily: *Held*, that non-compliance with an order of Government as to the formalities to be observed in recording confessions, does not render a confession inadmissible in evidence. The Court has to determine whether such confession was voluntary or not.

Public Prosecutor v. *Sarabu Chennayya* 413

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EXECUTOR DE SON TORT, LIABILITY AS—*Widow in possession of husband's undivided property not liable as executor* de son tort, *when such property has devolved on coparceners—Decree, suit on—No suit maintainable on decree, when the passing of the decree gives no cause of action independent of the original cause of action*—Res judicata—*Subsequent suit on same cause of action barred though different reliefs claimed—Suit against partners, parties to :*

On the death of an undivided coparcener, the estate vests in the survivors and there is no estate belonging to a deceased person. The widow of the deceased, by the fact of being in possession of a portion of the joint family property, does not become liable as an executor *de son tort*, as she has not intermeddled with any estate belonging to a deceased person. A suit is not maintainable on a decree, when the mere passing of the decree does not give rise to a cause of action distinct from the original obligation. The passing of a decree against an undivided coparcener, does not give rise to such a cause of action against other coparceners, except his sons, whatever be the nature of the original debt on which the decree was passed. A decision in a prior suit bars a subsequent suit on the same cause of action, though the reliefs claimed in the two suits may be different. To a suit for winding up a partnership, all partners having distinct interests must be parties; and where such a suit, brought against all the partners, is not maintainable against some, the suit must be dismissed.

Ramasami Aiyar v. *Veerappa Chetty* 423

FIDUCIARY RELATIONSHIP—*Direction by creditor to debtor—How far such direction can create fiduciary relationship between creditor and debtor :*

A customer who had certain amount standing to his credit in a Bank, gave directions to the Bank to utilise the money for a certain purpose and the officers of the Bank, when the customer called at the Bank, informed him that his instructions would be carried out in due course. The Bank became insolvent before the directions were so carried out. On a motion by the creditor to have his amount paid in full:—*Held, per* MUNRO, J., that, by virtue of the direction by the customer, the Bank held the money for a specific purpose and that a fiduciary relationship was established between the customer and the Bank. The customer was therefore entitled to be paid his money in full. *Per* ABDUR RAHIM, J.—The direction by the customer did not alter the relation of creditor and debtor between the customer and the Bank into a fiduciary relationship. Such relationship could not be created unless the debtor by some unequivocal act, shows that he had changed his position into that of a bailee. The mere promise to carry out the customer's directions, without doing anything to appropriate the money, is not sufficient. The customer was only entitled to prove for his debt.

Official Assignee of Madras v. *Luppriah* 145

2.——————— *When banker holds money as agent—Banker holding money as agent not a debtor :*

O, who owed certain money to *M.C.*, sent a cheque to Bank *A* for the amount, asking *A* to place the amount to the credit of *M.C.*, who at the time had no account with *A*. *M.C.* was informed by *A* that the amount was placed to her credit. *M.C.*, on the 5th October, asked *A* to send her the amount and *A* sent *M.C.*, a form of receipt to be signed by her. *M.C.* signed the receipt and sent it to *A*, who received it before the 20th when *A* suspended payment. *A* applied to the Court for the relief of insolvent debtors and the estate of *A* was vested in the Official Assignee. On a motion by *M.C.* claiming payment;—*Held*, that the relationship of debtor and creditor did not exist between *A* and *M.C.* and that the formed held the money as agent of the latter when payment was suspended. *Per* MUNRO, J.—As the receipt and demand for payment reached *A* before payment was suspended, the result was the same as if *M.C.* attended in person and demanded payment. On *A*'s failure to remit the money, which

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it was *A*'s duty to do, *A* held the money in a fiduciary capacity. *Per* ABDUR RAHIM, J.—As *A* received the money for a particular purpose and, as there was no account between *A* and *M.C.*, *A* had no right to appropriate the money and did not purport to do so. Even supposing the case were otherwise, the subsequent communication by *A* to *M.C.* that he held the money for *M.C.* in accordance with the instructions received was an act of appropriation, sufficient to show *A*'s consent to hold the money in a fiduciary capacity. *In re Hallett's Estate*, [(1879) 13 Ch.D., 696, referred to.

Official Assignee of Madras v. *The Oriental Government Security Life Assurance Company* 150

FRAUDULENT CONVEYANCE—TRANSFER OF PROPERTY ACT, s. 53—*Conveyance void if intended to convert land into cash and place it beyond reach of creditors—Equity on setting aside transfer—Transferee entitled to a charge for amount spent in discharging valid prior mortgage :*

A transferee for value, who takes the transfer with the intention of helping the transfer or to convert his immoveable property into cash which can be easily concealed and thus to defeat or delay his creditors cannot be treated as a transferee in good faith within the meaning of section 53 of the Transfer of Property Act. *Isham Chunder Das Sarkar* v. *Bishu Sirdar*, [(1897) I.L.R., 24 Calc., 825], followed. In such cases it lies on the transferee to prove good faith and valuable consideration; and where the latter is proved the Court will be slow in ordinary circumstances to hold that there was an absence of good faith. *Amarchand* v. *Gokul*, [(1903) 5 Bom., L.R.), 142, referred to. Where the transferee has discharged a valid prior mortgage on the property sold, the transfer will be set aside only on his being given a charge for the amount spent by him in discharging such mortgage. *Chithambaram Chettiar* v. *Sami Iyar*, [1907) I.L.R., 30 Mad., 6], distinguished.

Palamalai Mudaliyar v. *South Indian Export Company* 335

HEREDITARY VILLAGE OFFICES ACT (MADRAS) ACT III OF 1895, ss. 3, 21—*Act applicable to offices mentioned in s. 3, cl. 4, only in villages other than proprietary estates :*

Clauses 3 and 4 of section 3 of Act III of 1895 must be read together. The Act is applicable to offices mentioned in clause 4 of section 3 only in villages other than those in proprietary estates and section 21 of the Act does not oust the jurisdiction of Civil Courts in regard to such offices in proprietary estates.

Veerbadran Achari v. *Suppiah Achari* 488

2.——————————————————, s. 5—*Permanent lease not a transfer within the meaning of s. 5 :*

Section 5 of Madras Act III of 1895 only prohibits the transfer of ownership. A permanent lease of lands forming the emoluments of an office does not amount to a transfer of ownership within the meaning of section 5 and is not prohibited by its provisions. *Vencataswara Yettiapah Naicker* v. *Alagoo Moothoo Servagaran*, [(1861) 8 M.I.A., 327), referred to.

Kshetrabaro Bissoyi v. *Sobhanapuram Harikristna Naidu* 340

3.——————————————————, ss. 13, 21—*S. 21 is no bar to suit for recovery of land :*

A suit in the Civil Courts for land, not based on the ground that such land constituted part of the emoluments of any of the offices described in section 13 of Madras Act III of 1895, is not barred by section 21 of the Act. The effect of the words in section 13 of the Act, "but such decision, etc.," is to preserve the jurisdiction of the Civil Courts even in cases where the Collector decided the case on the assumption mentioned therein and not to oust such jurisdiction where he did not.

Gavara Raman v. *Adabala Rattayya* 235

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———— ———— ————, ss. 13, 21—*Prohibition in s. 21 applies only when jurisdiction is conferred on Revenue Courts by s. 13—Construction of statute:*

Notwithstanding the apparent generality of the language of section 21 of Madras Act III of 1895, it must be held that the section takes away the jurisdiction of Civil Court only in those cases in which jurisdiction is conferred on Revenue Courts by section 13. A suit for a village officer's inam land on the expiry of a lease granted by such village officer to the defendant is cognizable by the Civil Courts as the plaintiff has only to prove the letting and expiry of the term and he is not called upon to prove his title which the defendant will be estopped from disputing. The plaintiff cannot, however, lease his claim on his title to the land. *Narasimhulu* v. *Narasimhulu*, (16 M.L.J., at p. 386), referred to. *Kesereim Narasimhulu* v. *Narasimhulu Pantnidu*, [(1907) I.L.R., 30 Mad., 126], referred to. It is a general principle of law that every presumption shall be made in favour of the jurisdiction of a Civil Court and that it shall not be taken away except by express words or by necessary implication.

Muvvula Seetham Naidu v. *Doddi Rami Naidu* 208

HINDU LAW—*Adoption—Adoption by widow of predeceased co-parcener after estate had vested in the widow of survivor invalid, though made with the consent of the latter:*

A power given to a widow to adopt is absolutely at an end when once the estate has vested in the heir of her deceased son and is not revived even if she afterwards succeeds to the estate. *Ramakrishna* v. *Shamrao* [(1902) I.L.R., 26 Bom., 526], and *Manikyamala Bose* v. *Nandkumar Bose* [(1906) I.L.R., 33 Calc., 1306], referred to. *Held* also that, in such a case, the consent of the son's heir in whom the estate had vested, will not validate the adoption. WALLIS, J.: *Semble*, the same rule would apply in the case of an adoption by the widow of a co-parcener who has lost her right to adopt independently of such consent by reason of the estate having devolved on the widow of the last co-parcener. *Annamma* v. *Mabbu Bali Reddy* [(1875) 8 M.H.C.R., 108], referred to.

Adivi Suryaprakasa Rao v. *Nidamarty Gangaraju* 228

2. ———— ——:—*See* "CIVIL COURTS ACT, s. 16" 342

3. ———— ————*Illegitimate son, by widow whose re-marriage is prohibited, has no right of succession—Adverse possession—Right of true owner to recover possession by inducing tenant to attorn:*

An illegitimate son by a Sudra widow, whose re-marriage is forbidden, has no right of inheritance. *Venkatachela Chetty* v. *Parvatham*, (1875) 8 M.H.C.R., 134], referred to. To entitle the illegitimate son to succeed, the connection must not be adulterous or forbidden by law. Where persons, holding adversely to the true owner, enjoy the lands through a tenant who however has not been let into possession by them or their predecessors in title, the true owner is not estopped from recovering possession by inducing such tenant to attorn to him.

Annayyan v. *Chinnan* 366

4. ———— ————*Jains—Inheritance—Competition amongst heirs—Mother's sister's son preferred to maternal uncle's son:*

Under Hindu Law a mother's sister's son is entitled to succeed to the estate of a deceased Hindu in preference to a maternal uncle's son.

Appendai Vaithiyar v. *Bagubali Mudaliyar* 439

5. ———— ————, **MITAKSHARA**—*Reunited family, succession in, governed by law of survivorship:*

Succession in a reunited family governed by Mitakshara Law is by survivorship. This mode of succession is not confined to the members

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who actually reunited and the son of a reunited member born after the reunion is reunited and takes by survivorship. *Krishtraya* v. *Venkatramayya*, [(Appeal No. 170 of 1901) (unreported)], followed. *Ramasamy* v. *Venketasan*, [I.L.R., 16 Mad., 440], distinguished.

Samudrala Varaha Narasimha Charlu v. *Samudrala Venkata Singaramma* ... 165

6. ————————*Partition—Temporary partition, to be followed by final partition, does not destroy the tenancy in-common—Purchaser of part from one parcener entitled to enforce his right by partition—Alienee of portion—Necessary party to such suit:*

An award, which purported to effect a division between several individual co-parceners, allotted each co-parcener a share and provided that each should enjoy the share allotted to him for a time and that at the end of such period, a re-partition according to profit and loss should be effected of all the properties. One of the co-parceners sold a portion of the share allotted to him to *A* and a portion was sold in execution of a decree for rent obtained by the landlord against all the co-parceners and purchased by *B*. *A* brought a suit for partition against all the co-parceners without making *B* a party. *B* was subsequently added more than 12 years after the date when the re-partition was directed by the award: *Held*, (1) that the partition was not final and the co-parceners, till the final partition, continued to be joint-tenants or tenants-in-common, subject to the separate enjoyment of the portions allotted to each. (2) That the proper remedy of *A* was by a suit for partition of the whole under the terms of the award. (3) That *B* was a necessary party and as he was joined after the suit as against him was barred, the suit ought to be dismissed.

Duri Bhagavanlu v. *Tadepatri Veeravadhanulu* 246

7. ————————*Reversioner, suit by—Suit by next male reversioner maintainable without proof of collusion of nearer female reversioner:*

The rule that suits to set aside alienations by a female heir having a limited interest should be brought by the next reversioner and that a remote reversioner cannot sue without showing collusion between the female heir and the next reversioner, does not apply where the next reversioner is a female and the suit is brought by the nearest male reversioner. Where a widow having daughters makes an alienation, the nearest male reversioner may sue without proving collusion between the widow and daughter.

Chidambara Reddiar v. *Nallammal* 410

8. ————————*Son not liable for father's debt when barred—Contract Act, ss. 134, 151—Surety not discharged if claim against principal debtor allowed to become barred—Limitation Act, sch. II, art. 98:*

Undivided family property devolving on the son by survivorship is not 'the general estate' of the father within the meaning of article 98 of Schedule II, Indian Limitation Act, and a suit to recover from the son out of such estate the loss occasioned by his father's breach of trust is not governed by article 98. A son is not, under the Hindu Law, liable to pay a debt of the father which was barred against him. A debt, the recovery of which is barred by limitation, is not extinguished and the debtor is not, by reason of the bar of limitation, discharged therefrom. The omission of the creditor to sue the debtor within the period of limitation is not an act, the legal consequence of which is the discharge of the debtor and such omission has not the effect of discharging the surety under sections 134 and 137 of the Indian Contract Act. *Carter* v. *White*, (1883) 25 Ch.D., 666)], referred to. *Ranjit Singh* v. *Naubat*, [(1902) I.L.R., 24 All., 504], dissented from.

Subramania Aiyar v. *Gopala Aiyar* 306

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9. ————*Succession—Illegitimate son succeeds as a co-heir with the widow:*

The illegitimate son of a separated Hindu, who dies without legitimate male issue, succeeds as a co-heir with the widow, daughter or daughter's son. *Ramalinga Muppan* v. *Pavadai Goundan*, [(1902) I.L.R., 25 Mad., 519 at p. 521], approved. *Chinnammal* v. *Varadarajulu*, [(1892) I.L.R., 15 Mad., 307], followed.

Meenakshi Anni v. *Appakutti* 226

10. ————*Widow, compromise by—When such compromise tantamount to alienation—Possession when adverse to reversioner:*

Where a widow, whose right to property is disputed, enters into a compromise with the disputant by which she merely undertakes to make no further claim to the property, such compromise does not amount to an alienation by the widow and the disputant does not hold the property under any title derived from her. *Sheo Narain Sing* v. *Khurgo Koery and Sheo Narain Singh* v. *Bishen Prosad Singh*, [(1882) 10 C.L.R., 337], dissented from. *Radha Mohan Dhas* v. *Ram Das Dey*, [(1869) 3 B.L.R., 362], referred to. The possession of the disputant under the above circumstances was adverse to the reversioner. In considering whether possession is adverse to the reversioner, it must be seen whether it is based on a title derived from the widow as representative of the separate estate or on one which leaves no separate estate to be represented.

Kambinayani Timmaji v. *Kambinayani Subbaraju* 473

11. ————*Widow—Debt contracted by widow for necessary purposes binding, though no formal charge created:*

A debt contracted by a widow as representative of the estate, for the purposes of the estate will be binding on it in the hands of the reversioners, though no formal charge on the estate is created; when the creditor looks not to the personal credit of the widow but to her as representative of the estate and relies on the credit of such estate. *Ramasamy Mudaliar* v. *Sellattammal*, [(1882) I.L.R., 4 Mad., 375], referred to.

Reyella Jogayya v. *Nimushakavi Venkataratnamma* 492

INDIAN COMPANIES ACT VI OF 1882, s. 76—*Alteration of memorandum of association by articles—To what extent a company can by resolution alter articles:*

Under section 76 of the Indian Companies Act anything which appears in the articles of association but is not provided for in the memorandum of association may be altered by a special resolution. Where the articles of association provide for matters which need not, under section 8 of the Companies Act, be contained in the memorandum of association and which are not either expressly or impliedly dealt with by such memorandum, the portions of the articles dealing with such matters cannot be treated as part of the memorandum and can be altered by a special resolution of the company. Rights which have their origin in a contract outside the articles, the terms of which contract are found in or referred to in such articles, can be altered by such alteration of the articles unless it is proved that one of the terms of such contract was that such rights should not be affected by an alteration of the articles.

Chithambaram Chettiar v. *Krishna Aiyangar* 36

INDIAN INSOLVENCY ACT, 11 AND 12 VICT., CAP. 21, s. 39—*Right of set off exists against Official Assignee in respect of bills discounted before and dishonoured after insolvency:*

Under sections 39 and 40 of the Indian Insolvency Act, anything can be set off in India which can be set off in England under the Bankruptcy law in force for the time being. Mutual credits which may be set off include credits which have a natural tendency to terminate in debt and not merely credits which must terminate in debts. Claims in respect of bills

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discounted for the insolvent before insolvency and dishonoured by the makers after insolvency, can be set off under section 39 of the Indian Insolvency Act. *Miller* v. *National Bank of India*, [(1892) I.L.R., 19 Calc., 149], dissented from. *Young* v. *Bank of Bengal*, [(1836) 1 Moo., I.A., 87], referred to and explained. *Alsager* v. *Currie*, (2 M. & W., 751), followed.

In the matter of Canthom & Co. 53

2. ————, ss. 39, 40—*'Mutual credits' relate to date of vesting order—Presidency Small Cause Courts Act, s. 69—Money deposited as security under section does not become the property of the decree-holder—Right to set off claims for unliquidated damages:*

Money deposited in Court under section 69 of the Small Cause Courts Act does not become the property of the decree-holder. Before the date of the vesting order an insolvent had obtained two decrees against a debtor. In the case of one of the decrees, the debtor applied for a reference under section 69 of the Presidency Small Cause Courts Act and the amount deposited by him remained in Court on the date of the vesting order. The High Court declining to express an opinion on the reference, the decree became absolute and the money was paid to the Official Assignee. Before the date of the vesting order the debtor had brought a suit against the insolvent, and a decree was passed therein against the insolvent after the vesting order:—*Held*, that the debtor was entitled under section 39 of the Insolvency Act to set off against the amount of the two decrees obtained against him the amount due by the insolvent under the decree obtained by the debtor. The decree in respect of which the depesit was made remained unsatisfied in law on the date of the vesting order and was an item of credit within the meaning of section 39 on such date. The subsequent payment to the Official Assignees did not deprive the debtor of his right of set off. *Per* KRISHNASWAMY AYYAR, J.—Claims for unliquidated damages cannot be the subject of set off as mutual credits under section 39 of the Indian Insolvency Act. Such claims are however mutual dealings within section 38 of the English Acts of 1869 and 1883 and can form the subject of set off under section 40 of the Indian Insolvency Act, which makes the provisions of the subsequent English Acts applicable to the proof of claims under the Indian Insolvency Act.

Chengalvaraya Mudaly v. *The Official Assignee of Madras* 467

3. ————, s. 73—*'Person aggrieved,' who is—Official Assignee, right of, to appeal as person aggrieved—Fiduciary relationship—Effect of demand by creditor in creating fiduciary relationship between him and debtor:*

A 'person aggrieved,' within the meaning of section 73 of the Indian Insolvency Act, is a person against whom a decision has been pronounced which has wrongly refused him something which he had a right to demand. Where a debtor, whose claim to be paid in full was rejected by the Official Assignee, moved the Insolvency Court making the Official Assignee a party and obtained an order directing payment in full, the Official Assignee is a 'person aggrieved' within the meaning of section 73 of the Act and is entitled to appeal against such order. *Ex parte Sidebottam, in re Sidebottam*, [(1880) 14 Ch.D., 458 at p. 465], referred to. *In re Lamb; ex parte Board of Trade*, [(1894) 2 Q.B.D., 805], referred to. The Official Assignee, in refusing the creditor's claim, does not act judicially and the notice of motion to Court cannot be considered as an appeal against a judicial or quasi-judicial proceeding of the Assignee. Where a person pays money into a Bank without giving any directions, the money becomes the property of the Bank and the relation between the Bank and the person paying is that of debtor and creditor. *Per* MUNRO, J.—Where the person paying money without any directions makes a proper demand for payment after the money has become payable, the debtor is bound to remit at once such money to the creditor; and the debtor thereafter holds such money in a fiduciary capacity, just as if the creditor had received payment and deposited it with directions to remit. *Per* ABDUR RAHIM, J.—It is not competent to a creditor by making a

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demand upon his debtor, to convert the latter into a trustee in respect of the amount due. Such a change in the relationship can be brought about only by the debtor agreeing to accept the altered position and by his doing something towards effectuating the trust.

Official Assignee of Madras v. *Ramachandra Iyer* 134

INDIAN SUCCESSION ACT, X OF 1865, ss. 82, 187—*Will—Bequest to widow, how to be construed:*

Section 187 of the Succession Act does not debar a defendant from relying on a will, in respect of which no Probate or Letters of Administration have been taken out, as he is not seeking to establish a right as executor or legatee. In a case to which the Hindu Wills Act applied, a testator made a bequest to his widow in the following terms:—"I give all the remaining properties of every sort which fell to my share to my wife Andalu. Therefore, the aforesaid Andalu herself should enjoy all the remaining properties":—*Held*, on the construction of the will, that the widow took only a limited estate. The operation of the ordinary rule of Hindu Law that a bequest to a wife, without words creating an absolute estate, conferred only a limited interest, was excluded by section 82 of the Succession Act. The fact that the donee was a widow, the absence of words of inheritance, and of words conferring powers of alienation were not sufficient to show that she took only a restricted interest. These circumstances, however, coupled with the recital in the will that she should "enjoy" the estate, indicated the intention of the testator that she should have no powers of alienation.

Caralapathi Chunna Cunniah v. *Cota Nammalwariah* 91

INDIAN TRUSTS ACT, s. 51:—*See* "TRUSTEE, POWERS OF INVESTMENT OF" ... 154

ILLEGITIMATE SON:—*See* "HINDU LAW" 366

INHERITANCE:—*See* "HINDU LAW" 439

JAINS:—*See* "HINDU LAW" 439

JURISDICTION—*Appellate decree passed without jurisdiction—High Court bound to set aside such decree:*

Where a small cause suit is tried by a Munsif on the original side and his decision is reversed on appeal, the High Court is bound to set aside the appellate decree as having been passed without jurisdiction. *Parameshwaran Nambudri* v. *Vishnu Embrandiri*, [(1903) I.L.R., 27 Mad., 478], dissented from. *Ramasamy Chettiar* v. *Orr*, [(1903) I.L.R., 26 Mad., 176], approved. *Shankarbhai* v. *Somabhai*, [(1901) I.L.R., 25 Bom., 417], approved.

Kollipara Seetapathy v. *Kankipati Subbayya* 323

JURISDICTION—LETTERS PATENT, cl. 12—*Suit for land—Suit in which decree is asked for operating directly on land, is a suit for land:*

A suit which prays for any relief with reference to any specific immoveable property is a suit for land within the meaning of clause 12 of the Letters Patent. Where in a suit for maintenance the plaintiff prays that the amount may be charged, not on the ancestral property generally, but on specific land, the suit is a suit for such land within the meaning of clause 12 of the Letters Patent.

Sundara Bai Sahiba v. *Tirumal Rao Sahib* 131

LANDLORD:—*See* "SPECIFIC RELIEF ACT, ss. 9, 42" 453

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LAND-REVENUE ASSESSMENT ACT (MADRAS), ACT I OF 1876—*Party driven to sue for separate registration not entitled to damages for refusal to register—Action for money had and received—Request, when implied:*

The alienee of a portion of an estate, who is driven to a civil suit to enforce separate registry, under Act I of 1876, all the parties to the alienation not consenting to the transfer, is entitled to recover only the costs of such suit and not any further damages. In an action to recover money paid by plaintiff for the defendant at his request, a request will generally be implied where the defendant has notice of the payment being made for him and does not dissent. Where the circumstances show that the owner of property which is saved by another party knew that the other party was laying out his money in the expectation of being repaid, the inference of an understanding between the parties, amounting in law to an implied contract will unhesitatingly be drawn. *Falcke* v. *Scottish Imperial Insurance Company*, [(1887) 34 Ch.D., 249], referred to. Where a portion of an estate is alienated and the vendor and vendee agree that the vendee should pay the vendor a certain amount as the vendee's share of peshkash on the portion alienated, which amount is in excess of the amount ascertained on separate registry to be due on such portion, the vendor is *interested* in paying the peshkash, as he makes a profit in doing so and he can recover the amount so paid.

Narayanasami Naidu v. *Sree Rajah Vellanki Sreenivasa Jagannadha Rao* ... 189

LETTERS OF ADMINISTRATION:—*See* "COURT FEES ACT, s. 19-I (1)" ... 93

LIMITATION—*Adverse possession—Party relying on title by adverse possession against Crown must prove 60 years' adverse possession—Burden of proof shifted on Crown by proof of adverse possession for shorter period:*

A party who rests his title on possession adverse to the Crown must prove such possession for 60 years. *Secretary of State for India* v. *Vira Rayan*, [(1886) I.L.R., 9 Mad., 175], explained. Where lands have been notified as a reserved forest under the Madras Forest Act, a claimant desirous of establishing his title against the Crown by adverse possession must prove adverse possession for 60 years before the notification. Where adverse possession for a shorter period is proved, it lies on Government to show that it has a subsisting title, by showing that such possession commenced within 60 years before such date. In this part of India, it is a well-established rule of common law that waste land, not being the property of an individual or community belongs to Government. Islands formed within 3 miles of the mainland vest in the Crown.

Sri Raja Chelikani Rama Rau v. *Secretary of State for India* 1

LIMITATION ACT (ACT XV OF 1877), s. 12, sched. II, art. 152—*Party applying for portions of the record, entitled to deduct time spent in obtaining them:*

Where a party appealing from the decree of a lower Court applies for copies of the judgment and decree at different times, the time which he is entitled to exclude in computing the period of limitation for such appeal is the aggregate of the periods required to grant the copies after the applications were made. *Raman Chetty* v. *Kadirvelu*, [(1898) 8 M.L.J., 148], referred to and approved.

Silamban Chetty v. *Ramanadhan Chetty*... 256

2. ——————————————, s. 22:—*See* "NEGOTIABLE INSTRUMENT." 115

3. ——————————————, s. 23, sched. II, arts. 36, 115, 116—*Transfer of Property Act, ss. 76, 92—Mortgagor's right to compensation for property not delivered to him is based on a continuing obligation and time does not run till redemption—Time runs under art. 36 of Limitation Act from date of tort and not from date of knowledge:*

Under section 92 of the Transfer of Property Act, the mortgagor on paying the mortgage debt is entitled to be put in possession of the mortgaged

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properties and the obligation to do so is a continuing obligation on the mortgagee which cannot cease so long as the right of redemption is not barred. The right of the mortgagor under section 76 of the Transfer of Property Act to have accounts taken and to debit the mortgagee with the loss caused to the mortgaged property is cumulative and does not take away the remedy under section 92 of the Act. Where the mortgagee in possession who is bound by the terms of the mortgage deed to pay the Government revenue due on the land neglects to do so and the mortgaged land is sold, a suit for compensation by the mortgagor, brought more than six years after such sale and less than six years from the date of the decree in the redemption suit brought by the mortgagor, is not barred under articles 115 and 116 of the Limitation Act read with section 23 of the Act. The express covenant in the mortgage deed by the mortgagee to pay the Government revenue only states in words the liability of the mortgagee under section 76 of the Act and does not curtail the general obligation of the mortgagee under the Act. In suits for compensation for tort to immoveable property, the period of limitation prescribed in article 36 of schedule II of the Limitation Act runs from the date of the tort and not from the time when the plaintiff has knowledge of such tortious Act.

Sivachidambara Mudaliar v. *Kamatchi Ammal* 71

4. ——————————, **sched. II, arts. 49, 145**—*Where depository refuses on demand to return thing deposited, art.* **145** *and not art.* 49 *applies:*

Where moveable property is deposited and the depositary on demand by the depositor refuses to return the thing deposited, the period of limitation applicable to a suit to recover such property is that provided in article 145 and not that in article 49 of the Limitation Act. The fact that the possession after demand and refusal is wrongful does not make article 49 applicable. *Obiter:* Where a thing is deposited for safe custody, the depositor has the right to demand the return of the thing at any time, although the deposit might have been for a term.

Gangineni Kondiah v. *Gottipati Pedda Kondappa Naidu* 56

5. ——————————, **sched. II, art. 98**:—*See* "HINDU LAW" ... 308

6. ——————————, **sched. II, art. 120**:—*See* "CIVIL PROCEDURE CODE, s. 103". 31

7. ——————————, **sched. II, arts. 120, 131**—*Right of tenant to sue in respect of excess collections arises on every occasion when excess collection is made—Art.* 120 *and not art.* 131 *of sched. II of the Limitation Act applies to such suits:*

A landlord had been collecting excess rents from his tenant from 1872. In respect of the excess collection made in October 1898, the tenant brought a suit in December 1909 for a declaration that the landlord was not entitled to collect such excess:—*Held*, that the right to sue for such declaration arose on each occasion the excess was collected; that the period of limitation was six years from the date of collection under article 120 of schedule II of the Limitation Act, and that article 131 of the schedule did not apply to such suits.

Sriman Madhabushi Achamma v. *Gopisetti Narayanaswamy Naidu* 171

8. ——————————*Suits against representatives of deceased tenant governed by art.* 189 *and not* 144*:*

A suit against the representatives of a tenant after the determination of the tenancy to recover the property leased is governed by article 139 and not by article 144 of schedule II of the Limitation Act. Such a suit would be barred against the representatives if it would be barred against the tenant if alive. *Vadapalli Narasimham* v. *Dronamraju Seetharma Murthy*, [(1908) I.L.R., 31 Mad., 163 at p. 167], doubted.

Subbravati Ramiah v. *Gundala Ramanna* 260

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9. ——————————, **sched. II, part 180**—*'Revival' of decree, what is—Civil Procedure Code, XI of* 1882, *s.* 248, *notice under—No revival where notice not issued:*

Where on an application for execution of a decree more than one year old, order for execution was issued without the notice to the judgment-debtor required by section 248 of the Civil Procedure Code of 1882, such order for execution does not 'revive' the judgment within the meaning of article 180 of schedule II of the Limitation Act of 1877. It is only where such notice has been issued that the judgment or decree is 'revived'.

Desoo Venkatesa Perumal Chetty v. *Srinivsa Ranga Row* 187

MALABAR COMPENSATION FOR TENANTS IMPROVEMENTS ACT (MADRAS), ACT I OF 1887, s. 7—*Stipulation in lease to receive compensation at ordinary rate does not exclude operation of the Act—Rate of compensation claimable is that prevailing when compensation is paid:*

The terms of a lease executed before the passing of Madras Act I of 1887 provided that the tenant at the time of surrender should receive compensation for fruit trees at the customary rate. Before the surrender, Madras Act I of 1887 was passed and provided a rate of compensation for fruit trees. In a suit by the tenant to recover compensation under the lease:—*Held*, that the stipulation aforesaid did not exclude the operation of the Act, there being no such special contract as is contemplated by section 7 of the Act and that compensation must be paid at the rate provided by the Act.

Kerala Varmah Valia v. *Ondan Ramunni* 218

MALABAR LAW—*Acquisition by manager of branch tarwad who is only anandravan of the whole tarwad—Property acquired by anandravan to be deemed property of the tarwad, in the absence of evidence to show self-acquisition:*

The rule of Hindu Law that if nothing appears in the case except that a member of a joint family is in possession of property, the burden of proving self-acquisition lies on such person, applies to property in the possession of an anandravan of a Malabar tarwad. Where such anandravan is also the manager of a branch tarwad and was in possession of funds belonging to such branch, the presumption will be that such property belongs to the branch.

Mari Veetil Chathu Nair v. *Mari Veetil Mulamparol Sekara Nair* 250

MARRIAGE:—*See* "CIVIL CURTS ACT, s. 16" 342

MINOR—*Determination of custody of—Contract of apprenticeship by minor, how far enforceable—Injunction against minor for breach of such contract—When Court will take minors from custody of parents or persons selected by them:*

A minor may bind himself by a contract of apprenticeship if it be for his benefit; but such a contract cannot be specifically enforced against him either directly or by restraining him from taking service under others or by restraining others from employing him. *DeFrancesco* v. *Barnum*, [(1889) 43 Ch.D., 165], referred to. If the contract is for the benefit of the minor apprentice an action will lie for enticing away such apprentice and to recover his earnings. Parents and guardians cannot divest themselves of their right of guardianship by any contract. A delegation of such right is revocable at any time and the parent or guardian is bound to revoke it if it is used to the detriment of the children; and it is open to the Court within whose jurisdiction the children are found to exercise the same power, if cause is shown for such interference. The jurisdiction of the Courts to take away children from parents or from persons selected by them is a parental one and the Courts must do what a wise parent under the circumstances would or ought to do. *The Queen* v. *Gyngull*, [(1893) 2 Q.B.D., 232 at p. 248], referred to. The main consideration to be acted upon is the benefit or welfare of the child; the welfare of the

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child means not only its physical but also its moral and religious welfare. A male child above the age of 14 and a female child above the age of 16 years will not ordinarily be compelled to remain in custody to which he or she objects; and in the case of younger children who are still old enough to form an intelligent preference, their wishes will form one of the elements for consideration. The Court will remove children from the custody of one from whom cruelty or corruption is apprehended.

Pollard v. *Rouse* 288

MINOR—*Sale in favour of, void:*

A sale in favour of a minor is void. *Mohari Bibee* v. *Dharmodas Ghose*, [(1903) I.L.R., 30 Calc., 539], followed.

Navakotti Narayana Chetti v. *Logalinga Chetti* 312

MISJOINDER INCLUDES NON-JOINDER:—*See* "CIVIL PROCEDURE CODE, s. 99" 436

MORTGAGE—*Decree, mortgage of—Mortgage has a charge on amount realised in execution of decree mortgaged—Civil Procedure Code, Act XIV of* 1882, *s.* 276 *—Attachment and mortgage of decree on same day—Mortgage vaild unless attaching creditor shows it to have been effected during the pendency of attachment:*

Where a decree is mortgaged and the amount due under the decree is subsequently realised in execution, the mortgagee has a charge on the amount so realised. The mortgagee is entitled to a charge on property which through no fault of his has taken the place of the mortgaged property. *Singarevelu Udayan* v. *Rama Iyer*, [(1903) 16 M.L.J., 306], dissented from. The receipt by one court of a notice of attachment by another court, is not a judicial act to which the principle that judicial acts must be presumed to have been done at the earliest point of time of the date thereof would apply. Where therefore a decree is mortgaged on a certain date, and notice of attachment of such decree is received by the court on the same day, it lies on the attaching creditor seeking to set aside such mortgage as made during the pendency of attachment under section 276 of the Civil Procedure Code to show that the receipt of such notice was prior to the execution of the mortgage. When a decree is attached and the attachment is subsequently withdrawn by agreement, the attachment does not continue against the money realised in execution of such decree in the absence of anything to that effect in the agreement.

Venkatrama Iyer v. *Esumsa Rowthen* 429

MUHAMMADAN LAW—*Hanafi Law—Divorce—Talak need not be addressed directly to the wife to constitute a valid divorce:*

According to the Hanafi Law, it is not necessary that the Talak or words of repudiation should be addressed directly to the wife to constitute a valid divorce. The expressions mentioned in the 'Hedaya' as constituting express divorce are not exhaustive, but merely illustrative of the different forms in which the Talak may be pronounced. The incidents of marriage and divorce under the Muhammadan Law fully discussed. *Fursund Hossein* v. *Janu Bibee*, [(1879) I.L.R., 4 Calc., 588], referred to and doubted.

Asha Bibi v. *Kadir Ibrahim Rowther* 22

2. ——— ——— ———*Wakf—Right to recover money under a decree cannot be made the subject of Wakf:*

Right to recover money under a decree cannot be made the subject of Wakf in the absence of a custom authorising such appropriation. *Kulsom Bibee* v. *Gulam Hossein Cassim Ariff*, [(1905) 10 C.W.N., 449 at p. 494], referred to and followed. *Kileloola Sahib* v. *Nusserudeen Sahib*, [(1895) I.L.R. 18 Mad., 201 at p. 209], referred to.

Kadir Ibrahim Rowther v. *Mahomed Rahumadulla Rowther* 118

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MUTT—*Head of, whether trustee or life tenant of mutt properties:*

It cannot be predicated of the head of a mutt, as such, that he holds the mutt properties as a life tenant or trustee. The question must be determined in each case upon the conditions on which they were given or which may be inferred from the long established usage and custom of the institution. *Giayana] Sambandha Pandara Sannadhi* v. *Kandaswami Tambiran*, [(1887) I.L.R., 10 Mad., 375], referred to. *Vidyapurna Tirthaswami* v. *Vidyanidhi Tirthaswami*, [(1904) I.L.R., 27 Mad., 435], referred to.

Kailasam Pillai v. *Nataraja Thambiran* 265

NEGOTIABLE INSTRUMENTS ACT XXVI OF 1881, s. 16—*Endorsement, what constitutes—Holder in due course—Bill payable on demand, when overdue:*

Section 16 of the Negotiable Instruments Act does not lay down any specific form of words for an endorsement. A promissory note payable on demand was executed on 18th December 1901. On the 12th September 1904, the payee received the amount due on the note from one S and the following was indorsed on the note by the payee: "I have this day received from you, S, the sum of . . . . due for principal and interest and assigned this note to you with power to recover the amount due under it by showing the same." No demand for payment was made before the 12th September 1904:—*Held*, that S was an indorsee of the promissory note, that the promissory note was not overdue on the date of indorsement and that S was entitled as holder in due course to sue on the note.

Sivaramakrishna Pattar v. *Mangalaseri Kunhu Moideen* 84

NEGOTIABLE INSTRUMENT PARTY TO SUIT ON—LIMITATION ACT, s. 22—*Amendment by adding party cannot relate back to date anterior to application to add party:*

A suit on a negotiable instrument must be instituted in the name of the person who, on the face of the instrument, is entitled thereto or by a holder deriving title from him. Where the suit is instituted in the name of a wrong person, the Court has power, under Order I, rule 10 (1), to amend the plaint by bringing the proper party as plaintiff. Such person cannot be brought on the record as from the day the suit was instituted. The amendment will relate back, at the most, to the date on which the application to be added as plaintiff was made and if such application was made after the right to sue was barred by limitation, such amendment should not be allowed. In suits of this kind, a mistake to be corrected under Order I, rule 10 (1), must be corrected before the limitation period of the suit expires. *Seshamma* v. *Chinnappa*, [(1897) I.L.R., 20 Mad., 467], referred to.

Subbaraya Iyer v. *Vaithinatha Iyer* 115

PLAINT—*Amendment of, by party to whom it is returned for proper valuation.*

A plaintiff, to whom a plaint was returned for properly valuing the properties claimed therein, altered the valuation as directed therein and struck out some of the properties to bring the suit within the jurisdiction of the Court:—*Held*, that there was nothing illegal in the amendment and that it was competent to the Court to accept such amended plaint.

Karumbayira Ponnapundan v. Authimoola Ponnapundan 262

PLEADER, RIGHT OF RETAINER OF—*Has no right to retain moneys in one cause for dues in another cause:*

A pleader in India has no right of retainer in moneys realised by him in one cause for his dues in other causes conducted by him.

Narayanaswami Naidu v. *Chellapalli Honumanlu* 255

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PENAL CODE, s. 494—*Bigamy—Remarriage of Hindu having Christian wife alive:*

A Hindu convert to Christianity married a Christian woman according to the rites of the Roman Catholic religion. Subsequently, and during the life-time of his Christian wife, he reverted to Hinduism and married a Hindu woman in accordance with the rites of the class to which the parties belonged:—*Held*, the offence of bigamy was not committed.

Emperor v. *Antony* 371

POST OFFICE ACT VI OF 1898, ss. 35, 64, 74—*Rules framed under Act, infringement of, falls within s. 63—General power to frame rules conferred by s. 74, cl. (1), not confined to such rules as are contemplated by s. 74, cl. (2):*

Rules framed by the Governor-General in Council under section 74, clause (1) of the Post Office Act regarding the declaration in the case of articles sent by value payable post form part of the Act under section 74 (3) and infringement of such rules is punishable under section 64. Section 35 also enables the Governor-General in Council to make such rules. The general power to make rules conferred by section 74, clause (1), is not confined to making such rules as are contemplated by clause (2).

The Crown Prosecutor v. *Kothandaramiah* 511

PRINCIPAL AND AGENT—*Agent with irrevocable authority may be removed for misconduct—Suit, abatement of:*

In every contract of service there is an implied condition that if the services be not faithfully performed, the employer is entitled to put an end to the contract; and an irrevocable contract of agency is no exception to this rule. An agent appointed under an irrevocable contract of agency may be removed if he is guilty of misconduct in the performance of his duties. The above principle will apply whether the person employed be a servant or agent or a person occupying a fiduciary position. A suit brought against such an agent for his removal and for recovering damages for his misconduct does not abate with the death of such agent.

Moyil Kotta Kunchunni Nair v. *Subramanian Pattar* 162

PRIVILEGE:—*See* "DEFAMATION" 67

PROVINCIAL SMALL CAUSE COURTS ACT IX OF 1887, sched. II, art. 18—*Suits 'relating to Trust' what are:*

Suit by a company by its President to recover from defendants Nos. 2 to 4 the subscriptions due under the Articles of Association of the Company. The first defendant was a trust; defendants Nos. 2 to 4 were the trustees of the trust and members of the plaintiff company, in their capacity of trustees. The plaint prayed that the moneys due may be recovered from the trust property in the first instance and if not so recoverable from the defendants Nos. 2 to 4 personally. The suit was instituted on the Small Cause side and the Subordinate Judge returned the plaints on the ground that the suit was one relating to a trust within the meaning of Act 18 of Schedule II of the Provincial Small Cause Courts Act and was not triable on the Small Cause side. The High Court was moved by petition under section 25 of the Act:—*Held, per* CHIEF JUSTICE, SANKARAN-NAIR and BENSON, JJ., dissenting.—The suit was to enforce payment of moneys due under the Articles of Association and not one 'relating to a trust' within the meaning of article 18. The fact that issues relating to the trust and the rights and liabilities of the trustees may have to be tried will not make the suit one 'relating to a trust.'

Sri Venkatachallapathy Sahaya Viyavasaya Company v. *Kanagasabhapathia Pillai* 494

RAILWAY COMPANY:—*See* "CARRIER, LIABILITY OF" 120

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REGISTRATION ACT III OF 1877, ss. 3, 17:—*See* "CIVIL PROCEDURE CODE, s. 375" 102

2. ——————————, **s. 17 (*d*) and proviso**—*Lease not reserving a yearly rent not within the exemption:*

The proviso to section 17 (*d*) of the Registration Act will apply only in the case of leases which reserve an annual rent. A lease for a term of 3 years which reserves no annual rent but only provides for the payment of a lump sum, is compulsorily registrable even when such lump sum is less than the aggregate of three annual instalments of Rs. 50.

Venkatasami Chetty v. *Suppa Pillai* 216

"RELATES TO THE SUITS," CONSTRUCTION OF:—*See* "CIVIL PROCEDURE CODE, s. 375" 102

RELIGIOUS ENDOWMENTS ACT, s. 18:—*See* "CIVIL PROCEDURE CODE, s. 622." 412

RENT RECOVERY ACT (MADRAS) VIII OF 1865, ss. 3, 11—*Rate of rent—Ascertaining of—Right of landlord to varam rate on wet crop raised on dry lands, when no contract for the rent chargeable:*

By agreement between the landlord and tenant, a permanent money rent was fixed for dry cultivation and the agreement provided for extra charge for wet and garden crops without however stating the amount of such charge. The land was subsequently cultivated with wet crop, without any assistance from the landlord, and the tenants took objection to the varam rate claimed by the landlord:—*Held*, that the landlord had the right to claim the varam rate as there was no contract in regard to the rent payable for wet cultivation. The contract having left the rate for wet cultivation undetermined was not a contract within the meaning of section 11 of the Act. Where, under the circumstances, the landlord becomes entitled to varam rate under section 11 of the Rent Recovery Act, his claim to such rate cannot be objected to on the ground that the rent is thereby increased and it is not necessary to obtain the sanction of the Collector. In the absence of contract or survey rates, the landlord is entitled to varam rate under clause 3 of the section. An enquiry to determine the rate according to local usage is not necessary to enable the landlord to claim varam rates.

Sri Raja Bommadevara Venkata Narasimha Nayudu v. *Kasaranevi China Bapayya* 13

2. ——————————————————— **s. 9**—*Tender of pattas on produce sharing system—Allegation by tenants that money system prevailed—Prevalence of money rent for series of years—Alleged express contract to make prevailing rate permanent—Implied contract presumption of—Evidence in considering usage prevailing—Remand of cases for determination of proper rate when no contract exists:*

The appellant, a zamindar, brought suits against the respondents, the tenants in a village on his estate, under section 9 of the Madras Rent Recovery Act (Madras Act VIII of 1865) to enforce of pattas tendered by him, and the execution of corresponding muchilikas. The pattas tendered were under the Asara, or produce sharing system, which the respondents denied was in force in their village, money rates, as they alleged, being proper form of rent. It appeared that in 1299 (1889) different rates of rent prevailed in the village, some being higher than Rs. 5, and others lower; that in that year a uniform rate of Rs. 5 per acre was introduced by mutual agreement between the appellant and respondents, and leases were exchanged on that basis for a term of 5 years. The respondents alleged that the appellant at that time expressly agreed that the rate of Rs. 5 should be permanent. The High Court did not uphold the express agreement, but found there was an implied contract to be inferred from the fact that rents at the same rate were paid and received for four years after the expiration of the term fixed by the leases of 1299 the presumption being that such rate of rent should continue the same in

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perpetuity :—*Held*, by the Judicial Committee that there was, alongside of the express contract embodied in the leases exchanged between the parties, no proof of any such collateral implied agreement relating to fixity of rent. Any understanding of the kind was denied by the appellant, and no credible explanation was given by the respondents why, if it existed, such an important arrangement was not reduced to writing. Whilst agreeing with the High Court that it was not open to Courts to imply, from the mere circumstance that the rent had been paid in money for a series of years an agreement to pay money rent. Their Lordships saw no reason why the fact that money rent had prevailed in a particular locality for a considerable number of years might not form an element in the consideration of usage. The real question between the parties not having been decided, namely, whether the pattas tendered by the appellant were such as he was entitled to impose on the respondents, a question which, it having been found that there was no express or implied contract, must be decided, in accordance with the rules contained in clause (iii) of section 11 of Act VIII of 1865 which dealt with the mode of determining the rate when no contract exists, their Lordships remanded the cases to the proper Court in India to determine under those provisions the *rates* the appellant was entitled to receive.

Parthasarathi Appa Row v. *Chevandra Venkata Narasayya* 177

'RES JUDICATA'—Res judicata *between co-defendants—Burden of proof :*

Where an adjudication between co-defendants is necessary to give the appropriate relief to the plaintiff, such adjudication will be *res judicata* between the defendants as well as between the plaintiff and defendants. There must be a conflict of interest between the defendants, a necessity for a decision between them and a judgment defining the rights and obligations of the defendants *inter se*. *Ramachandra Narayen* v. *Narayen Mahadev*, [(1887) I.L.R., 11 Bom., 216 at p. 220)], referred to and followed. The general rule is that a person who claims property through some other person must prove that such property vested in that other person. A person who alleges that property in the hands of a female was inherited from some person whose heir he claims to be, must prove that it belongs to that person. *Diwan Ran Bijai Bahadur Singh* v. *Indarpal Singh*, [(1899) 26 I.A., 226 at p. 228], referred to.

Narasimma Ammal v. *Srinivasaragava Aiyangar* 112

2. ——————:—*See* "CIVIL PROCEDURE CODE, ss. 13, 30"... 482

3. ——————:—*See* "CIVIL PROCEDURE CODE, s. 375" 102

4. ——————:—*See* "EXECUTOR DE SON TORT, LIABILITY AS" 423

REVENUE RECOVERY ACT (MADRAS) II OF 1864, ss. 3, 35—*'Defaulter' who is—Defaulter means registered pattadar—Contract Act, s. 69 :*

Where one person is the real owner of a share in land and another is the registered proprietor of the whole, the latter and not the former is the 'defaulter' within the meaning of the Revenue Recovery Act; and where the latter as mortgagee of a share of the land not owned by the former has paid the arrears of revenue due on the whole land and the former has paid the revenue of his share, he cannot, being himself the defaulter, recover the amount from the former under section 35 of the Revenue Recovery Act. The latter cannot recover under section 69 of the Contract Act as the former is not bound by law to pay the money which the latter has paid.

Subramania Chetty v. *Mahalingasami Sivan* 14

REVERSIONER, SUIT BY:—*See* "HINDU LAW" 410

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REVIEW—*Power of Collector to review his own order :*

The Collector has no power to review his own order refusing to interfere with an order passed by his subordinate, confirming a sale for arrears of land revenue.

David Nadar v. *Manikka Vachaka Desika Gnana Sambanda Pandara Sannadi* 65

RIGHT OF SUIT—*Suit by person not a party to an instrument sustainable when charge created in such person's favour—Decrees for relief not specifically asked for when allowable :*

A plaintiff asking for certain specific reliefs and for such other relief as the Court should deem fit, should, on being found disentitled to the specific reliefs asked for, be given such relief as the circumstances justify. A person who is no party to a document but in whose favour a charge is created by such document is entitled to maintain a suit to enforce its terms, either as the actual beneficiary or as the charge-holder.

Shuppu Ammal v. *Subramaniyan* 238

SALE, ORDER FOR STAY OF—*Order becomes effective only when communicted to the lower Court :*

An order by the Appellate Court for stay of sale takes effect only when communicated to the lower Court; and a sale by the lower Court after the passing of the order but before the order was communicated is valid. *Besseswari Chowdhurany* v. *Horrosundar Mozumdar*, [(1892) 1 Calc. W.N., 226], followed. *Hukum Chahd Boid* v. *Kamalanand Singh*, [(1906) I.L.R., 33 Calc., 927], not followed.

Muthukumarasami Rowther Minda Nayinar v. *Kuppusami Aiyangar* 74

SALE:—*See* "TRANSFER OF PROPERTY ACT, s. 55, CL. 4 (*b*)" 446

SAME JUDGMENT-DEBTOR:—*See* "CIVIL PROCEDURE CODE, s. 295" 465

SPECIFIC RELIEF ACT I OF 1877, ss. 9, 42—*Trustee of temple—Wrongful dismissal and dispossession by co-trustees—Suit for declaration, invalidity of dismissal and injunction—Consequential relief—No claim to recover possession—Suit so framed not mintainable—Landlord-Possession by receipt of rent—Dispossession—Interest capable of delivery and possession :*

When A, the trustee of a temple who had been ousted from possession by his co-trustees sued for a declaration that his dismissal from the trusteeship was invalid and for an injunction restraining his co-trustees and the temple committee from interfering with the exercise of his rights as trustee, there being no prayer for consequential relief in the nature of possession against his co-trustees :—*Held*, that the suit was not maintainable. That the suit is brought be a trustee is no answer to the objection. That possession should have been used for and not a mere declaration. An injunction is a discretionary relief and cannot be claimed by a plaintiff out of possession when he does not ask for possession against defendants who are actually in possession: *Kunj Bihari* v. *Keshavlal Hiralal*, [(1904) I.L.R., 28 Bom., 567], dissented from. *Jagadindra Nath Roy* v. *Hemantra Kumari Debi*, [(1905) I.L.R., 32 Calc., 129 (P.C.)], referred to. *Held further*, that notwithstanding the lands belonging to the temple were in the physical possession of tenants, yet the plaintiff's right to receive rents was capable of possession which if disturbed entitled him to bring a suit for possession under section 9, Specific Relief Act. *Jagannatha Charry* v. *Rama Oayer*, [(1905) I.L.R., 28 Mad., 288], followed. *Abdul Kadir Mahomed*, [(1892) I.L.R., 15 Mad., 15], followed. *Narayana* v. *Shankunni*, [(1892) I.L.R., 15 Mad., 225], followed.

Rathnasabapathy Pillai v. *Ramasami Aiyar* 452

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2. ——————————, ss. 14, 15, 16, 17—*Contract entered into by person on his behalf and on behalf of minors—Form of decree in suit for specific performance of such contract, when contract found not to be binding on minors:*

Where a contract of sale entered into by a person on his own behalf and on behalf of minors is found not be binding on the minors, no decree for specific performance can be passed against the interest of such minors in the properties. Sections 14—16 of the Specific Relief Act do not enable such contract to be separated as regards the adult person who entered into the contract; and section 17 of the Act precludes the passing of a decree against the share of such party alone or a decree for the whole against such person. The purchaser in such a case will be entitled, on offering to pay the whole purchase money, to a decree directing the adult party to convey all his interest in the properties.

Poraka Subbarami Reddy v. *Vadalmudi Seshachalam Chetty* 360

SUIT, ABATEMENT OF:—*See* "CIVIL COURTS ACT, s. 16" 342

——————————:—*See* "PRINCIPAL AND AGENT" 162

SURETY TO ADMINISTRATION BOND—*Right of surety to apply for cancellation of bond on administration being completed:*

A surety to an administration bond cannot, when the administration is complete and the bond becomes void and ineffective, apply to the Court to have the bond vacated and to be discharged from his suretyship. There is nothing in the Indian Succession Act or in the Rules of Practice to authorise such an application.

In the matter of Arthur Gerald Norton Knight 378

TENDER:—*See* "TRANSFER OF PROPERTY ACT, s. 84" 100

TRADE MARK, INFRINGEMENT OF—*Essentials necessary to maintain action for:*

It is settled law that a dealer in, or a manufacturer of a particular article who adopts a name for that article, whether the name be a purely fancy name or a descriptive name, cannot restrain another dealer from using the same name simply upon the ground that the article so named has acquired a reputation, even though it may be that the public have grown accustomed to buy the article in question only relying on the name and without examining the quality of the article. For a man to be entitled to restrain another from using a particular name with reference to a commodity he must show that the public have grown to associate that particular name with himself as the manufacturer of, or dealer in, the article. *Barlow* v. *Gobindram*, [(1897) I.L.R., 24 Calc., 364], referred to.

Mahomed Esuf v. *Rajaratnam Pillai* 402

TRANSFER OF PROPERTY ACT IV OF 1882, s. 53:—*See* "FRAUDULENT CONVEYANCE" 335

2. ——————————s. 53—*Subsequent creditors are within the rule in cl.* (1) *of the section—Presumption in cl.* 2 *of section applies to subsequent creditors:*

Subsequent creditors are within the rule enunciated in the first clause of section 53 of the Indian Transfer of Property Act and a settlement can be avoided at the instance of subsequent creditors. *Hussain Bhai* v. *Haji Ismal Sait*, (5 Bom., L.R., 255), referred to. The presumption in clause 2 of section 53 of the Transfer of Property Act applies in the case of subsequent creditors.

Thomas Pillai v. *Muthuraman Chettiar* 205

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——————————, s. 55, *cl.* 4 (*b*)—*Sale—Consideration therefor—Covenant by purchaser to discharge inabilties of seller—Breach of covenant gives rise to action for damages only—Statutory charge under cl.* 4 (*b*) *negatived by contract to the contrary arising by implication:*

When a purchaser of immoveable property covenants, in consideration of the transfer of such property to him, to discharge certain liabilities of the seller and further stipulates, that upon his failure to do so he shall be liable for any damages resulting from such default:—*Held* that upon breach of such a covenant the seller is entitled to be compensated in damages but has no charge upon the property in the hands of the purchaser under section 55, clause 4 (*b*) of Act IV of 1882. To negative the statutory charge afforded by section 55 it is sufficient if 'a contract to the contrary' arises by implication. *Webb* v. *Macpherson*, [(1903), 301 A., 238], *referred to. In re Albert Life Assurance Company* v. *Western Life Assurance Society*, [(1870), 11 Eq., 164], followed. *Ramakrishna Ayyar* v. *Subramania Ayyar*, [(1906), I.L.R., 29 Mad., 305], distinguished.

Abdulla Beary v. *Mammali Beary* 446

4. ——————————, ss. 76, 93:—*See* "LIMITATION ACT, s. 23, sched. II, arts. 36, 115, 116" 71

5. ——————————, s. 84—*Tender, what amounts to:*

Under section 84 of the Transfer of Property Act, interest ceases to run on the principal amount from the date of tender; it is not necessary that the mortgagor should, after such tender, always keep the money ready for payment.

Velayuda Naicker v. *Hyder Hussin Khan Sahib* 100

6. ——————————, ss. 107, 108 (*b*):—*See* "CIVIL PROCEDURE CODE, s. 375" 102

7. ——————————, s. 108—*Failure of lessor to put lessee in possession—Absence of request by lessee to be put in possession—Applicability of section to agricultural leases:*

In a case where the lessor does not put the lessee in possession, but there is no obstruction or likelihood of obstruction to the lessee taking possession of the same, and he neither tries nor requests the lessor to put him in possession:—*Held*, in a suit by the lessor for rent that the lessee is liable.

Narayanaswami Naidu Garu v. *Verramilli Ramakrishnayya* ... ...

8. ——————————, ss. 130, 131, 134—*Transfer of debt, notice of—Duty of debtor on receiving notice from transferee:*

Where a creditor hypothecates a debt due to him, and authorises the person to whom the debt is hypothecated by power-of-attorney in writing to recover the debt from the debtor, the debt is absolutely transferred to the transferee under section 130 of the Transfer of Property Act. Notice of the transfer is not necessary to perfect the title of the assignee but until the debtor receives notice of the assignment in accordance with law his dealings with the original creditor will be protected. The notice of transfer need not necessarily be free from any condition or qualification. A debt was assigned absolutely; and the debtor received notice of assignment from the transferor, who at the same time requested the debtor to pay only if the liability forming the consideration for the transfer was not discharged. The debtor also received notice of the assignment from the transferee who claimed payment. The transferee did not represent that he had discharged the claim on account of which the transfer was made. The debtor after receiving the above notices

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refusing to recognise the assignment paid the amount to the transferor:—*Held*, that the payment was inoperative and that the transferee was entitled to recover from the debtor. If the fact of the assignment or its validity is disputed, the only safe course for the debtor who has received notice of the assignment is not to pay either party but to ask them to interplead. *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.*, [(1905) A.C., 454], referred to.

Gopalakrishna Iyer v. *Gopalakrishna Iyer* 128

9. ———————————————————, s. 108, cl. (*o*)—*Principle applicable to agricultural leases—Mulgeni tenant has no right to fell timber standing at time of grant:*

Although Chapter V of the Transfer of Property Act does not apply to agricultural leases, the principles embodied therein may be applied to such leases. The rules contained in section 103 (*h*) (*o*) will apply to mulgeni leases and a mulgeni tenant is not entitled to cut trees standing at the date of grant. The law applicable to occupancy tenants will not apply to such leases as the former is not a tenant but one holding divided ownership.

Gangamma v. *Bhommakka* 253

TRUSTEE, POWERS OF INVESTMENT OF—*Investment by trustees, who are members of a firm, in the firm under the direction of cestui quetrust—Firm does not hold the money in a fiduciary capacity—Indian Trusts Act, s. 51:*

Where the settler appoints the members of a banking firm as trustees and directs them to invest the trust funds with the firm in deposit account without any directions which would constitute the firm a trustee, such funds are, when invested, held by the firm as its own property and the relation between the firm on the one hand and the trustees and settlor on the other is merely that of debtor and creditor. On the bankruptcy of the firm such amount cannot be recovered in full, but can only be proved as a debt. The doctrine embodied in section 51 of the Trusts Act that a trustee cannot use trust funds for his own profit does not apply where the settlor directs such use. *In re Beale Ex-parte Corbridge*, [(1876) 4 Ch. D., 246)], referred to.

Official Assignee of Madras v. *Krishnaswami Naidu* 154

TRUSTEE TEMPLE:—*See* "SPECIFIC RELIEF ACT, ss. 9, 42" 452

TRUSTS ACT, II OF 1882, s. 36—*Lease by trustee for term exceeding twenty-one years not void but only voidable:*

A lease by a trustee for a term exceeding twenty-one years is not void and illegal under section 36 of the Indian Trusts Acts, but only voidable at the instance of the *cestui que trust*.

Kadir Ibrahim Rowthen v. *Arunachellam Chettiar* 397

VARIANCE BETWEEN PLEADING AND PROOF—*Where plaintiff sues in ejectment on the ground of exclusive title, he cannot be given a decree for partition when the claim set up is found to be barred:*

Where a plaintiff sues the defendant in ejectment on the ground that he and defendant were separately enjoying properties, he cannot, when such claim is found to be barred by limitation, rely on a tenancy in common not alleged in the plaint and claim a decree for partition.

Chidambaram Pillai v. *Muthu Pillai* 356

WAKF:—*See* "MUHAMMADAN LAW" 118

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WILL:—*See* "INDIAN SUCCESSION ACT, ss. 82, 187" 91

———*Mutual and joint wills—Power of survivor of joint will to revoke—Survivor can revoke unless he derives some benefit under the will:*

Where two persons agree to make mutual wills, and one of them dies, the survivor can revoke his will unless he has taken some benefit under the will of the deceased testator. *Stone* v. *Huskins*, [(1905) L.R., Prob. Dn., 194], referred to.

Minakshi Ammal v. *Viswanatha Aiyar* 406

APPELLATE CIVIL.

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

1909. December 21, 23. 1910. January 19.

CHENGALVARAYA MUDALY (PETITIONER), APPELLANT,

v.

THE OFFICIAL ASSIGNEE OF MADRAS AND AS SUCH THE ASSIGNEE OF THE PROPERTY AND CREDITS OF C. P. NAMBERUMALL CHETTY AND C. P. VEERA-RAGHAVULU CHETTY, ADJUDICATED INSOLVENTS (COUNTER-PETITIONERS), RESPONDENTS.*

Indian Insolvency Act, 11, 12 Vict., cap. 21, *ss.* 39, 40,—*'Mutual credits' relate to date of vesting order—Presidency Small Cause Courts Act, s.* 69—*Money deposited as security under section does not become the property of the decree-holder—Right to set off claims for unliquidated damages.*

Money deposited in Court under section 69 of the Small Cause Courts Act does not become the property of the decree-holder.

Before the date of the vesting order an insolvent had obtained two decrees against a debtor. In the case of one of the decrees, the debtor applied for a reference under section 69 of the Presidency Small Cause Courts Act and the amount deposited by him remained in Court on the date of the vesting order. The High Court declining to express an opinion on the reference, the decree became absolute and the money was paid to the Official Assignee. Before the date of the vesting order the debtor had brought a suit against the insolvent, and a decree was passed therein against the insolvent after the vesting order:

Held, that the debtor was entitled under section 39 of the Insolvency Act to set off against the amount of the two decrees obtained against him the amount due by the insolvent under the decree obtained by the debtor.

The decree in respect of which the deposit was made remained unsatisfied in law on the date of the vesting order and was an item of credit within the meaning of section 39 on such date. The subsequent payment to the Official Asignees did not deprive the debtor of his right of set off.

Per *Krishnaswamy Ayyar, J.*—Claims for unliquidated damages cannot be the subject of set off as mutual credits under section 39 of the Indian Insolvency Act. Such claims are however mutual dealings within section 38 of the English Acts of 1869 and 1883 and can form the subject of set off under section 40 of the Indian Insolvency Act, which makes the provisions of the subsequent English Acts applicable to the proof of claims under the Indian Insolvency Act.

APPEAL against the order of Wallis, J., Insolvency Commissioner, in Petition No. 267 of 1908, dated the 5th day of April 1909, in the

* Original Side Appeal No. 24 of 1909.

matter of Namberumall Chetty and C. P. Veeraraghavulu Chetty, adjudicated insolvents.

The facts necessary for this report are set out in the judgments.

K. Ramanath Shenai for appellant.

J. R. B. Branson, the Official Assignee, in person.

JUDGMENTS (THE CHIEF JUSTICE).—We have had some difficulty in getting at the facts in this case, but as I understand them and so far as they are material to the question we have to decide, they are these.

In August 1906 the insolvents entered into a contract with the appellant that he was to do certain shipping work for them for two years certain, that he was to receive an advance of Rs. 2,000 for which he was to execute two promissory notes in favour of the insolvents, and that the notes were to be met out of the amounts due to the appellant under his agreement. The advance was received and the notes were executed.

Suits were brought against the appellant on the promissory notes. He set up the agreement of August 1906 by way of defence. Two decrees were obtained against the appellant on the notes in the Small Cause Court, one in Suit No. 11 and the other in Suit No. 12. The appellant asked for a reference under section 69 of the Small Cause Courts Act in Suit No. 11 and paid into Court under section 70 of the Act Rs. 1,060, the amount of the judgment and costs. The High Court declined to express an opinion, and in August 1908 the contingent judgment in Suit No. 11 was made final and there was a final decree against the appellant in Suit No. 12.

On November 30th, 1908, the appellant being the petitioning creditor, the vesting order was made in respect of the estate of the insolvents.

On April 2nd, 1909, *i.e.*, after the vesting order, the money which had been paid into Court by the appellant in Suit No. 11 was paid out to the Official Assignee.

Pending the reference to the High Court in Suit No. 11, and before the adjudication the appellant brought a suit against the insolvents on the agreement of August 1906. He recovered judgment for Rs. 4,000 and odd on February 12th, 1909.

The appellant applied to the Insolvency Commissioner for an order that the sum of Rs. 4,000 and odd for which he had instituted his suit before the vesting order, and for which he had

recovered judgment dated after the vesting order should be set off against the amounts of the two decrees obtained against him on the promissory notes. The learned Commissioner allowed the judgment for Rs. 4,000 to be set off as against the decree in Suit No. 12. He disallowed the set off as regards the decree in Suit No. 11 on the ground that as the Official Assignee had obtained an order for the payment out to him of the amount of his decree and the money had been paid to him and there was nothing to set off. Here, with all respect, I think the learned Commissioner was wrong. For the purpose of section 39 of the Insolvency Act the line is to be drawn at the date of the vesting order. At the date of the vesting order, the insolvents had, no doubt, obtained a final decree in Suit No. 11 against the appellant, but the decree was, at that date, unsatisfied in the same way as the decree in suit No. 12 was unsatisfied, since the money in Court which had been paid in by way of security in suit No. 11 under section 70 of the Small Cause Courts Act was, in my opinion, at the date of the vesting order the appellant's money. For the purposes of the question before us I do not think any distinction can be drawn between the two Small Cause Court decrees.

A point was taken by the Official Assignee that assuming there had been mutual dealings between the appellant and the insolvents within the meaning of section 38 of the English Act of 1883 this was not a case of mutual credit within the meaning of section 39 of the Indian Act. There is nothing in the judgment of the learned Commissioner to show that this contention was raised before him. It is clear that, if it is well founded, there is no right of set off as regards the decree in Suit No. 12. The learned Commissioner has held that there is this right of set off and the Official Assignee has not appealed. In these circumstances I do not feel called upon to discuss the question. I think the appellant is entitled to a set off as against both the Small Cause Court decrees; that the order of the learned Commissioner should be modified accordingly and that the appellant should have his costs here and in the Insolvency Court.

KRISHNASWAMI AYYAR, J.—The petitioning creditor appeals against an order of the learned Commissioner in insolvency in so far as he refused to allow a set off. There were two decrees of the Presidency Small Cause Court obtained against the petitioner.

The first decree was passed in December 1907 contingent upon the view of the High Court on a question stated by the Chief Judge. The petitioner deposited in Court the amount of the decree and costs under section 70 of the Small Cause Courts Act. The High Court having refused to give any opinion the decree was made absolute on the 3rd August 1908. A decree was passed for a similar sum in another Small Cause Suit against the petitioner on the same date virtually in favour of the insolvents. Upon the application of the petitioner the decree-holders in the Small Cause Suits were adjudicated insolvents and a vesting order was made on the 30th November 1908 The petitioner had on that date a claim against the insolvents for certain sums due to him for work done on behalf of the insolvents, and for damages in respect of alleged breaches of contract by the insolvents. The learned Commissioner has allowed the set off in respect of one of the Small Cause decrees against the claim of the petitioner which since matured into a decree of this Court in Original Suit No. 4 of 1908 on the 12th February 1909. But he has refused to set off the other decree. I am unable to agree with the reasons for this decision. The only difference between the two Small Cause decrees lies in the circumstance that the amount of one decree was in deposit and was paid over to the Official Assignee on the 2nd April 1909, and in the case of the other, execution has still to be taken out. The petitioner gave notice of motion on the 15th of March 1909 and it was during the pendency of his application that the Small Cause Court ordered payment of the money in deposit. We are informed that the order for payment by the Small Cause Court was on the understanding that it was subject to the order of the Commissioner in Insolvency on the notice of motion. There is nothing on the record to support this statement. But there is no doubt that the Small Cause Court was apprised of the application to the Commissioner in Insolvency for the set off. If section 39 of the Insolvency Act applies no distinction can be made between the two Small Cause decrees. The payment by the Small Cause Judge pending the application to the Insolvency Court, would clearly be illegal and the Official Assignee would be liable to refund the amount received by him to be set off against the decree to which the insolvents' estate was liable. It is well settled that the time at which the right of set off is to be determined is the date of the vesting order (see *Eberle's Hotels and*

Restaurant Company v. *Jonas*(1) and also *Palmer* v. *Day & Sons*(2)). In this view it would follow that if the case be one of mutual credit as contemplated by section 39 of the Indian Insolvency Act, the order of the learned Commissioner would be liable to be cancelled. I cannot attach any force to the contention of Mr. Branson that money deposited under section 70 of the Presidency Small Cause Act became the money of the decree-holders—the insolvents—and that, therefore, at the date of the insolvency, there was no money due to the insolvents' estate from the petitioning creditor in respect of one of the Small Cause decrees to be set off against the claim of the petitioning creditor. There is nothing in the language of that section to convert the money paid into Court by the judgment-debtor pending the reference to the High Court into the money of the decree-holder. The judgment-debtor is required to give security as a condition of the reference or to pay the money into Court instead of giving security. The cases to which reference was made by Mr. Ramanath Shenai are authority, if any were needed, (although they were decided on analogous provisions of the law as to payment into Court), for the position that a mere payment into Court by the judgment-debtor under section 70 has not the effect of making the money so paid the property of the decree-holder. See *Mothiar Mira Taragan* v. *Ahmatti Ahmed Pillai*(3), *Dal Singh* v. *Pitam Singh*(4), *Prosunnonath Mookerjee* v. *Binode Ram Sein*(5) and *Fatima Khatoon Chowdrain* v. *Mahomed Jan Chowdry*(6).

A new contention has, however, been raised that the petitioning creditor's claim on the 30th of November 1908 in excess of a sum of Rs. 600 and odd was for unliquidated damages for breaches of contract by the insolvents. An examination of the plaint in Original Suit No. 4 of 1908 on the file of this Court shows that this was so. The question is whether a claim for unliquidated damages falls within the language of section 39 which enables mutual credits to be set off. This provision corresponds to section 38 of the English Bankruptcy Act of 1883, but is more restricted in scope. While section 39 of the Indian Insolvency Act is confined to mutual credits, section 38 of the English Act of 1883 extends the rule of set off to all mutual dealings. It is true that mutual

(1) (1887) 18 Q.B.D., 459 at p. 470.
(2) (1895) 2 Q.B., 618 at p. 622.
(3) (1906) I.L.R., 29 Mad., 232.
(4) (1903) I.L.R., 25 All., 179.
(5) (1870) 13 W.R., 29.
(6) (1868) 12 M.I.A., 65.

credit is a wider term than mutual debt. See *Rose* v. *Hart*(1). But it is not as wide as mutual dealings. The claim for unliquidated damages by or against the insolvent's estate cannot be set off under the provision as to mutual credits in the Bankruptcy Acts before 1861, *Bell* v. *Corey*(2). Section 153 of the Act of 1861 for the first time provides for the proof in respect of unliquidated damages. This is re-enacted in section 37 of the Bankruptcy Act of 1883. The 171st section of the statute 12 and 13 Victoria, Chapter 106, enabled every debt, or demand provable against the estate of the bankrupt to be set off. Since 1861 the law in England is settled that unliquidated damages due by the estate of the insolvent by reason of a contract or promise are capable of being set off against a debt or demand due to his estate. See *Makeham* v. *Crow*(3). The provision as to mutual dealings was introduced into the statute of 1869 and has been re-enacted in section 38 of the Act of 1883. There is no doubt that unliquidated damages can be set off under this section. Claims for rent and damages for non-completion of buildings, *Booth* v. *Hutchinson*(4), for price of goods and damages for non-delivery, *Peat* v. *Jones*(5), *Mersey Steel and Iron Company* v. *Naylor Benzon & Co.*(6), for price of goods and damages for misrepresentation in the contract, *Jack* v. *Kipping*(7), have been thus set off under the English Act. Although if section 39 as to mutual credits stood alone the set off claimed in this case except as to Rs. 600 and odd would not be allowable, section 40 of the Indian Act makes the provisions "of other statutes hereafter to be passed" as to proof of debts, dues and claims applicable, subject to the like deductions and conditions as in the said statutes are set forth or prescribed. See *In re Vardalaca Charri*(8). Unliquidated damages, therefore, may be proved against the insolvents' estate. *In the matter of Omertololl Daw*(9). And as section 38 of the English Act of 1883 provides that there shall be a set off in respect of the mutual dealings, *i.e.*, that the sum due from the one party shall be set off against any sum due by the other party and the balance of the amount and no more shall be

(1) 2 Sm. L.C., 298.
(2) (1849) 19 L.J.C.P., 103.
(3) (1864) 15 C.B.N.S., 847.
(4) (1872) 15 Eq., 30.
(5) (1881) 8 Q.B.D., 147.
(6) (1884) 9 A.C., 434.
(7) (1882) 9 Q.B.D., 113.
(8) (1877) I.L.R., 2 Mad., 15.
(9) (1874) 13 B.L.R., app., page 2.

claimed or paid on either side, the damages claimed against the insolvents' estate in this case must be subject to this deduction of the amounts due to that estate by the petitioning creditor. I would therefore modify the order of the learned Commissioner and allow the whole set off claimed. The appellant will have his costs here and in the Court below.

THE CHIEF JUSTICE.—I do not dissent from the grounds on which my learned brother bases his judgment, but I prefer to base my judgment on the ground stated by me.

C. Vijiarayavalu Naidu, Attorney, for appellant.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Munro.

KAMBINAYANI JAVVAJI TIMMAJI AMMA GARU AND ANOTHER (PLAINTIFF AND HER LEGAL REPRESENTATIVE), APPELLANTS,

v.

KAMBINAYANI JAVVAJI SUBBARAJU NAYANIVARU AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1909. December 16, 17, 20. 1910. February 1.

Hindu Law—Widow, compromise by—When such compromise tantamount to alienation—Possession when adverse to reversioner.

Where a widow, whose right to property is disputed, enters into a compromise with the disputant by which she merely undertakes to make no further claim to the property, such compromise does not amount to an alienation by the widow and the disputant does not hold the property under any title derived from her.

Sheo Narain Sing v. *Khurgo Koery and Sheo Narain Singh* v. *Bishen Prosad Singh*, [(1882) (10 C.L.R., 337)], dissented from.

Radha Mohan Dhas v. *Ram Das Dey*, [(1869) (3 B.L.R., 362)], referred to.

The possession of the disputant under the above circumstances was adverse to the reversioner.

In considering whether possession is adverse to the reversioner, it must be seen whether it is based on a title derived from the widow as representative of the separate estate or on one which leaves no separate estate to be represented.

APPEAL against the decree of K. C. Manavedan Raja, District Judge of North Arcot, in Original Suit No. 9 of 1903.

The facts of the case are sufficiently stated in the judgment.

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The main question of law involved in the case was stated and discussed in the judgment of the lower Court as follows :—

"The defendant's vakil does not seriously dispute the proposition that, if there is an alienation by a widow subsequent to the decree and it is not binding on the reversioner, the reversioner's remedy is by a suit. He contends that there was no alienation in the present case; that a compromise and an alienation are essentially different; that the circumstances under which Exhibit XLI was brought into existence absolutely preclude the supposition that any rights were conveyed by Madamma or acquired by the first defendant's father; and that the execution of Exhibit XLI and the entering up of satisfaction, if fraudulent and not binding on the plaintiff, are questions relating to execution, discharge or satisfaction of the decree, and are therefore such as can be raised and determined in the execution proceedings and not by a suit.

The main points, then, which have to be decided in connection with issues 6, 7 and 8 are whether a compromise is necessarily an alienation, and whether Madamma can be said to have alienated the properties under Exhibit XLI to the first defendant's father. It may be mentioned that, if these points are found in favour of the plaintiff, issues 2 and 3 will also have to be found for the plaintiff; because plaintiff will have had a fresh cause of action in consequence of the alienation by the widow. Again, a transfer by the widow implies a delivery in the first instance to her and a re-delivery by her to the first defendant's father. There would thus be an interruption in the defendant's possession and the subsequent possession will not be adverse to plaintiff.

A compromise is an adjustment of claims by mutual concession; and it is hardly necessary to say that no authority has been cited in support of the general proposition that a compromise is an alienation. Plaintiff's vakil relies on (1) Sheo Narain Singh *v.* Khurgo Koerry and Sheo Narain Singh *v.* Bishen Prosad Singh (10 C.L.R., 337), (2) Mussamat Indro Kooer *v.* Shkhai Abool Burkat, 14 Weekly Reporter 146; (3) Sant Kumar *v.* Deo Saran (8 All., 365); and (4) Jeram *v.* Veerbai (5 B.L.R., 885). Of these, in Sheo Narain Singh *v.* Khurgo Koerry and Sheo Narain Singh *v.* Bishen Prosad Singh there is an observation that the suit by the widow and the succeeding

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compromise was tantamount to an alienation by the widow, and that there was consequently no adverse possession during her life. It is clear that this was not intended to be a general definition; on the face of it, it refers only to the document in the particular case then before the Court. Moreover, the question before the Court was not as to the nature of a compromise or the distinction between a compromise and an alienation. The question the Court was considering was, whether the defendants' possession under the circumstances of the case could be said to be adverse; and it was decided that possession would not be adverse, because the compromise was effected on the basis of the widow giving the property to her husband's coparceners and their possession was derived from the widow. In Mussamat Indro Kooer *v.* Shaikh Abool Burkat "a compromise *like the present*," says Mitter, J., "by which a Hindu widow gives up all her rights in the estate of her deceased husband, reserving only a life interest for herself in some of the villages belonging to that estate, cannot but be regarded as an alienation." (The observation is expressly limited to the facts of the particular case; and they obviously differ materially from the facts and recitals of Exhibit XLI.) In judging whether the compromise was binding upon the reversioners, the Court held that the compromise cannot but be regarded as an alienation. In Sant Kumar *v.* Deo Saran, all that is said is that the particular compromise then before the Court can scarcely be regarded as having any footing higher than that of an alienation which the widow in possession of her husband's divided estate could have made. The question which Mahmood, J., was considering was whether a suit for a declaratory decree was maintainable; and he argues at considerable length in support of the maintainability of such a suit. Now, if his Lordship's view was that a compromise by a widow is an alienation, all this long argument was out of place, as such a suit by a reversioner during the lifetime of the widow is expressly allowed by the Specific Relief Act, section 42 [see illustration (*e*)].

The case of Jeram *v.* Veerbai merely refers to, and adopts, this view of Mahmood, J., and requires no further comment.

These are the authorities cited in support of the proposition that a compromise is an alienation. Far from supporting the contention, they merely show that, under certain circumstances and for certain special purposes, certain compromises

have been considered as having the force of alienations. As observed by the defendants' vakil, a compromise and an alienation are different in their nature and in their operation. In all alienations except gift, valuable consideration seems to be essential. Mere doubt or dispute is sufficient to uphold a compromise. But the more important distinction is that an alienation proceeds on the footing that the ownership is with the alienor and that the alienee's title is derived from him. There is a common agreement as to the title. In a compromise there is no such *concensus*. Each practically denies the other's title; but make concessions to purchase peace. The facts of the present case will also show that it was not the intention of the parties that Madamma should be regarded as owner of one-third under the decree in favour of her husband and that on that footing she was to alienate, and the first defendant's father was to reacquire under a title derived from Madamma, her right to one-third of the zamindari, etc., but that, on the contrary, the first defendant's father was to be treated as owner of the whole, as he has all along been contending, or, at any rate, became such on the death of the plaintiff's father, the decree-holder, which was the contention involved, in his Privy Council appeal, and that on that footing he was to make a settlement of certain villages on Madamma and her daughter and cash and annuity for life on Madamma in consideration of Madamma entering up satisfaction without executing the decree."

The lower Court dismissed the suit. Plaintiffs appealed.

The Hon. the Advocate-General and *L. A. Govindaragava Ayyar* for second appellant.

P. R. Sundara Ayyar for first respondent.

P. R. Ganapathi Ayyar for all the respondents.

S. V. Padmanabha Ayyangar for second respondent.

JUDGMENTS (MILLER, J.).—The preliminary objection that the suit was not on behalf of the estate fails. There is nothing in the language of the plaint to which our attention was called which rebuts the presumption arising from the nature of the relief claimed, that the suit was on behalf of the estate.

On the merits I have had an opportunity of reading the judgment which my learned brother has prepared, and I agree with him that the compromise does not effect an alienation by the widow of rights which she possessed, so as to make the

possession of the first defendant's father a possession derived from her. The widow gave up or relinquished her rights and interest and all claim under the decree, but I do not read that as meaning that she transferred those rights, interests and claims to the first defendant's father, but only that she undertook to make no further claim under the decree. There is a transfer of property by him to her but none by her to him.

That being so I concur in dismissing the appeal on the ground that the suit is barred by limitation.

MUNRO, J.—This is an appeal by the plaintiff against the decree of the District Court of North Arcot in Original Suit No. 9 of 1903. The plaintiff's father brought Original Suit No. 5 of 1876 against the father of the first defendant, and a compromise was entered into and a decree passed thereon by which one-third of the Kangundi zamindari and a sum of Rs. 20,000 were awarded to the plaintiff's father. The plaintiff's father executed the decree so far as the sum of Rs 20,000 was concerned. He also applied in execution for the one-third share of the zamindari, but died in 1878 before the division was carried out. The plaintiff's mother Madamma was brought on record as legal representative. Her right to execute the decree was contested by the first defendant's father, but was upheld by the District Court and by the High Court on appeal. The first defendant's father on the 28th October 1881 obtained leave to appeal to the Privy Council and on the 30th March 1882 applied for stay of execution. While matters stood thus the parties came to an agreement and executed Exhibit XLI on the 2nd July 1882. Exhibit XLI sets out the above facts and goes on to say that in view of the termination of the disputes, in view of the trouble and loss that both parties had been put to, and also in view of the uncertainty of the result of the appeal to the Privy Council a settlement had been arrived at. Under the settlement the first defendant's father was to give certain immoveable properties to Madamma and to the plaintiff who was then a minor, pay Rs. 2,500 annually to Madamma and a lump sum of Rs. 57,000 to Madamma and the plaintiff. On their part Madamma, the plaintiff, and their heirs were to relinquish all their rights under the decree in Original Suit No. 5 of 1876. The deed then proceeds to say, in paragraph 10, that Madamma took possession of the immoveable properties and received payment of the Rs. 57,000, and relinquished on

her own behalf and on behalf of the plaintiff all rights and interest in the decree in Original Suit No. 5 of 1876, while the first defendant's father and his heirs relinquished all their rights and interest in the matter of Madamma, the plaintiff and their heirs enjoying the properties put in Madamma's possession. It was further provided that Madamma should within twenty days certify satisfaction of the decree in Original Suit No. 5 of 1876, and that the first defendant's father should withdraw his appeal to the Privy Council and his application for stay of execution. These provisions were carried out. Madamma died in 1885, and the estate was in charge of the Court of Wards till the 11th March 1900. On the 15th March 1900 the plaintiff applied to be brought on record as her father's representative, and to be allowed to execute the decree in Original Suit No. 5 of 1876. The first defendant contended that as satisfaction had been recorded there was no subsisting decree which the plaintiff could execute. This contention was upheld by the District Court and the High Court, and the plaintiff's application was dismissed. The plaintiff then filed the present suit. She alleged in her plaint that the settlement under Exhibit XLI was fraudulent and intended to defeat her rights; that for the consideration set out in Exhibit XLI Madamma alienated the property decreed to her father; and that as the settlement was without legal necessity and in fraud of her rights the alienation effected thereby was not binding beyond her mother's life-time. She prayed *inter alia* for a declaration that the alienation was invalid and inoperative beyond Madamma's life-time, and for partition and recovery of a third share of the zamindari.

The District Judge found that the plaintiff's suit was barred by *res judicata*, by limitation and by section 244, Civil Procedure Code (Act XIV of 1882). He also found that the plaintiff had no cause of action. The decision of these questions turned mainly upon whether there was an alienation by Madamma of her husband's estate as alleged in the plaint. The District Judge found there was not, and it is to the propriety of that finding that the arguments for the appellant have been mainly directed. *Sheo Narain Singh* v. *Khurgo Koerry* and *Sheo Narain Singh* v. *Bishen Prosad Singh*(1), *Mussamut Indro Kooer* v. *Shaikh Abool Burkat*(2),

(1) (1882) 10 C.L.R., 337.

(2) (1870) 14 W.R., 146.

and *Sant Kumar* v. *Deo Saran*(1), are relied upon in support of the contention that under the settlement or compromise evidenced by Exhibit XLI there was an alienation by Madamma of the property decreed to the plaintiff's father in Original Suit No. 5 of 1876. In the first of these cases one Tejmun Singh having died in 1835, his brothers, though divided from him, got their names registered as owners of the estate which had been in his possession till his death and, as is clear from the report—see particularly page 345, where it says the brothers got possession in 1835—took possession of at least two mouzahs of that estate. The widow of Tejmun Singh, alleging that he had been divided from his brothers, sued for cancelment of the registration and for confirmation of possession. She succeeded in the first Court, but was defeated on appeal. She then preferred a special appeal, and, while that appeal was pending, entered into a compromise, by which she gave up her claim of having the special appeal heard, and agreed that the heirs of her husband's brothers should remain in possession of the two mouzahs, of which, as above mentioned, they had taken possession, she herself taking the rest of the property for life with reversion to the heirs of the brothers. In 1879 within twelve years after the death of the widow suits to recover the two mouzahs were brought by the daughters of Tejmun Singh and their assignees, and one of the questions which the High Court had to decide was whether the suit was barred by limitation. The Court held that there was no adverse possession during the life of the widow because "the suit by the widow and the succeeding compromise was tantamount to an alienation by the widow of a portion of the property for her life-time," and that the period of limitation must be counted from her death. With great respect I find myself unable to accept this view. In *Radha Mohun Dhar* v. *Ram Das Dey*(2), one Ramkant died leaving immovable property and his widow took possession. The defendant claimed the property and threatened the widow with legal proceedings. The widow thereupon gave up her own title and possession and permitted the defendant to hold the property as part of his estate. The question arose whether the possession of the defendant was adverse to the widow, and it was held that it was. In *Adi Deo Narain Singh* v. *Dukharan*

(1) (1886) I.L.R., 8 All., 365.

(2) (1869) 3 B.L.R., 362.

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Singh(1), on the death of the widow, who was in possession, the person entitled to succeed to the property was the daughter of the last male holder if it was his separate property. The defendants however took possession, and it was alleged that the daughter acquiesced in this possession. It was contended that as the defendants held possession with the consent of the daughter their possession was not adverse to her. The argument was held to be fallacious. It was observed that the possession of the defendants was in no way derived from or under the daughter, as she had never obtained possession herself at all, and that the defendants did not maintain their possession in virtue of any title acquired by them through her, by sale, transfer or otherwise. It is pointed out that the two cases just referred to were not cases in which there had been a compromise after suit brought. It can, I think, make no difference whether the female gives up her claim before suit or by compromise after suit, unless there is something in the compromise itself to make a difference. In *Gunesh Dutt* v. *Mussamut Lall Muttee Kooer*(2), there were two brothers. One had a son, Chedee Lall, who died leaving a widow. This widow and the sons of the other brother put in applications under Act XXVII of 1860, the former claiming a life interest in Chedee Lall's estate and the latter claiming the property as joint family property. There was a compromise by which the widow abandoned her claim and admitted the right claimed by the brother's sons. It was contended that the brother's sons were holding with the widow's consent, and that therefore their possession was not adverse to her. The Court observed as follows:—"Looking to the proceedings under Act XXVII it is quite clear that the defendants have never admitted in the slightest degree that they hold under the widow. They alleged, and still allege, a title entirely hostile to her and possession based on that title, and the fact that she, for reasons which we need not consider, chooses to abandon her own claim . . . . does not alter the nature of their possession from an adverse to a derived possession. The compromise may be perfectly binding on her, but there is nothing in the terms of it to show that the appellants admitted and acquired her rights. . . . . They bought the widow's

(1) (1883) I.L.R., 5 All., 532.

(2) (1871) 17 W.R., 11.

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silence, but did not attempt to acquire her rights as heiress . . . . In considering whether the possession is adverse, we must see whether it is based on a title derived from the widow as representative of the separate estate or on one which leaves no separate estate to be represented." Now I have no hesitation in holding that the principles upon which the three cases last quoted were decided are correct, and, applying them to the facts in *Sheo Narain Singh* v. *Khurgo Koerry* and *Sheo Narain Singh* v. *Bishen Prosad Singh*(1), I am constrained to hold that the decision in that case on the question of adverse possession cannot be supported. The possession of the brother's heirs was clearly adverse to the widow, and this being so, their holding could not be regarded as being under an arrangement which in its effects was tantamount to an alienation by the widow. In *Mussamut Indro Kooer* v. *Shaikh Abool Burkat*(2), there was a compromise by which a Hindu widow gave up all her rights in the estate of her deceased husband, reserving only a life interest in part of it, and the question was whether the reversioner was bound by the compromise. It was held that he was not on the ground that the compromise could not but be regarded as an alienation. Now there can be no doubt that such a compromise would not be binding on the reversioner—*Imrit Konwur* v. *Roop Narain Singh* (3), and if, as I think, what the learned Judges meant to say was that the compromise could not affect the rights of the reversioner any more than an alienation could have done, there is no difficulty in agreeing with them. In *Sant Kumar* v. *Deo Saran*(4), the widow got possession of her husband's property alleging it to be his separate estate. Her husband's brother's sons sued her for possession of the property. There was a compromise by which the widow admitted that the family was joint and that she was only entitled to maintenance. In a suit by a reversioner after the widow's death the question arose whether the compromise was binding on the reversioner. It was pointed out that while a decree finally obtained against a widow in a *bonâ fide* litigation could bind the reversioners, a compromise was not on the same footing as such a decree, and that the compromise then in question could scarcely be regarded as having any footing

(1) (1882) 10 C.L.R., 337.

(2) (1870) 14 W.R., 146.

(3) (1880) 6 C.L.R., 76.

(4) (1886) I.L.R., 8 All., 865.

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higher than that of an alienation which the widow in possession of her husband's divided estate could have made. With all this I entirely agree. But it is no authority for saying that the same results necessarily flow from a compromise by a widow as would flow from an alienation by the widow.

Now when we examine the compromise in the present case in the light of the principles indicated abo e, it is I think impossible to hold that there was an alienation by Madamma of one-third of the zamindari. The effect of the compromise briefly is that for a consideration Madamma agreed not to press her disputed claim to execute the decree and recover the property. There was no admission of her right, no title derived from her. In this view the only other question which need be considered is whether the suit is barred by limitation. Though the plaintiff's father got a decree in 1876 for the suit property he never got possession, nor did Madamma. Even as against the plaintiff's father the possession of the first defendant's father was adverse, and it having been found that no title was derived by the first defendant's father by alienation from Madamma, the property continued to be held adversely by the first defendant's father and the first defendant up to the date of the suit. The suit is therefore clearly barred by limitation and was rightly dismissed. This appeal fails and is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Miller.

SRINIVASA AIYANGAR AND OTHERS (PLAINTIFFS NOS. 1 TO 6 AND LEGAL REPRESENTATIVES OF THIRD APPELLANT DECEASED), APPELLANTS,

v.

ARAYAR SRINIVASA AIYANGAR AND OTHERS (DEFENDANTS), RESPONDENTS.*

1906. November 15, 16, 20, 21. December 10. 1909. March 16, 17, 18. 1910. February 17.

Civil Procedure Code, Act XIV of 1882, *ss.* 13, 30—*Decree in suits under s.* 30—*Order in execution not binding on persons not actually brought on record*—Res judicata—*When judgments obtained in one capacity binding on the same persons in another capacity.*

Where a party to a suit is allowed to represent others under section 30 of the Civil Procedure Code, the decree will be binding on those whom he is allowed to represent. But an injunction is personal in its nature, and where such a party disobeys an injunction and is proceeded against in execution for such disobedience, an order in such proceedings will not be binding on those whom he was allowed to represent in the suit.

Where a trustee is a member of a sect and his rights as trustee are linked with and subordinate to the rights of the sect, a decision on the rights of his sect fairly obtained in a suit between his sect and a rival sect will be binding on him in his special capacity as trustee in a subsequent suit between him in such capacity and the rival sect.

Judgments *in personam* in general bind only parties and their privies. But the relation established between them by a judgment is, in the absence of fraud or collusion, conclusive against third parties.

APPEAL against the decree of B. Cammaran Nair, Subordinate Judge of Tuticorin, in Original Suit No. 22 of 1903.

The facts are fully stated in the judgment.

T. R. Ramachandra Aiyar for *P. R. Sundara Ayyar* and *K. R. Krishnaswami Ayyangar* for fourth to seventh appellants.

C. Narasimhachariar for *S. Alasingaracharia*r for respondents.

JUDGMENT.—Judgment in this case was reserved as we wished to consider, in connection with an argument of Mr. P. R. Sundara Aiyar to be noticed presently, the true effect, with reference to the present claim, of the adjudication in Original Suit No. 2 of 1896 on the file of the Subordinate Judge's Court of Tinnevelly,

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* Appeal No. 85 of 1904.

wherein it was established that the right to the Adhyapakam office in the temple of Nachiar and Vatapatrasayanar in Srivilliputtur as well as in all the shrines attached thereto was vested in the Thenkalai and other Thirtakars, residents of that place, as found in the decree and judgment and that the Vadakalais other than the Thirtakars possessed no interest whatsoever in the office. As was intimated by us in the course of the argument, there can be no doubt that in that litigation the then plaintiffs acted on behalf of all the Thenkalais, while the then defendants represented the Vadakalais of the place, having been duly constituted so to represent by the notification issued by the Court under section 80 of the Code of Civil Procedure. As the present plaintiffs belong to the community of Vadakalais of Srivilliputtur, the previous adjudication clearly binds them as mere Vadakalais, if the Vedanta Desikar shrine be, as contended on behalf of the Thenkalai defendants in the present suit, a shrine attached to the Nachiar and Vatapatrasayanar temple.

No doubt, in the execution proceedings taken in that suit, it was held that the shrine in question was one so attached. The execution was however with reference to the enforcement of the order restraining the then actual defendants from interfering with the discharge of the duties of the Adhyapakam office. The present plaintiffs, not having been impleaded in the previous suit as defendants actually, were not liable to be proceeded against in execution for any alleged disobedience of the injunction granted therein; *Sadagopa Chari* v. *Krishnama Chari*(1). Consequently, the finding in the execution proceedings as regards the question whether the Vedanta Desikar shrine was appurtenant to the main temple or an independent institution, is not *res judicata* and that question would have to be tried in the present suit regarding the plaintiffs as mere members of the Vadakalai community and *a fortiori* if, as the plaintiffs allege, the right of management of the shrine belongs to them.

Before however passing orders as to the trial of the point, we proceed to deal with the argument of Mr. Sundara Ayyar referred to, viz., that even on the assumption that the shrine in question is subordinate and attached to the big temple, the finding that the Adhyapakam miras belongs exclusively to the Thenkalais, and

(1) (1889) I.L.R., 12 Mad., 356.

the Vadakalai Thirtakars, is, with reference to the plaintiffs' special capacity as *trustees* of the shrine, *res inter alios acta* and therefore it is open to them to prove that the rightful holders of the office are not the Thenkalais but the Vadakalais, to restrain the former from interfering with the office and to ensure the observance of the usage of the institution by executing the duties of the office from the Vadakalais. Though the decision of the question thus raised is not altogether free from difficulty, we are of opinion that the contention ought not to prevail, as the office of Adhyapakam in the shrine belongs, according to the plaintiffs, exclusively to the Vadakalais of Srivilliputtur and is vested in them and their descendants hereditarily, and as between that community and the Thenkalais of the place the adjudication in favour of the latter in the litigation of 1896 is as already stated absolutely binding. The case, with reference to these special facts, must be held to be governed by the rule stated in Bigelow on Estoppel as an exception to the general doctrine that judgments *in personam* bind only parties and privies, according to which exception the *relation* established between parties by such judgments is conclusive against third persons in the absence of fraud upon them (5th edition, p. 150). A clear instance of this exception is furnished by *Candee* v. *Lord*(1); followed in other cases, where it was held by the Supreme Court of New York that a judgment is conclusive evidence in a creditor's suit founded on it, as against the other creditors of the debtor, that the plaintiff is a creditor and to the amount awarded him by the judgment, unless it is impeached for fraud or collusion. In the absence of any precedents, Indian or English, elucidating this point, the reasoning of Gardiner, J., who delivered the judgment may usefully be set forth. He observed: "A debtor may be said to "sustain two distinct relations to his property, that of owner and "quasi trustee for his creditors. As owner he may contract debts "to be satisfied out of his property, confess judgments, create liens "upon it, sell or give it to others at pleasure and so far as he is "personally concerned will be bound by his own acts. But the "law lays upon him an obligation to pay his debts and holds him in "behalf of his creditors to the exercise of good faith in all transactions "relating to the fund upon which they must depend for payment.

(1) 51 Am. Dec., 294; 2 N.Y., 269.

"He can therefore neither create a debt nor do any of the things "above mentioned *mala fide* to their prejudice. The common law, "of which the English Statute and our own is but the exposition, "declares that every such debt, judgment or assurance contracted "or given with the intent to hinder, delay or defraud his creditors "is as against them to be void. And equity in many cases holds "the debtor and his confederates in the fraud as trustees for the "parties aggrieved. The rights of creditors to the property of the "debtor are to be worked out through the different relations to "which I have alluded. In creating debts or establishing the "relation of creditor and debtor, the debtor is accountable to no "one unless he acts *mala fide*. A judgment therefore obtained "against the latter without collusion is conclusive evidence of the "relation of debtor and creditor against others: 1. Because it is "conclusive between the parties to the record who in the given case "have the exclusive right to establish it; and 2. Because the "claims of other creditors upon the debtor's property are through "him and subject to all previous liens preferences or conveyances "made by him in good faith. Any deed, judgment or assurance "of the debtor so far at least as they conclude him must estop his "creditors and all others. Consequently, neither a creditor nor "stranger can interfere in the *bonâ fide* litigation of the debtor or "retry his cause for him or question the effect of the judgment as "a legal claim upon his estate. A creditor's right, in a word, does "not arise until the latter has violated the tacit condition annexed "to the debt, that he has done and will do nothing to defraud his "creditors.

"Where however fraud is established, the creditor does not "claim through the debtor but adversely to him and by a title "paramount which over-reaches and annuls the fraudulent con- "veyance or judgment by which the latter himself would be "estopped. It follows from the principles suggested that a judg- "ment obtained without fraud or collusion and which concludes "the debtor, whether rendered upon default, confession, or after con- "testation is upon all questions affecting the title to his property "conclusive evidence against creditors to establish first the relation "of creditor and debtor between the parties to the record; and "second the amount of the indebtedness." *Candee* v. *Lord*(1).

(1) 51 Am. Dec. at pp. 295, 296.

The Full Bench ruling in *Periasami Mudaliar* v. *Seetharama Chettiar*(1) that, independently of the original transaction, the decree against a father creates by its own force a debt as against him which his sons according to the Hindu Law are bound to pay unless it is illegal or immoral would seem to rest on the principle enunciated in the passage quoted above.

Turning to the present case, it is clear that the right of the trustee to require compliance with the usage of the institution in regard to the Adhayapakam office which office, by virtue of its hereditary character stands, according to the law of this country, on a par with interests in immoveable property, is necessarily linked with, dependent upon and subordinate to the right of the exclusive mirasi holders of the office—dependent and subordinate because it is by them and by them only that he can get the functions of the office performed. It follows that an adjudication obtained against them would be as binding on him as it is on them in the absence of fraud or collusion. A different view would be to uphold a contrariety of conclusions leading to a deadlock, that is to say, on the one hand the Thenkalais are entitled to exclude every Vadakalai interfering with their exercising the functions of the office in the shrine by virtue of the former decision, and yet, on the other hand, the trustee thereof is entitled to insist on the Vadakalais performing them. It would therefore seem to be the better opinion that the trustee is also concluded by the judgment which declared that the body of people put forward by him as entitled to the office were not so entitled. It is scarcely necessary to say that there was nothing to prevent the present plaintiffs in their alleged character of trustees making themselves parties to the former suit and resisting the claim of the Thenkalais as best they could and if possible preventing an adjudication in their favour. The omission to do so could not properly be held to give them the right to get rid of the effect of a decision against those very parties *in whose right* in truth the plaintiff's are now endeavouring to deny the title of the successful party. As the previous adjudication has not been impeached on the ground of fraud, the contention under consideration must be held to fail, and it will not be open to the plaintiffs to question the title of the Thenkalais to the office of Adhyapakam in the Vedanta

(1) (1904) I.L.R., 27 Mad., 243.

BENSON AND MILLER, JJ.

SRINIVASA AIYANGAR v. ARAYAR SRINIVASA AIYANGAR.

Desikar shrine, if that is found to be an adjunct of the main temple.

The Subordinate Judge is called upon to submit within three months from this date findings on the following points :—

(1) Whether the plaintiffs are the hereditary trustees entitled to the management of the Vedanta Desikar shrine ?

(2) Whether the said shrine is, or is not, one of the shrines attached to the Nachiyar and Vatapatra Sayanar temple ? and

(3) Whether the plaintiffs are disentitled to a declaration of their alleged right as trustee with reference to the proviso to section 42 of the Specific Relief Act ?

We direct that the trustees of the Nachiyar and Vatapatra Sayanar temple be made defendants in the case. The trial of the issues should take place after these newly added defendants have had notice of their inclusion as parties and after they have had time to appear and file written statements. If necessary, further issues may be framed on their written statements.

Fresh evidence may be received.

Seven days will be allowed for filing objections.

[In compliance with the above order, the Subordinate Judge, Tinnevelly, submitted findings and their Lordships granted the plaintiffs the declaration and injunction prayed for.]

APPELLATE CIVIL.

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

1909. December 9, 13.

VEERABADRAN ACHARI AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

SUPPIAH ACHARI AND ANOTHER (DEFENDANTS), RESPONDENTS. *

Hereditary Village Offices Act, Madras Act III of 1895, *ss.* 3, 21—*Act applicable to offices mentioned in s.* 3, *cl.* 4 *only in villages other than proprietary estates.*

Clauses 3 and 4 of section 3 of Act III of 1895 must be read together.

The Act is applicable to offices mentioned in clause 4 of section 3 only in villages other than those in proprietary estates and section 21 of the Act does not oust the jurisdiction of Civil Courts in regard to such offices in proprietary estates.

* Second Appeal No. 1513 of 1907.

WHITE, C.J. AND KRISHNASWAMI AYYAR, J.

VEERABADRAN ACHARI v. SUPPIAH ACHARI.

SECOND APPEAL against the decree of Arthur F. Pinhey, District Judge of Madura, in Appeal Suit No. 317 of 1906, presented against the decree of S. Raghava Ayyangar, District Munsif of Sivaganga, in Original Suit No. 49 of 1905.

The facts are thus stated in the judgment of the District Munsif.

"This is an application to file an award under section 525, Civil Procedure Code. The submission to arbitration is admitted. But the award is disputed. The defendants have raised a question as to the competency of this Court to entertain the application. Issue I has therefore been raised.* The submission to arbitration is filed as Exhibit B. The award has been filed for purposes of reference as Exhibit A. The parties are carpenters. The dispute is as to the right to hold the hereditary office of carpenter and to receive the swatantrams and enjoy the manibam land attached to the office in 3 villages. The arbitrators have decided that the office belongs to the plaintiffs, that the defendants are mortgagees; and that the plaintiffs are entitled to recover possession of the emoluments including the manibam land. The plaintiffs pray that the award may be filed and that a decree for redemption may be passed in terms of the award as provided in section 526, Civil Procedure Code. The defendants contend that the Civil Court has no jurisdiction to take cognisance of suits relating to emoluments attached to service inams, and that this Court has no jurisdiction to pass a decree declaring the rights of parties with regard to such service inams.

I think that this Court has no jurisdiction over the subject matter of the award, and I think that an application under section 525 can be maintained only in a "Court of the lowest grade having jurisdiction over the matter to which the award relates." If this Court cannot try a claim with reference to the subject matter of the award in this case, then I think this application must be rejected.

I think that the matter in dispute being the emoluments attached to the office of village carpenter in three villages, of which two form part of the Sivaganga zamindary, and the third an inam

* Issue I was as follows : "Whether this Court has no jurisdiction."

village enfranchised by the Inam Commissioner, the Civil Court has no jurisdiction under section 21 of the Madras Act III of 1895 to pass a decree "for the recovery of the emoluments" as it must if a decree has to be passed in terms of the award. Act III of 1895 applies to the hereditary office of a village carpenter in proprietary estates (*See* section 3, clauses 3 and 4). Of the three villages now in question, two villages form portion of the Sivaganga zamindary and one village is an inam village, the grant of which has been confirmed by the Government by enfranchisement. The villages therefore come under 'Proprietary Estates' defined in section 4 of Madras Act III of 1895. (*See* also section 4, clauses (*a*) and (*d*) of Madras Act II of 1894.)

I think that the Civil Court has no jurisdiction to pass a decree for possession or redemption in this case. In the case reported in Indian Law Reports, XXI Madras, page 134, it has been held that the office of village carpenter came under the purview of Madras Regulation VI of 1831, which has been repealed by Madras Act III of 1895. In the case reported in Indian Law Reports, XXVI Madras, page 490, Ambalam of a village was decided to have been included in section 3, clause 3 of Act III of 1895; and a suit for the recovery of Ambalam Manibam by a mortgagee was held to be barred by Act III of 1895.

There is no doubt that this Court has no jurisdiction over the matter dealt with by the award and that I cannot entertain the application or pass a decree even if the award be valid.

On the view I have taken, I have not thought it necessary to take evidence with regards to the other issues in the case.

The application registered as a suit is dismissed. The plaintiffs will pay the costs of the defendants and bear their own."

This judgment was confirmed on appeal.

Plaintiffs appealed to the High Court.

V. Narasimha Ayyangar for *V. N. Kuppu Rau* for appellants.

The respondents were not represented.

JUDGMENT.—This is a suit relating to certain lands alleged to form part of the emoluments belonging to the office of carpenter in certain villages. The lower Courts have held that the jurisdiction of the Civil Courts is barred under section 21 of Act III of 1895. Section 21 states that no Civil Courts shall have authority to take into consideration or decide, any claim to succeed to any office specified in section 3, etc.

The question is whether this is an office specified in section 3. Section 3 of the Act enumerates 4 clauses. Clause 3 speaks of other hereditary village offices in proprietary estates except the offices forming clause 4 below. Clause 4 no doubt deals with the hereditary offices of village artisans and village servants such as the village carpenter. But we must construe clause 3 and clause 4 together, and if, in clause 3, we find that in the case of hereditary village offices in proprietary estates the offices named in clause 4 are excepted we must construe clause 4 to mean that the Act applies to the hereditary offices of village artisans such as carpenter, etc., only in villages other than proprietary estates.

The plaintiffs claim to hold the office of village carpenter in three villages. As regards the offices in the zamindary villages it is clear from what we have said already that the jurisdiction of the Civil Courts is not ousted. As regards the third office it is stated to be in an inam village, a proprietary estate. The office of carpenter is not one of the offices to which either the Madras Village Cess Act of 1893 or the Madras Proprietary Estates Village Service Act of 1894 is applicable; and as it is not an office in a village other than proprietary estate, clause 4 of section 3 is inapplicable to the office in the inam village. *Pichuvayyan* v. *Vilakkudayan Asari*(1), and *Palamalai Padayachi* v. *Shanmuga Ausari*(2), are decisions under Regulation 6 of 1831 and not under Act 3 of 1895. *Soundara Pandia Thevan* v. *Velathiappa Thevan*(3), relates to the office of Ambalam falling within clause 3 of section 3 of the Act and not within the exception in that clause. They have no application to this case. We regret there is no appearance for the respondents, but on the best consideration we have been able to give to the matter, we think the Courts below are wrong in declining to entertain the suit. We reverse the decrees of the Courts below and remand the case to the Court of First Instance. Costs will abide and follow the result.

(1) (1898) I.L.R., 21 Mad., 184. (2) (1894) I.L.R., 17 Mad., 302,
(3) (1903) I.L.R., 26 Mad., 490.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Sankaran-Nair.

1910. January 5.

REGELLA JOGAYYA (PLAINTIFF), APPELLANT IN SECOND APPEAL No. 1399 OF 1907.

GUNDU AGASTESWARUDU (PLAINTIFFS), APPELLANT IN SECOND APPEAL No. 1400 OF 1907,

v.

NIMUSHAKAVI VENKATARATNAMMA AND ANOTHER (DEFENDANTS Nos. 2 AND 3), RESPONDENTS IN BOTH.*

Hindu Law—Widow—Debt contracted by widow for necessary purposes binding, though no formal charge created.

A debt contracted by a widow as representative of the estate, for the purposes of the estate will be binding on it in the hands of the reversioners, though no formal charge on the estate is created when the creditor looks not to the personal credit of the widow but to her as representative of the estate and relies on the credit of such estate.

Ramasamy Mudaliar v. *Sellattammal*, [(1882) I.L.R., 4 Mad., 375], referred to.

SECOND APPEALS against the decrees of Dowan Bahadur M. O. Parthasarathy Aiyangar, District Judge of Gódávari at Rajahmundry, in Appeal Suits Nos. 53 and 54 of 1906, presented against the decrees of K. Krishnamachariar, District Munsif of Amalapur, in Original Suits Nos. 56 and 85 of 1905.

The facts are stated in the appellate judgment as follows:—

"The suit was laid on a negotiable instrument made by the first defendant, a widow, in favour of the plaintiff.

The first defendant died and the second and third defendants as daughters were brought on record as legal representatives.

"Whether the plaint note is binding on the estate of the late P. Kameswara Row, first defendant's husband?" was framed as an additional issue, and the said issue was found against the plaintiff.

It was contended in appeal that part of the consideration for the note sued on was first defendant's husband's debt renewed from time to time, that to that extent at least the estate of Kameswara Row in the hands of defendants Nos. 2 and 3 should be held liable. The first defendant did not create a charge on the estate but, on the other hand, from what appears from the note

* Second Appeal Nos. 1399 and 1400 of 1907.

itself she executed the document in her personal capacity. The case reported in I.L.R., 4 Madras, 375, relied on by the Munsif appears to me to be a clear authority in favour of the respondents, and I feel bound to follow it notwithstanding the fact that other High Courts have expressed opinions tending to the contrary view. I therefore agree with the Munsif in his finding on this issue."

The Munsif passed a decree against the assets of the widow and this was affirmed on appeal with some modification in the rate of interest.

Plaintiff appealed.

T. V. Seshagiri Ayyar for appellant.

P. Narayanamurti for respondents.

JUDGMENT.—In *Ramasami Mudaliar* v. *Sellattammal*(1), the case by which the District Judge holds himself bound, INNES, J., no doubt held that the reversioners will not be bound to pay a debt contracted by the widow unless the debt is charged on the estate. KINDERSLEY, J., however took a different view holding that the plaint did not allege clearly that the promissory note was made by the widow as representative of the estate, and did not allege such a state of facts as would by operation of Hindu Law render the debt due on the promissory note binding on the reversioners.

Neither KINDERSLEY, J., nor TURNER, C.J., who rejected the plaint in the Original Court take the view that, as a matter of law, the reversioners cannot be bound unless the debt is formally made a charge on the estate, and there is no other authority in this Court for that view except the opinion of INNES, J.

In our opinion no distinction can be properly drawn between the case where a charge is formally created and the case in which the creditor lends for the necessary purposes of the estate to the widow as representative of the estate. In such a case though there is no formal charge upon the property forming the estate, the debt is a debt due by the representatives of the estate and recoverable from them. This seems to be the view of TURNER, C.J., and KINDERSLEY, J.

In the case before us the question whether the debts were borrowed by the widow as representative of the estate and for

(1) (1882) I.L.R., 4 Mad., 375.

MILLER AND SANKARAN-NAIR, JJ.

REGELLA JOGAYYA v. NIMUSHAKAVI VENKATARATNAMMA.

purposes binding on the reversioners, and the question whether the creditor looked only to the personal credit of the widow or lent to her as representative of the estate on the credit of the estate, have not been decided.

We accordingly reverse the decree of the District Judge and remand the case for decision according to law in accordance with the above observation. Costs will abide the result. It will be open to the District Judge to remand the case to the Court of First Instance or take evidence himself as he deems necessary.

APPELLATE CIVIL.

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

1909. November 26. December 10. 1910. February 10, 11.

SRI VENKATACHALLAPATHY SAHAYA VIYAVASAYA COMPANY, BY ITS PRESIDENT, S. R. VENKATRAMIER (PLAINTIFF), PETITIONER IN ALL,

v.

KANAGASABHAPATHIA PILLAI (DEFENDANT), ORIGINAL SUIT No. 491 (RESPONDENT) IN CIVIL REVISION No. 751 OF 1908.*

Provincial Small Cause Courts Act, IX of 1887, sch. II, art. 18—Suits 'relating to Trust' what are.

Suit by a company by its President to recover from defendants Nos. 2 to 4 the subscriptions due under the Articles of Association of the Company. The first defendant was a trust; defendants Nos. 2 to 4 were the trustees of the trust and members of the plaintiff company, in their capacity of trustees. The plaint prayed that the moneys due may be recovered from the trust property in the first instance and, if not so recoverable, from the defendants Nos. 2 to 4 personally. The suit was instituted on the Small Cause side and the Subordinate Judge returned the plaints on the ground that the suit was one relating to a trust within the meaning of Act 18 of Schedule II of the Provincial Small Cause Courts Act and was not triable on the Small Cause side. The High Court was moved by petition under section 25 of the Act, *Held*:

Per CHIEF JUSTICE and SANKARAN-NAIR, J.—BENSON, J., dissenting:—

The suit was to enforce payment of moneys due under the Articles of Association and not one 'relating to a trust' within the meaning of article 18. The fact that issues relating to the trust and the rights and liabilities of the trustees may have to be tried will not make the suit one 'relating to a trust'.

* Civil Revision Petition Nos. 751 to 757 of 1908.

WHITE, C.J. BENSON AND SANKARAN-NAIR, JJ.

SRI VENKATACHALLAPATHY SAHAYA VIYAVASAYA COMPANY v. KANAGASABHAPATHI PILLAI.

PETITIONS under section 25 of Act IX of 1887 praying the High Court to revise the orders of K. Srinivasa Rao, Subordinate Judge of Tuticorin, in Small Cause Suits Nos. 491 to 495, 1139 and 1140 of 1908.

The facts necessary for this report are sufficiently set out in the order of the Subordinate Judge as follows:—

"In all these suits the plaintiff is "Sri Venkatachalapathi Sagaya Vyavasaya Company, Limited," and the defendants Nos. 2, 3 and 4 in all of them are the same individuals, the first defendant alone being the particular "dharmam" or "trust" of which the defendants Nos. 2, 3 and 4 are the trustees. It has to be borne in mind that the first defendant in all these suits is thus admittedly the "trust" or "dharmam" itself, and the defendants Nos. 2, 3 and 4 are, as stated above, the managers or trustees thereof. The suits have arisen out of the defendants Nos. 2, 3 and 4 having become members of the plaintiff association in the capacity of trustees of the various "trusts" or "dharmams" by formal applications for membership in the said association, which are all signed by defendants Nos. 2, 3 and 4. The object of these suits is to recover arrears of subscriptions due from the defendants Nos. 2, 3 and 4 as trustees of the said dharmams to the plaint association. The plaint describes them as trustees or managers of the various trusts, and the prayer in each plaint is that the arrears may be recovered in the first instance from the trust property itself. The application forms filled up and signed by the defendants Nos. 2, 3 and 4 contain descriptions of the lands of the various dharmams or trusts of which they are managers and the object of giving these particulars of the trust property is obviously to recover the dues to the association from the trust property. The plaint association, being an agricultural association, and the defendants Nos. 2, 3 and 4 having become members thereof, as trustees of these trusts, it is clear that the benefit or the burden of the association was admittedly to go to the trust property, and it is equally clear that the suits that have been filed against defendants Nos. 2, 3 and 4 are filed against them, not, in their private or individual capacity, but only, as trustees of these trusts."

A. S. Balasubrahmania Ayyar for petitioners.

S. Srinivasa Ayyar for respondent.

JUDGMENT (The CHIEF JUSTICE).—Civil Revision Petition No. 751 of 1908 :—This is a petition under section 25 of the Provincial Small Cause Courts Act, 1887, against the decision of the Subordinate Judge of Tuticorin on the preliminary objection that the suit being one "relating to a trust" within the meaning of the article 18 of the second schedule to the Act, it was not triable on the Small Cause side of the Court. The Subordinate Judge allowed the preliminary objection.

The suit is by a limited liability company brought in the name of the "President" of the Company for "subscriptions" alleged to be due to the Company, under its Articles of Association and rules, from defendants Nos. 2 to 4 as "members" of the company.

Defendants Nos. 2 to 4 are described in the plaint as trustees of a "dharmam" or charitable trust, the trust itself being the first defendant.

The claim is made against defendants Nos. 2 to 4 as trustees, and alternatively in their private capacity. The plaintiff asks for payment of the amount claimed from the first defendant, *i.e.*, apparently out of the trust property, and alternatively by defendants Nos. 2 to 4 personally.

The second defendant pleads that the trust funds are in the possession of defendants Nos. 3 and 4 and that they are liable. He denies his personal liability. The third defendant pleads *inter alia* that he and the defendants 2 and 4 are not the trustees of the "dharmam", and that the properties of the dharmam are managed by the entire body of the caste of which defendants Nos. 2 to 4 are members. The fourth defendant pleads *inter alia* that defendants Nos. 2 to 4 are not the sole trustees and that the trust property is managed by the whole caste.

It seems to me the suit is one relating to the liability of the defendants, either as trustees, or in their personal capacity, to pay to the company the "subscriptions" alleged to be due from them as "members", and that is not a suit relating to a trust within the meaning of the words in the second schedule to the Act. In my opinion the fact that, in order to decide the questions raised in the suit, it may be necessary to determine whether the trust property is liable does not make the suit one "relating to a trust." The defendants are not sued because they are trustees but because, as the plaintiff alleges, they are liable under the Articles of Association of the company to pay the subscriptions

claimed. It may be that, as the result of a decision in this suit, questions may arise for determination as between the defendants Nos. 2 to 4 and their *cestuis que trustent* (if any), but this, in my opinion, does not make the suit one "relating to a trust" as between the plaintiff and defendants Nos. 2 to 4.

The words "suit relating to a trust" are no doubt wider than the words in the corresponding enactment in the Presidency Small Cause Courts Act, 1882, which are "suits to enforce a trust," but the introduction of the words "including a suit", etc., in article 18 of the second schedule to the Provincial Small Cause Courts Act, seems to me to indicate that the words "suits relating to a trust" should be construed in a restricted sense. If the words "suits relating to a trust" are susceptible of the general interpretation which the Subordinate Judge has placed upon them, the later words of the paragraph "including, etc.," would seem to be unnecessary.

I think the view I have indicated is borne out by the authorities (see *Sundaralingam Chetti* and another v. *Mariyappa Chetti* and another(1)).

In *Krishnayyar* v. *Soundararaja Ayyangar*(2) where it was held the suit was not cognisable by a Small Cause Court, the suit was by a trustee against his predecessor in office for loss to the *Cestui que trust*, by the defendant's negligence, *i.e.*, breach of trust. In *M. V. Subramania Ayyar* v. *Pandi Doraisami Taver* and others(3) where it was held the suit was not cognisable, the plaintiff's cause of action, if any, was to enforce the performance of the trust in so far as the trust related to him.

I think the Small Cause Court had jurisdiction, that the order of the Subordinate Judge on the preliminary objection should be set aside, and that the case should go back to the Subordinate Judge to be dealt with by him as a Small Cause suit. The costs in this Court are to abide the event. Civil Revision Petitions Nos. 752 to 757 of 1908 follow.

BENSON, J.—C.R.P. Nos. 751 to 757 of 1908).—I find it difficult to hold that these suits are not "suits relating to a trust" within the meaning of article 18 of the Provincial Small Cause Courts Act.

(1) (1903) I.L.R., 26 Mad., 200. (2) (1898) I.L.R., 21 Mad., 245.
(3) (1903) I.L.R., 26 Mad., 368.

WHITE, C.J., BENSON AND SANKARAN-NAIR, JJ.

SRI VENKATA-CHALLAPATHY SAHAYA VIYAVASAYA COMPANY v. KANAGA-SABHAPATHIA PILLAI.

The first defendant is the trust itself. Defendants Nos. 2 to 4 are sued as trustees and it is the trust property which the plaint seeks to make primarily liable for the sums claimed, the claim against defendants Nos. 2 to 4 personally being only an alternative claim. I do not think that the cases cited by the petitioner's pleader support his contention that such suits as those now in question do not "relate to a trust" nor do I think that the words at the end of article 18 "including a suit", etc., can be read so as to restrict the generality of the preceding words "suits relating to a trust."

The present suits on the face of the plaints involve the question of the liability of the trust property and this directly raises the question of the trustees' right to deal with the trust property in the way they have done.

I therefore think that they relate to a trust and are not triable by a Small Cause Court.

I would dismiss the petitions with costs.

THE CHIEF JUSTICE.—As my learned brother differs, the point of law which is stated in the judgments will be referred to Mr. Justice Sankaran-Nair under section 98 of the Civil Procedure Code.

These petitions came on for hearing before the Hon'ble Mr. Justice Sankaran-Nair who delivered the following

JUDGMENT.—I agree with the Chief Justice. The orders of the Subordinate Judge will be set aside and he will be directed to restore the suits to his file and dispose of them in accordance with law. It is open to him if he thinks fit to act under section 23 of the Provincial Small Cause Courts Act. The parties will bear their own costs in this Court. The costs in the lower Court will be provided for in the final decree.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim.

G. NARAYANASWAMI NAIDU GARU, RECEIVER, NIDADAVOLE ESTATE (PLAINTIFF), PETITIONER IN ALL CIVIL REVISION PETITIONS NO. 470 TO 480 OF 1908 *

1910. January 19

v.

YERRAMILLI RAMAKRISHNAYYA AND OTHERS (DEFENDANT), RESPONDENTS IN CIVIL REVISION PETITIONS No. 470 TO 480 OF 1908.

Transfer of Property Act IV of 1882, s. 108—Failure of lessor to put lessee in possession—Absence of request by lessee to be put in possession—Applicability of section to agricultural leases.

In a case where the lessor does not put the lessee in possession, but there is no obstruction or likelihood of obstruction to the lessee taking possession of the same, and he neither tries nor requests the lessor to put him in possession.

Held, in a suit by the lessor for rent, that the lessee is liable.

PETITIONS under section 25 of Act IX of 1887, praying the High Court to revise the orders of T. Varadarajulu Naidu, District Munsif of Tanuku, in Small Cause Suits Nos. 480, 482, 483, 485, 486, 488, 489, 492, 495, 497 and 511, respectively.

Suits for rent.

The defendant denied that he had enjoyed the lands in respect of which rent was claimed and that the plaintiff had neither put him into possession of the lands nor offered to do so.

In dealing with this question the District Munsif found—

"It is conceded for plaintiff that he has not in this case proved possession or enjoyment of the land by defendant. The suit land adjoins defendant's inam, and this fact coupled with the circumstance that defendant is a Brahman, who leases out all his lands, no doubt raises a suspicion that Parimi Guriah's sons—Narasiah and Adiah—who appear to have actually cultivated the land in the suit faslis, may be the lessees under defendant, but the evidence, as conceded by plaintiff's pleader, does not justify a finding that defendant took possession of the land and leased it out to Parimi Guriah's sons. The fact that no deposit was taken and no patta and muchilika were exchanged as was proposed

* Civil Revision Petitions Nos. 470 to 480 of 1908.

ABDUR RAHIM, J.

NARAYANASWAMI NAIDU GARU v. YERRAMILLI RAMAKRISHNAYYA.

(*vide* exhibits II to V) indicate an absence of formal delivery by plaintiff.

"It is urged, however, that defendant was bound to take possession himself and that all the plaintiff could do was to ask defendant to take possession, and that if he was obstructed by any in taking possession, he had his remedy against plaintiff or against the obstructor. I am not, however, prepared to hold that there was no further obligation on the part of the plaintiff—than a mere direction to defendant to take possession. Even such a direction has not been proved in the present case. Section 108 of Transfer of Property Act is not applicable to the present case, by virtue of section 117 of the Act, and under the general law the obligation of a landlord to place a tenant in possession is absolute. A tenant may know where the land leased is, and the land may not even be in the occupation of any one who has to be ousted, and yet a landlord is bound to deliver the land to a tenant, if he is not in possession already and if he does not undertake to take possession himself—*vide* observations in I.L.R., 25 Mad., 585, at p. 591. The land in question is *a puntha kethu*, with apparently nothing to distinguish it from the adjoining *puntha*, and, admittedly, in or about October 1904, disputes arose between plaintiff and the Local Fund Board in respect of trees in *punthas* and the facts would not unreasonably have created an apprehension in the minds of persons in the position of defendant that their entry might be held to be illegal. The land was, according to plaintiff, not in the possession of any one entitled to hold it in the suit faslis, and the defendant could therefore have been placed in actual possession and not a mere constructive possession."

In the result plaintiff's suit was dismissed.

The plaintiff applied to High Court to revise the orders of the District Munsif.

P. Nagabhushanam for petitioner.

P. Narayanamurthi for respondent in Civil Revision Petition No. 471 of 1908.

P. C. Lobo for *T. Prakasam* for respondent in Civil Revision Petitions Nos. 472 to 480 of 1908.

JUDGMENT.—The District Munsif in my opinion is wrong in laying down as an absolute proposition of law that where the lessee is acquainted with the land leased to him and there is no obstruction or likelihood of obstruction to his going upon the land and taking possession of it but he does not choose to take possession of the land, he is not liable for rent because the lessor who was never asked to put him in possession did not offer to put him in possession. Section 108 of the Transfer of Property Act imposes an obligation on the lessor to put the lessee in possession on a request being made to him to that effect and it seems to me the principle of this enactment which appears to be quite reasonable is applicable to leases of agricultural land as well. And the case of the Zemindar of *Vizianagaram* v. *Behara Suryanarayana Patrulu*(1) does not lay down the law differently. But if the land is already in possession of a third person to the knowledge both of the lessor and the lessee, I should be inclined to hold that it would be the duty of the lessor to make it possible for the lessee to take possession by removing the third person from the possession thereof even though no express request for the purpose is made by the lessee. And this seems to be the gist of the ruling in *Hurish Chunder Koondoo* v. *Mohinee Mohun Mittel*(2). But in all these cases except Civil Revision Petition, No. 479, there is evidence of promise on the part of the receiver to put the particular lessees in possession and the receiver never put such lessees in possession. And the evidence also shows that a request was made for being placed in possession and there was apparently an obstruction in the way of the lessees taking possession. The learned pleader for the petitioner does not press petitions, Nos. 475 and 480.

Petitions Nos. 471, 472, 473, 474, 475, 476, 477, 478 and 480 are dismissed with costs, and 470 is dismissed without costs.

Civil Revision Petition, No. 479, is decreed with costs in both Courts as there is no evidence of any request being made by the lessee or of any obstruction to his taking possession.

(1) (1902) I.L.R., 25 Mad., 587.

(2) (1868) 9 W.R., 582.

ABDUR RAHIM, J.

NARAYANASWAMI NAIDU GARU v. YERRAMILLI RAMAKRISHNAYYA.

APPELLATE CRIMINAL.

Before Mr. Justice Benson and Mr. Justice Abdur Rahim.

1910. January 5, 6. February 2.

CHORAGUDI VENKATADRI, APPELLANT IN CRIMINAL APPEAL No. 487 OF 1909,
ORUGANTI VENKATA SUBBA RAO, APPELLANT IN CRIMINAL No. 522 OF 1909,
BODDUPALLI SUBBAYYA AND ANOTHER APPELLANTS IN CRIMINAL APPEAL No. 563 OF 1909,

v.

EMPEROR, RESPONDENT.*

Criminal Procedure Code, Act V of 1898, *s.* 235—"*Same transaction*" *what is—Community of purpose or design and continuity of action necessary.*

In order that a number of acts may be so connected together as to form part of the same transaction within the meaning of section 235, Criminal Procedure Code, community of purpose or design and continuity of action are essential elements. To constitute community of purpose, the mere existence of some general purpose or design will not be sufficient. The purpose in view must be something particular and definite. There is no continuity of action where each act is a completed act in itself and the original design accomplished so far as that act is concerned.

Where a company is formed with the object of defrauding the public, it cannot be said that distinct acts of embezzlement committed in the course of several years form part of the same transaction by reason of such general object.

Appeal against the sentences of T. T. Rangachariar, Sessions Judge of Guntúr Division in case No. 13 of the calendar for 1909.

The facts are sufficiently stated in the judgment of Abdur Rahim, J.

P. R. Sundara Ayyar and *A. Krishnaswami Ayyar* for appellant in Criminal Appeal No. 487 of 1909.

The Hon. *Mr. L. A. Govindaraghava Ayyar* for appellant in Criminal Appeal No. 522 of 1909.

Dr. S. Swaminadhan for *E. R. Osborne* and *M. K. Narayanaswami Ayyar* for appellant in Criminal Appeal No. 563 of 1909.

The Public Prosecutor in support of the conviction.

JUDGMENT (BENSON, J).—I agree with the conclusions arrived at by my learned brother whose judgment I have had the advantage

* Criminal Appeals Nos. 487, 522 and 563 of 1909.

BENSON AND ABDUR RAHIM, JJ.

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of perusing. There can be no doubt, I think, that the so-called Provident Fund, with its hypocritical professions of philanthropy and large promises of profit to all, was, from its very inception, a gambling concern, cunningly devised to swindle the unwary and ignorant. Its articles of association were such that effect could be given to them only for a brief period while the number of subscribers was rapidly increasing and the number of deaths among the lives insured was few. While this condition of things lasted the few subscribers whose nominees died stood to receive handsome sums compared with the subscriptions paid, but as soon as the increase in the number of new subscribers slackened or deaths increased, it was bound inevitably to become impossible to continue to pay the benefits promised in the prospectus, and liquidation became a necessity. The articles of association are, however, so elaborate and involved that all this would not be apparent to any one reading them unless he was both an attentive and intelligent person, and, no doubt, the promoters of the Company, including the accused, counted on this, as well as on the cupidity and gambling spirit of those to whom they appealed, to secure subscribers to the Fund. Among the charges brought against the accused, there were three of having cheated specific persons, but the accused have been acquitted on these charges and there is no appeal against the acquittal, so it is not necessary to consider whether the conduct of the accused amounted to that offence.

As regards the offences of misappropriation of which they have been convicted I think it is clear that they must be acquitted. It has certainly not been shown that the "Company people" referred to in articles 10 and 14 mean the subscribers. In fact there is no doubt that those words must be held to mean the Directors, that is the accused themselves, and their heirs; and that both the entrance fees of Rs. 3 for each subscriber and the sum of 3 annas in each rupee subsequently paid as subscriptions were set apart under the articles for certain expenses including the profits of the Directors. The accused were therefore not guilty of any offence in appropriating these sums for themselves, and there is no charge of misappropriation against them except in regard to these sums. I also agree with my learned brother that the trial was illegal as contravening the provisions of the Criminal Procedure Code with respect to the joinder of more than one charge at one trial. The joinder of the various charges

could only be supported, if at all, provided they were "committed in one series of acts so connected together as to form the same transaction" within the meaning of section 235 of the Code. I do not think that it is necessary or advisable to attempt to define the expression "the same transaction" which the Legislature has left undefined. Whether any series of acts is so connected or not must necessarily depend on the exact facts of each case, but these are so varied in character that it is impossible, to provide a completely accurate definition. There is, however, usually no great difficulty in deciding whether any particular case comes within the rule. In the present case I do not think that it can be said that the alleged misappropriations, extending over the whole period of the Company's existence, were committed in the course of the same transaction within the meaning of section 235; for, if so, the expression would equally cover misappropriations of a similar kind extending, it may be, over 40 or 50 years. This would obviously render nugatory the provisions of the law which are designed to simplify and define within reasonable limits the charges that may be tried at one and the same time and so avoid the embarrassment of the accused and I may add of the jury, in attempting to deal with a multitude of charges at one and the same time. How necessary is a rule of the kind is well exemplified by the Sessions Judge's judgment in the present case. It is very desirable that Public Prosecutors and the Courts should give full effect to the spirit of the provisions of the Code, instead of straining them to cover doubtful cases.

If we were of opinion that on the merits there was a case against the accused we should have had to order a retrial owing to the illegality of the trial of the various charges at one trial, but this is unnecessary in the view we take of the facts.

The accused must be acquitted and the fines if levied must be refunded.

In my opinion the Legislature might well consider whether some action is not called for with a view to protect the ignorant and unwary from the snares set for them by such Companies as that of which the accused are Directors.

ABDUR RAHIM, J.—In Sessions Case No. 13 of 1909 six persons were placed on their trial before the Sessions Judge, Guntur Division, and assessors. All the six accused were charged as Directors of the Circars Provident Fund, Bapatla, with having

committed breaches of trust in respect of three sums of money alleged to belong to the Company, viz., Rs. 469-13-3 between the 30th September 1905 and the 25th March 1906, Rs. 4,639-8-6 between the 25th March 1906 and the 25th March 1907 and Rs. 5,226-7-1 between the 25th March 1907 and the 18th September 1907, the misappropriation thus covering a period of nearly two years. The fourth and sixth accused were also charged with having falsified certain accounts by making false entries therein on the 20th and the 25th April 1905, and these two and the first accused with having falsified another document on the 24th June 1905. The sixth accused was further charged with having cheated two persons, one on the 6th March 1905 and another on the 29th March 1905, and the fourth accused with having cheated a third person on the 17th June 1905. Those among the six accused persons who were not charged with the substantive offences of falsification of accounts and cheating were charged with having abetted the commission of those offences. *Primâ facie* the trial is open to objection on the ground of multifariousness. It violates the express injunctions of the Legislature prohibiting the trial of several offences covering a period of more than one year at one trial and the trial together of a number of offences which are not of the same kind within the meaning of the Code. Objection on this score was taken on behalf of the defence before the Sessions Judge, but the Public Prosecutor contended that the trial was justified by the provisions of section 235, Criminal Procedure Code, and the Sessions Judge accepted the contention. The same section of the Code is relied on before us by Mr. Napier to uphold the legality of the trial and if the trial can be justified at all it must be by virtue of section 235, Criminal Procedure Code. It may be mentioned that the charges relating to falsification of accounts and cheating failed and all the accused have been acquitted of those charges. But if the joinder of those charges was in violation of the law the accused must have been considerably embarrassed in their defence on the remaining charges and their acquittal on the charges which the prosecution failed to prove cannot make valid the trial if it was illegal *ab initio*. Further the charges of criminal breach of trust as laid, and of which the appellants have been convicted are themselves in violation of the law, as the alleged acts of misappropriation extended over a period of more than twelve months.

Section 235, Criminal Procedure Code, allows of a number of offences, even if exceeding three and extending over a period of more than twelve months, being tried at one trial if they are committed "in one series of acts so connected together as to form the same transaction." It is argued that the case of the prosecution being that the Provident Company was in fact a bogus concern and the object with which it was set on foot by its promoters, these being the six accused, was to defraud the public, the various offences charged against them came within the purview of section 235, Criminal Procedure Code.

I think this contention of the prosecution is clearly unsustainable. Now what is the nature of the connection contemplated between different acts which would bind them into the "same transaction"? The idea conveyed by the words "same transaction" seems to be obvious enough and it may be doubted whether it can be compendiously expressed in simpler and clearer language. And generally speaking there can be very little difficulty in arriving at a proper conclusion in a concrete case. For instance, in this case what is said to connect the different acts charged into one transaction is the allegation that these acts were committed by the six persons in pursuance of a systematic scheme for defrauding those members of the public who might subscribe to the Fund. If this contention were sound then if the Company was carried on for ten or twenty years and a hundred acts of embezzlement were committed during that period the accused would be liable to be tried at one trial for all these offences. Obviously this cannot be the scope of section 235, Criminal Procedure Code. No doubt proximity of time any more than unity of place is neither a necessary nor decisive test of what constitutes the "same transaction," though such proximity often furnishes good evidence of the connection which unites several acts into one transaction, see *Krishnasami Pillai* v. *Emperor*(1). I think—and this seems to be the effect of the decisions reported in *Emperor* v. *Sheruf Alli*(2), *Emperor* v. *Datto Hanmant Shahapurkar*(3), *Queen-Empress* v. *Fakirapa*(4) and *Queen-Empress* v. *Vajiram*(5)—that at least in a certain class of cases—the present case is alleged to be within that

(1) (1903) I.L.R., 26 Mad., 125. (2) (1903) I.L.R., 27 Bom., 185.
(3) (1906) I.L.R., 30 Bom., 49. (4) (1891) I.L.R., 15 Bom., 491.
(5) (1892) I.L.R., 16 Bom., 414.

category—community of purpose or design and continuity of action are essential elements of the connection necessary to link together different acts into one and the same transaction. In such cases the acts alleged to be connected with each other must have been done in pursuance of a particular end in view and as accessory thereto or perhaps as suggested by the circumstances in which the acts in pursuance of the original design were done and in close proximity of time to those acts. But mere community of purpose is not sufficient; there must also be continuity of action. For it may happen that an act is done with a particular objective in view but the final aim is abandoned for some time and pursued afterwards. For instance, suppose a man forges a document with a view to cheat a certain individual and then foregoes his intention for two years and afterwards reverts to his original intention and uses the document for the fraudulent purpose which he had in mind when he committed the forgery, it would be difficult to say in such a case that the offences of forgery and of cheating by means of the forged document were committed in course of the same transaction. As regards community of purpose I think it would be going too far to lay down that the mere existence of some general purpose or design such as making money at the expense of the public is sufficient to make all acts done with that object in view part of the same transaction. If that were so, the results would be startling; for instance, supposing it is alleged that A for the sake of gain has for the last ten years been committing a particular form of depredation on the public, viz., house-breaking and theft, in accordance with one consistent systematic plan, it is hardly conceivable that he could be tried at one trial for all the burglaries which he committed within the ten years. The purpose in view must be something particular and definite such as where a man with the object of misappropriating a particular sum of money or of cheating a particular individual of a certain amount falsifies books of account or forges a number of documents. In the present case not only is the common purpose alleged too general and vague but there cannot be said to be any continuity of action between one act of misappropriation and another. Each act of misappropriation was a completed act in itself and the original design to make money was accomplished so far as the particular sum of money was concerned, when the misappropriation took place.

This also holds good with reference to the several charges of cheating though the falsification of accounts may have connection with the charges of misappropriation.

In my opinion therefore the trial was illegal.

I am also of opinion that the convictions of the accused are not justified by the evidence in the case and there should not be a retrial. The proposed objects of the Company were to enable people of the middle class to secure "high profits" in return for the money subscribed by them and the advancement of charitable works. Its *modus operandi* may be shortly described as follows. The fund of the Company was to consist of subscriptions paid by persons who are called "pattadars" and also described as "subscribers" or "nominees" or "diploma-holders." The subscriptions payable were to be at the rate of Re. 1 a month and no subscription was to be paid after 53 payments or after the death of the person called "Darkhastdar" or "applicant." At the end of each year, half the amount of the money collected during the year was to be distributed among the "nominees" of those "applicants" who happened to die during that year in proportion to the amount of money paid under each patta subject to the maximum of Rs. 1,000. By rule 14 of the articles of association 8 annas out of every rupee subscribed was to go towards the bonus fund, while the remaining 8 annas was to be dealt with as follows :—

RS.	A.	P.	
0	2	0	Reserve fund.
0	0	6	Guarantee fund up to Rs. 5,000.
0	0	6	Charity fund.
0	2	0	Commission to agents; the rest, *i.e.*, 3 annas

out of each rupee "will go towards the expenses of the Company, viz., office establishment charges, printing charges, etc., and towards the profits of the *company people* (the vernacular word being "*company varu*"). Another rule (No. 10) provided that the first three rupees paid by a subscriber would be treated as entrance fee and not as subscription and "this entrance fee will be appropriated by the *company people* for expenses etc., and shall not form part of the bonus which will be distributed." The object of the guarantee fund was to secure to the nominees at least twice the amount paid by the subscribers. Thus the benefit which is promised in express words to the nominees or subscribers is the

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bonus which in no case is to fall short of twice the amount paid as subscriptions but which may extend up to Rs. 1,000. The "applicant" or "darkhastdar," on whose death alone his pattadar or nominee is to get the bonus that may fall to his lot, need not be under any particular age-limit, nor is any certificate required as to the state of his health, nor need he be in any way related to the nominee so as to give the latter an insurable interest in his life. A lucky pattadar therefore stands to win a prize of Rs. 1,000 for paying in a few rupees, may be 12 or may be 53, but not exceeding fifty-three rupees and in any case a pattadar whose darkhastdar happens to die before the company is wound up is sure to get twice the amount subscribed. There is no proper provision for the profitable investment of the funds of the company and the company may go into liquidation whenever it chooses. Such a concern can only last so long as there is an accession of new diploma holders every year and a fair proportion of the "applicants" do not happen to die in the course of the year. As a business undertaking it has no sound or stable financial basis and the so-called Provident Fund appears to be more in the nature of a lottery than anything else. It may be assumed that the promoters of the company must have foreseen this and it could not be expected that they should have promoted a concern of this nature without at least securing for themselves an adequate return for their trouble. The case therefore of the accused is that by the company varu in Rules 10 and 14 they meant themselves and not the diploma-holders. This has been their contention from the time the Fund was started and the entrance fee as well as the 3 annas out of each rupee have been treated in the books of account as money over which they had absolute control to be disposed of in meeting the expenses and providing their own profits. At the meetings of the diploma-holders the balance sheets were circulated among them and these showed that the very sums which the accused are alleged to have misappropriated were treated by them as their own money and no objection was taken to this by any one. Those diploma-holders to whom bonuses became due were regularly paid, the reserve fund, the guarantee fund, and the charity fund have not been touched and no irregularity of any importance has been pointed out in the conduct of the business such as it was All the books were regularly and correctly kept. Under these circumstances it would be very difficult to say, even if the action of the accused were not

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justified by the rules as we think they ought to be interpreted, that they in dealing with the amounts as their own did not believe in good faith that they had a right to do so. But I may say without entering into a detailed consideration of the question that I am not satisfied that by the "*Company people*" in Rules 10 and 14 is meant the diploma holders or darkhastdars or both. On the other hand having regard to the fact that express provision is made for bonus to diploma-holders and no rules whatever are made for declaration of dividends which I should have expected to find if the diploma-holders were regarded as share-holders of an ordinary Joint Stock Company, I am inclined to the view that by the phrase "*company varu*" the promoters of the Fund alone were meant.

No doubt the accused from time to time submitted to the Registrar the names of the applicants or the diploma-holders and issued notices to those persons in accordance with the rules of the Companies Act which would not have been necessary in law unless they thought the diploma-holders were really the shareholders. I do not however think that the inference which might thus be suggested by this conduct of the accused is sufficient to override the provisions of the articles of association especially when we find that the sums now alleged to have been dishonestly misappropriated were appropriated by the accused with the knowledge of the diploma-holders and with their approval in assertion of a right inconsistent with the claim which is now put forward by the Public Prosecutor on behalf of the diploma-holders. I would set aside the convictions and sentences and acquit the accused. The bail bonds of such of the accused persons as are on bail will be discharged. The fines if levied will be refunded to the accused.

APPELLATE CRIMINAL.

Before Mr. Justice Benson and Mr. Justice Abdur Rahim.

1909. December 22.

1910. January 10.

THE CROWN PROSECUTOR, APPELLANT,

v.

G. KOTHANDARAMIAH, ACCUSED.*

Post Office Act VI of 1898, *ss.* 35, 64, 74—*Rules framed under Act, infringement of, falls within s.* 63—*General power to frame rules conferred by s.* 74, *cl.* (1) *not confined to such rules as are contemplated by s.* 74, *cl.* 2.

Rules framed by the Governor-General in Council under section 74, clause (1) of the Post Office Act regarding the declaration in the case of articles sent by value payable post form part of the Act under section 74 (3) and infringement of such rules is punishable under section 64. Section 35 also enables the Governor-General in Council to make such rules.

The general power to make rules conferred by section 74, clause (1), is not confined to making such rules as are contemplated by clause 2.

APPEAL under section 417 of the Code of Criminal Procedure against the judgment of acquittal passed on the accused in Calendar Case No. 5538 of 1909 by C. Gahan, Second Presidency Magistrate, Georgetown, Madras.

The facts of this case are sufficiently set out in the judgment.

The Crown Prosecutor for appellant.

P. R. Sundara Ayyar for accused.

JUDGMENT.—This appeal is by the Crown against an order of the Second Presidency Magistrate acquitting Mr. G. Kothandaramiah, manager of a journal called the "International Police Service Magazine" of a charge preferred against him under section 64 of Post Office Act. On the 29th October 1908 the accused sent a copy of this magazine by value payable post to Mr. Webster, Superintendent of Police, Haldwani, signing a declaration to the effect that the article was sent in execution of a *bonâ fide* order received by him. Without such declaration being made the Post office would not, by reason of a rule issued under the Act by the Governor-General in Council, have accepted the value payable post article for transmission to the addressee. Mr. Webster refused to receive the article on the ground that he never gave an order for it and moved for the prosecution of the sender for making a false declaration to the contrary in violation of the Post Office Act. The Magistrate found on the evidence that the accused had received

* Criminal Appeal No. 486 of 1909.

no order from Mr. Webster to send the value payable post article and therefore the declaration made by the accused was false. He, however, thought that the prosecution must fail because the Post Office Act itself, that is, the sections in the body of the Act do not require such a declaration to be made, and therefore the words of section 64 which says "whoever being required by this Act to make a declaration, etc.," cannot sustain the charge because the rule framed by the Governor-General in Council is not part of the Act though properly framed under powers conferred by the Act. This view is obviously wrong. According to general canons of interpretation when a statute empowers the Government or any other authority to frame rules or by-laws for the purpose of carrying out the objects of the statute, rules or by-laws so framed must if within the scope of such powers be regarded as part of the enactment. And in this case section 74, clause 3 of the Act expressly lays down that rules made under the Act shall have effect as if enacted by the Act. Section 35 gives power to the Governor-General in Council to make rules directing the Postal authorities not to receive a value payable article for transmission unless its sender makes a declaration that it is sent in execution of a *bonâ fide* order received by him and section 74, clause (1), gives him power generally to make rules for the purpose of carrying out the objects of the Act. The rule which the accused is said to have violated was made in pursuance of such powers. (See Rule No. 68, notification, dated the 5th August 1908, Gazette of India, Part I, August 1908, page 747). But it is argued by Mr. Sundara Ayyar who appeared in support of the Magistrate's order that that is not "requiring" a declaration within the meaning of section 64. It is somewhat difficult to appreciate the point of this argument; if it be that the Postal authorities cannot by an order passed under the Act compel a person to make any declaration on the pain if he refuses to make the declaration of his being guilty of the offence of disobeying a lawful order within the meaning of the Penal Code, that may be conceded. But that is not the question here. What clearly is required by the Act is that if a person wishes to utilise the services of the post office for sending a value payable post article and makes a declaration to obtain such services he shall make a true declaration. If he makes a false declaration or a declaration which he does not believe to be true he makes himself liable to the penalty prescribed by section 64.

Another branch of Mr. Sundara Ayyar's argument, so far as we are able to follow it, is that clauses 1 and 2 of section 74 should be read together and, reading them together, he contends that the general power to frame rules conferred by clause (1) must be confined to making such rules as are contemplated by clause (2), and not rules requiring a declaration within the contemplation of section 64, but there is no reason whatever for cutting down in this manner the operation of the general words of clause (1) of section 74. Clause (2) of that section is obviously meant to meet such cases for which no penalty is prescribed by any of the sections of the Act itself. Besides as already pointed out section 35 expressly authorises the Governor-General in Council to make such a rule as the one in question.

It has also been contended before us that upon the facts proved in the case we ought to hold that the declaration made by the accused was either a true declaration or one which he had reason to believe to be true. It is not suggested that Mr. Webster at any time by writing or by word of mouth gave order for the value payable post article or for any previous issue or issues of the magazine to be sent to him. But it is urged that since he did not refuse to receive nor did he return by post any of the previous issues sent to him and received intimation through slips attached to some of those issues and by means of postal cards that he had been enrolled as subscriber and that the issue in question would be sent to him as a value payable post article and yet made no protest and in fact glanced at some of the numbers of the journal it should be held that the accused had reason to infer that he had received an order from Mr. Webster to send the value payable post article. Now an order cannot be said to have been received by one person from another to send an article by post unless the latter is shown to have communicated a request or desire to the former to that effect. The communication of such a request need not perhaps be made by means of words written or spoken and may be inferred from the previous conduct of the addressee. For instance, if Mr. Webster had paid for the issue which was sent to him value payable post and continued to receive further issues of the magazine, say for about a year and then an issue was sent to him value payable post for the amount of subscription for that year it might well be that we could infer an order under such circumstances. But Mr.

BENSON AND ABDUR RAHIM, JJ.

THE CROWN PROSECUTOR v. G. KOTHANDARAMIAH.

Webster as his evidence shows treated the numbers of the magazine which were delivered to him in the same manner as ordinary trade circulars and threw them away. It is true that he did not return the articles nor did he reply to any of the accused's postal cards but there was no obligation on him to do either of these things. It may be that the accused interpreted Mr. Webster's silence as indicative of willingness on his part to pay for the numbers sent to him. But, even if so, he could not reasonably have thought that he had received an order from Mr. Webster to send the value payable post article. The case of *Ghulam Rabbani* v. *King-Emperor*(1) referred to by the Magistrate was a very different case. There there was an order to send the article in question insured for a certain amount and it was actually sent value payable post but uninsured for a somewhat larger amount. There can be no doubt in this case that the accused has offended against the post office regulations and we convict him under section 64 of the Act. The learned Crown Prosecutor tells us that the object of this appeal is to obtain a ruling as to whether the Magistrate's view of the law is correct, and he does not press for a heavy penalty. We sentence the accused to pay a fine of Rs. 10 (Rupees ten) or in default to 5 (five) days' simple imprisonment.

APPELLATE CRIMINAL.

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

1910. January 18, 20.

ALAGIRISAMI NAICKEN

v

EMPEROR.*

Criminal Procedure Code V of 1898, ss. 337, 339—No true and full disclosure where witness subsequently recants his previous statement—On trial after withdrawal of pardon, if pardon pleaded in bar, jury to determine whether pardon forfeited.

A person who has accepted a tender of pardon under section 337 of the Criminal Procedure Code and made a true and full disclosure before the inquiring Magistrate, may be recalled and examined by such Magistrate; and his pardon will be forfeited if he resiles from such former statement.

(1) 6 All. L.J., 481.

* Criminal Appeal No. 697 of 1909.

BENSON AND SANKARAN-NAIR, JJ.

ALAGIRISAMI NAICKEN v. EMPEROR.

It is not necessary in order to forfeit the pardon that he should be examined as a witness in the Court of Sessions. He is examined in the "case" when he is examined by the Magistrate and the prosecution is not bound to examine before the sessions an untrustworthy witness.

When such person is tried after withdrawal of pardon for the original offence and pleads the pardon as a bar, the jury must determine whether the pardon was forfeited or not.

In default of such determination, a conviction will be bad.

Kullan v. *Emperor*, [(1909) I.L.R., 32 Mad., 173], referred to.

Emperor v. *Kothea*, [(1906) I.L.R., 30 Bom., 611], referred to.

APPEAL against the sentence of M. J. Murphy, Additional Sessions Judge of Madura Division, in case No. 45 of the calendar for 1909.

The facts for the purpose of this case are sufficiently stated in the judgment.

P. C. Lobo for appellant.

The Public Prosecutor in support of the conviction.

JUDGMENT.—During the preliminary enquiry into a certain dacoity Case, R.C. No. 19 of 1908 on the file of the Periakulam Sub-Magistrate, the present accused was tendered a pardon by the District Magistrate under the provisions of section 337, Criminal Procedure Code, and accepted the tender, and was examined as a witness on the 4th and 5th December 1908 and then made what may be taken to be a full and true disclosure of what was known to him in connection with the dacoity as required by that section.

A few days afterwards the present accused was examined as a witness in the Dindigul Sub-Divisional Magistrate's Court in another case connected with the same transaction and made a statement which was totally contradictory of the evidence given by him in R.C. No. 19 of 1908. In consequence of this the Sub-Magistrate who was holding the enquiry in R.C. No. 19 of 1908 recalled the present accused and further examined him on the 4th January 1909 and the accused then adhered to the statement made by him before the Dindigul Sub-Divisional Magistrate, and denied the truth of his previous statements in R.C. No. 19 of 1908. In consequence of this the District Magistrate on the 20th January 1909 revoked the pardon. The accused was then committed to the sessions on a charge of having taken part in the dacoity, and was convicted. He now appeals against the conviction on the ground that the condition on which the pardon was granted having been fulfilled by the statement made by him on the 4th and 5th

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December 1908, the Sub-Magistrate acted illegally in examining him again, and that, in any case, his resiling from the first statement would not work a forfeiture of the pardon, and further, that had he been examined at the trial in the Sessions Court he was prepared to adhere to his first statement before the Sub-Magistrate, but that no opportunity was given him of doing so. As regards this plea we are unable to see that the Sub-Magistrate acted illegally or improperly in recalling and re-examining the witness on the 4th January, nor do we think that the prosecution was bound to examine the accused as a witness in the Sessions Court after he had resiled from his original statement before the Magistrate and thereby shown that he was a witness on whose evidence no reliance could be placed. This was expressly ruled in *Queen Empress* v. *Ramasami*(1). It was there pointed out that the requirement of clause 2 of section 337 of the Criminal Procedure Code that a person accepting a tender of pardon under that section must be examined as a witness "in the case" was satisfied by his examination in the preliminary enquiry, and that the prosecution was not bound to put him forward as a witness in the Sessions Court if it was of opinion that his evidence would not be truthful. As regards the plea that the statement of the 4th and 5th December 1908 was a compliance with the condition on which the pardon was tendered and could not be affected by the witness subsequently resiling and contradicting that statement, the Appellant's Counsel relies on the observations of Aston, J., in the case of *Emperor* v. *Kothia*(2). What was actually decided in that case was that when a person has been pardoned and has afterwards been placed on his trial for the offence on an allegation that he has forfeited the pardon, it is open to him to plead the pardon in bar of the trial, and the Court (*i.e.*, the jury in a jury case and the judge in other cases) must first try the issue as to whether the accused has, in fact, forfeited the pardon. In deciding the question the court would in the words of Beaman, J. "have to raise the issues whether he had or had not complied with the conditions of the pardon; whether he had or had not made a full and true disclosure of the whole facts, and where, as in the present case, after having admittedly done that, he had at a later stage recanted, whether that recantation amounted to giving false evidence within the

(1) (1901) I.L.R., 24 Mad., 321. (2) (1906) I.L.R., 30 Bom., 611.

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meaning of section 339 and worked a forfeiture of the pardon." This view of the law was accepted by this court in the case of *Kullan* v. *Emperor*(1) and is, no doubt, correct. It has nowhere been laid down that if a witness first makes a full and true disclosure he is then at liberty to contradict his statement or deny its truth without any fear of forfeiting his pardon. Such an interpretation of section 339 would, we think, be unreasonable, and would render nugatory the provisions of the law which aim at obtaining true evidence of offences by the grant of pardons to accomplices. The contrary has, in fact, been clearly laid down by this court in *Queen Empress* v. *Ramasami*(2) and in *Kullan* v. *Emperor*(1) already cited where it was said that the transaction is one of the utmost good faith on both sides and that "the approver commits a breach of the conditions if he fails to make a full and true disclosure throughout. It is not enough for him to make such disclosure before the committing Magistrate if he withdraws it in the Sessions Court, or to make it when examined in chief if he withdraws it in cross examination." In the present case, however, the Sessions Judge has not followed the procedure above prescribed. He has not left it to the jury to say whether the accused has given false evidence and has thereby forfeited his pardon. He has himself decided that the withdrawal of the pardon by the Magistrate is conclusive that it has been forfeited. This is not the law under the present code as pointed out in the two cases cited above.

We must therefore set aside the conviction of the accused and direct the Sessions Judge to retry the case in accordance with law.

(1) (1909) I.L.R., 32 Mad., 173. (2) (1901) I.L.R., 24 Mad., 321.

THE

INDIAN LAW REPORTS,

Madras Series.

APPELLATE CIVIL.

Before Sir Ralph Sillery Benson, Officiating Chief Justice, and Mr. Justice Munro.

SRI RAJA CHELIKANI RAMA RAU AND OTHERS (CLAIMANTS), APPELLANTS IN SECOND APPEAL No. 1434 of 1904,
SRI RAJA BALLAPRAGADA VENKATA SUBBA ROW GARU AND OTHERS (CLAIMANTS AND SECOND CLAIMANT'S LEGAL REPRESENTATIVE) APPELLANTS IN SECOND APPEAL No. 1435 OF 1904,

1908, January 21, 22, 23, 24, 28, March 27, 1909, September 30.

v.

THE SECRETARY OF STATE FOR INDIA REPRESENTED BY THE DISTRICT FOREST OFFICER, GODAVARI (DEFENDANT), RESPONDENT IN BOTH.*

Limitation—Adverse possession—Party relying on title by adverse possession against Crown must prove 60 years' adverse possession—Burden of proof shifted on Crown by proof of adverse possession for shorter period.

A party who rests his title on possession adverse to the Crown must prove such possession for 60 years.

Secretary of State for India v. *Vira Rayan*, [(1886) I.L.R., 9 Mad., 175], explained.

Where lands have been notified as a reserved forest under the Madras Forest Act, a claimant desirous of establishing his title against the Crown by adverse possession must prove adverse possession for 60 years before the notification.

Where adverse possession for a shorter period is proved, it lies on Government to show that it has a subsisting title, by showing that such possession commenced within 60 years before such date.

In this part of India, it is a well established rule of common law that waste land, not being the property of an individual or community, belongs to Government.

Islands formed within 3 miles of the mainland vest in the Crown.

* Second Appeals Nos. 1434 and 1435 of 1904.

BENSON, C.J., AND MUNRO, J.

SRI RAJA CHELIKANI RAMA RAU v. SECRETARY OF STATE FOR INDIA.

SECOND APPEALS against the decrees of F. H. Hamnett, District Judge of Godavari, in Appeal Suits Nos. 591 and 593 of 1903, presented against the decrees of E. A. Smith, Forest Settlement Officer, Kistna, etc., District, in Claims Nos. 1 and 2 of 1902, respectively.

The facts necessary for the report are set out in the judgment.

T. Subramania Ayyar for appellants.

The Government Pleader for respondents.

JUDGMENT.—These are appeals by the claimants against the decrees of the District Court of Godavari in Appeal Suits Nos. 591 and 593 of 1903 confirming the decisions of the Forest Settlement Officer of Godavari in Claims Nos. 1 and 2 of 1902. These were claims by the Mallavaram and Nadavapalli Estates, respectively, to land at the mouth of the Godavari which Government by a notification, dated the 2nd December 1901, proposed to form into a reserved forest. Both claims, being intimately connected, were dealt with by the lower Appellate Court in one judgment, and in this Court the same arguments were put forward on behalf of both sets of claimants. It was first contended that, as the appellants were in possession at the date of the notification, the lands should not have been notified as a reserved forest. This contention was properly dealt with and overruled by the Forest Settlement Officer in paragraph 7 of his judgment in Claim No. 1. The appellant's pleader did not attempt to argue the matter before us, but contented himself with stating this objection.

It was further contended that the right of the Crown would be barred if the claimants succeeded in proving 12 years' adverse possession prior to the coming into force of the limitation section of Act IX of 1871, and if Madras Regulation II of 1802 applied to suits to enforce public rights. The contention was based upon certain remarks in the case of the *Secretary of State for India* v. *Vira Rayan*(1). The remarks are at pages 185 and 186 of the report and are as follows:—

"The clause of Act XV of 1877 which precluded the reviver "of a right to sue barred was not confined to that Act, but was "extended to Act IX of 1871. The words are 'All references to

(1) (1886) I.L.R., 9 Mad., 175.

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"the Indian Limitation Act, 1871, shall be read as if made to "this Act, and nothing herein or in that Act contained shall be "deemed to revive . . . . any right to sue barred under that "Act or under any enactment thereby repealed.' Had this stood "alone and had we come to the conclusion that Regulation II of "1802, section 18, applied to public rights, we should have "agreed with the Judge that 12 years' adverse possession would "have barred the right of the Crown to sue." When these remarks were made it was apparently thought that Regulation II of 1802 was repealed by Act IX of 1871. Regulation II of 1802 was not repealed by Act IX of 1871. This was discovered in the course of the argument before us and the contention was then dropped. We have however referred to the matter because it seemed desirable to point out the misconception on which the remarks in *Secretary of State for India* v. *Vira Rayan*(1) were based. It is now clear that if the claimants had to establish a title by adverse possession they would have to prove such possession for 60 years before the notification.

The main portion of the land in dispute lies between Hope Island on the north and a channel called Neelarva on the south. The District Judge finds that the claimants have been in possession since 1882 of the portions of this tract claimed by each of them.

The District Judge has further found that this tract together with that portion of Yalakalatippa which is shown in exhibit I, consists of islands formed in the bed of the sea at the mouth of the Godavari. This finding is attacked, but there is in our opinion evidence to support it, and we must accept it. No doubt the District Judge is possibly in error in assuming that exhibit I, a map published in 1842, correctly represents the outlines of the coast and adjacent islands in that year. The survey on which the map is based may reasonably be supposed to have been made some time before 1842, and between the survey and 1842, some changes in the outlines may have occurred. This possible error however in no way affects the correctness of the finding now in question inasmuch as the finding applies to the portion of Yalakalatippa shown in exhibit I as well as to the land subsequently formed.

(1) (1886) I.L.R., 9 Mad., 175.

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The District Judge has next found that the title to the islands in question originally vested in the Crown. It is admitted before us that all the islands were formed within 3 miles of the main land. The rule of English law is that islands arising out of the sea belong *primâ facie* to the Crown—*vide* the "Law of Waters, Coulson and Forbes", 2nd Edition, page 31. In the absence of local usage or statutory enactment to the contrary the same rule would apply in British India—vide *Secretary of State for India* v. *Kadirikutty*(1). It is argued however that the rule of English Law abovementioned no longer holds good owing to the decision in *Reg.* v. *Keyn*(2). The reason generally given for the rule is that the King is the owner of the soil beneath the sea. Since the case of *Reg.* v. *Keyn*(2), this reason can apparently no longer be resorted to in support of this rule. But that circumstance by itself is no reason why the ancient rule should not continue to be followed. If it were necessary to find support for the rule it could, no doubt, be found in the well established rule of the common law of this part of India that waste land which is not the property of an individual or a community belongs to the Government, or it may be correct to regard the title of the Crown as similar to the title by escheat as suggested in *Secretary of State for India* v. *Kadirikutty*(1) with reference to the observations of the Privy Council in the case of *The Collector of Masulipatam* v. *Cavaly Venkata Narrainapah*(3); "private ownership not existing, the State must be owner as ultimate Lord."

The District Judge then holds that as the title was originally in the Crown the claimants must prove adverse possession for 60 years. Here the District Judge is clearly wrong. Though the title was originally in the Crown, still, as the possession of the claimants for 20 years prior to the notification is found, it rests upon the Crown to prove that it has a subsisting title by showing that the possession of the claimants commenced or became adverse within the period of limitation, *i.e*, within 60 years before the notification. *Secretary of State for India* v. *Vira Rayan*(4), *Secretary of State for India* v. *Bavotti Haji*(5), *The Secretary of State for India* v. *Kota Bapanamma Garu*(6). As the several islands were

(1) (1890) I.L.R., 13 Mad., 369 at p. 376.
(2) (1876) 2 Ex.D., 63.
(3) (1860) 8 M.I.A., 500 at p. 525.
(4) (1886) I.L.R., 9 Mad., 175.
(5) (1892) I.L.R., 15 Mad., 315.
(6) (1896) I.L.R., 19 Mad., 165.

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formed gradually and probably appeared and became capable of occupation at different times, it may be that there is proof that some if not all of them came into existence as land capable of occupation within 60 years prior to the notification. In the case of such land the title of the Crown must be a subsisting title. In the case of lands which came into existence as land capable of occupation more than 60 years prior to the notification, the Crown must show by evidence that it had a subsisting title at sometime within that period.

We must therefore ask the District Judge to return a finding as to whether the Crown has a subsisting title to the whole or any portions of the claim land lying between Hope Island on the north and Neelarva on the south.

Further evidence on both sides on this question may be adduced before the District Judge as the true point in issue was not correctly understood by the parties at the trial. The finding should be returned within five months from date of the receipt of this order and ten days will be allowed for filing objections.

The remaining land in dispute consists of the plots B and C in the plan exhibit II. As to these plots the finding of the District Judge is that they arose as islands out of the sea subsequent to 1842, and we are of opinion that there is evidence to support the finding. The plots thus came into existence within 60 years of the notification. The title to them was originally with the Crown and there has not been sufficient time for that title to be lost. The claim with regard to these plots was therefore rightly rejected.

In compliance with the above order, the District Judge submitted the following finding :—

I accordingly find that the Crown has no subsisting title to the whole or any portion of the claim land lying between Hope Island on the north and Neelarva on the south.

These Second Appeals coming on for final hearing after the return of the above finding, the Court delivered the following

JUDGMENT.—We accept the finding and allow the claim to the lands dealt with in this finding. The decrees of the Courts below will be modified accordingly.

The appellant in Second Appeal No. 1435 of 1904 will get full costs throughout.

BENSON, C.J., AND MUNRO, J.

SRI RAJA CHELIKANI RAMA RAU v. SECRETARY OF STATE FOR INDIA.

In Second Appeal No. 1434 of 1904 the appellant has succeeded in part only. Each party will pay and receive proportionate costs.

APPELLATE CIVIL.

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

1909. March 1, 2, 3, 5, 17.

S. R. M. A. RAMASWAMI CHETTIAR (PETITIONER), APPELLANT,

v.

OPPILAMANI CHETTI AND ANOTHER (DECREE-HOLDER AND PURCHASER), RESPONDENTS. *

Decree, execution of—Who ought to be made representative—Person with the best primâ facie *title sufficiently represents estate.*

A decree-holder who has to apply for execution against the legal representative of the deceased judgment-debtor, may select, from among several rival claimants, as legal representative, the one whom he believes honestly to have the best *primâ facie* title and the representation, in the absence of fraud or collusion, will be sufficient, even though it is subsequently found out some other person is the true legal representative.

Khiarajmal v. *Daim*, [(1905) I.L.R., 32 Calc., 296], explained.

APPEAL against order of V. Subramaniyam, Subordinate Judge of Tanjore, in Execution Application No. 619 of 1905 in Execution Petition No. 45 of 1903 (Original Suit No. 23 of 1889).

Application under sections 244 and 311 of the Civil Procedure Code of 1882 to set aside sale of villages in execution of a mortgage decree.

One O obtained a mortgage decree against K as guardian of his minor son P. Subsequent to the decree P attained majority and died issueless. K thereupon took possession of the properties under color of a will alleged to have been executed in his favor by P. Certain persons claiming to be the sapindas of the deceased P, and, as such his heirs, sold their rights in the estate of P to one R. R filed a suit to set aside the alleged will of P and to recover possession of the properties. While the suit was pending O applied for execution of the decree making K the legal representative of the deceased P, and the two villages in respect of which

* Civil Miscellaneous Appeal No. 183 of 1905.

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the present application is made were sold. Shortly before the sale, in the suit brought by R, it was declared that the will set up by K was not genuine and that the sapindas were the heirs of P.

The present application was made by R to set aside the sale of the two villages chiefly on the ground that it was void, because the proper legal representative of P was not brought on the record.

The Subordinate Judge dismissed the application.

R appealed to the High Court.

The Hon'ble Mr. *V. Krishnaswami Ayyar* and *S. Srinivasa Ayyangar* for appellant.

P. R. Sundaram Ayyar and *S. Gopalaswami Ayyangar* for respondents.

JUDGMENT.—In our opinion the Subordinate Judge was right in holding that the estate of the deceased zamindar was sufficiently and properly represented by his natural father Krishnaswamy Panikondar for the purpose of the execution proceedings under our consideration. At the death of the zamindar in 1900 Krishnaswamy Panikondar was in possession of the zamindari and claimed title thereto under a will of the deceased. Some remote sapindas of the zamindar claimed to be his heirs and denied the genuineness of the will, but the District Registrar registered it "after a severe contest" (to quote the Subordinate Judge). The sapindas then sold their claims to the appellant.

Now the first respondent having obtained in the life-time of the zamindar an order for the sale of the property mortgaged to him had, in order to bring the property to sale, to apply for execution against the legal representative of the mortgagor. He knew that the true legal representative in the eye of the law was one of the rival claimants but he did not know which. It was not contended that he was bound to wait until a decision had been obtained or a settlement arrived at on all the conflicting claims of the rivals or, it may be, of speculators who might have purchased those claims or portions of them. To compel the creditor so to wait would, as was pointed out in an analogous case (*Janaki* v. *Dhanu Lall*(1)), put it in the power of his debtor's representatives to deprive him altogether of his dues by the simple expedient of delaying the settlement of the question "who is the representative." Mr. Krishnaswamy Ayyar's contention seemed to be in

(1) (1891) I.L.R., 14 Mad., 454.

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effect that the creditor must, if he does not wait, pick out the legal representative from among the rivals at his peril. If in the course of years it be finally decided that one of the other claimants is entitled in law to succeed to the estate, all the proceedings had in the interval, are, if not null and void, voidable at the option of the finally successful claimant.

We do not find anything in the judgment of the Privy Council in *Khiarajmal* v. *Daim*(1), to compel us to accept this contention. Their Lordships recognise that representation for the purposes of litigation may be incomplete and yet sufficient, and though they confine their observations on this point to cases in which all the representatives are the members of a family, the case before them being of that kind, they do not lay it down that those cases exhaust the matter, but rather indicate that the sufficiency of the representation may be in part a question of fact. The estate of Naurez, they say at page 315, was not represented "either in law or in fact."

The first respondent had in this case before us to choose whether to apply for execution against one of several rival claimants or against them altogether. It seems to us that in selecting one he has made the choice of a course which is obviously the most convenient course, and which is in accordance with the principles on which the law must be applied where, as here, there is no power to give letters of administration to a creditor (*vide Janaki* v. *Dhanu Lall*(2). The creditor must, if he is not to be liable to lose his money, be permitted to apply for execution against that one of the rival claimants whom he honestly and reasonably believes to be the legal representative: and if the person so nominated, though it may turn out afterwards that he is not the true legal representative, is yet competent in fact to represent the estate, if his interests in respect of the proceeding in question are identical with those of his rivals, and if he acts without fraud or collusion, it is hard to see any reason why his representation should not be held to be sufficient. It is not necessary to go the full length of the decision in *Kadir Mohideen Marakkayar* v. *Muthukrishna Ayyar*(3), which does not relate to execution proceedings; but the principle of section 368 of the Civil Procedure Code of 1882, by which the plaintiff nominates the representative

(1) (1905) I.L.R., 32 Calc., 296.
(2) (1891) I.L.R., 14 Mad., 454.
(3) (1903) I.L.R., 26 Mad., 230.

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of the defendant, who is appointed by the Court subject to intervention of rival claimants, seems applicable also to the appointment of a representative in execution proceedings.

And the principle of selecting from among rival claimants that one who has the best *primâ facie* right is recognised in the Indian law. When there are rival claimants to an estate, the law allows the Court in certain circumstances to select the one having *primâ facie* the best title, and to empower him to collect outstanding debts of the estate, and to give a good discharge to debtors [section 7 (3) of the Succession Certificate Act].

The same principle may well be applied to a case in which disputes among claimants to an estate threaten to prevent a judgment-creditor from realising within a reasonable time the fruits of his decree.

And here the first respondent nominated as representative the claimant who held possession and whose claim had the support of the District Registrar's decision after enquiry—the other claimants being out of possession and apparently not agreed among themselves which was the heir or whether all were heirs together. He clearly selected the one having the best *primâ facie* title, and one too who was in every other respect the most competent to represent all the claimants in the particular proceeding then in progress. Krishnaswami Panikondar had conducted, on behalf of the deceased Zamindar, the litigation with the first respondent on his mortgage, and was evidently as knowing all the facts, the best able to resist the execution, if resistence was in any way honestly possible. His interests were absolutely identical in this matter with those of his rivals and he was better able than they to protect them. There existed, therefore, no reason why if one of the claimants was to represent the estate it should not be he, and no fraud or collusion has been proved in this case to vitiate his representation.

There is then no good reason why as the person with the best *primâ facie* title, and holding possession of the property, Krishnaswami Panikondar should not be held to have sufficiently represented his natural son's estate in fact.

Mr. Sundara Ayyar cited several cases, which we do not think it necessary to discuss, in support of the view that the claimant in possession may represent the estate, and, on the other side, Mr. Krishnaswami Ayyar referred us to *Chathakelan* v. *Govinda*

Karumiar(1). This case however is clearly distinguishable from the present on the ground that the stranger in possession of the assets there was not a claimant of the estate to which the assets belonged (*vide Chuni Lal Bose* v. *Osmond Beeby*(2)). Reliance was placed on *Sambasiva Chetti* v. *Veera Perumal Mudali*(3) as showing that the true legal representative cannot intervene in a proceeding after decree; but that case decides only that the representative cannot initiate the proceedings. Here, neither the sapindas of the deceased Zamindar, nor their transferee intervened before 1904 (when the application of the appellant was held to be too late) and it is very possible that they, and the receiver appointed in 1903, were satisfied with the representation of the estate by Krishnaswami Panikondar. However that may be, there is nothing that we can see in the procedure indicated by the Code of 1882 as applicable to proceedings after decree, which would make it inequitable or illegal to accept Krishnaswami Panikondar as a sufficient and proper representative in this case.

Nor do we think the appointment of a receiver in 1903 can make any difference. At most it was irregular to proceed without him; but the interests which he was appointed to protect did not cease, upon his appointment, to be represented by Krishnaswami Panikondar, and he did not apply to be made a party to the execution proceedings.

There is no other substantial question in the case. Assuming it to be open to the appellant to raise the question of limitation, he fails to show that there is any bar. The case was at first put on the ground that the fourth application (that of the 17th October 1899) being unverified was not in accordance with law, and, that consequently, the fifth (dated the 23rd March 1900) and all succeeding applications are barred by limitation. This case fails when it is seen that the interval between the third application (dated the 23rd April 1897) and the fifth (dated the 23rd March 1900) is less than three years.

Then it was contended that the third application was itself not in accordance with law as it was not accompanied by a verified statement of property. The contention based on this fact was not substantiated by reference to the record. Sale was ordered on

(1) (1894) I.L.R., 17 Mad., 186. (2) (1903) I.L.R., 30 Calc., 1044 at p. 1058.
(3) (1905) I.L.R., 28 Mad., 361.

the third application, the 23rd March 1897 and on the 26th of April in the same year a verified statement was called for. We are not prepared to assume in the absence of evidence that the Court treated as in accordance with law an application which was not so at the time when the order was made on it. It has not been shown to us that the verified statement called for in April 1897 was not furnished before the 23rd of August of that year. The next proceeding application (the 2nd) was in 1896, so that in no case was the third barred by time. It is thus unnecessary to discuss the question whether an unverified application may not be called in aid to save limitation.

The objections to the sale taken under section 311 of the Code of 1882, are of no avail for two reasons. They fail when it is held that Krishnaswami Panikondar represented the estate sufficiently, and they fail whether he did so or not because there is not the slightest proof that the sale caused loss to the appellant. It was contended on the strength of an observation in *Krishnayya* v. *Unnissa Begam*(1) that we ought to hold that substantial injury is the necessary result, to the true legal representative, of a sale of his property behind his back. But apart from the fact that the observation cannot be universally true, there is this difference here that a person perfectly competent and *primâ facie* anxious to protect the interests of the legal representative was a party to the proceedings. As a matter of fact it was decided by the Subordinate Judge on enquiry that the property sold was worth in the market only Rs. 21,000, while at the sale it fetched Rs. 43,000. The appeal is dismissed with costs.

(1) (1892) I.L.R., 15 Mad., 399 at p. 400.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Pinhey.

1908. September 28, 29. October 13.

SRI RAJA BOMMADEVARA VENKATA NARASIMHA NAYUDU, BAHADUR ZAMINDAR GARU (PLAINTIFF), APPELLANT IN SECOND APPEAL No. 902 of 1906,

v.

KASARANEVI CHINA BAPAYYA (DEFENDANT), RESPONDENT IN SECOND APPEAL No. 902.*

Rent Recovery Act (Madras) VIII of 1865, ss. 3, 11—Rate of rent, ascertaining of —Right of landlord to varam rate on wet crop raised on dry lands, when no contract for the rent chargeable.

By agreement between the landlord and tenant, a permanent money rent was fixed for dry cultivation and the agreement provided for extra charge for wet and garden crops without however stating the amount of such charge. The land was subsequently cultivated with wet crop, without any assistance from the landlord, and the tenants took objection to the varam rate claimed by the landlord:

Held, that the landlord had the right to claim the varam rate, as there was no contract in regard to the rent payable for wet cultivation. The contract having left the rate for wet cultivation undetermined was not a contract within the meaning of section 11 of the Act.

Where, under the circumstances, the landlord becomes entitled to varam rate under section 11 of the Rent Recovery Act, his claim to such rate cannot be objected to on the ground that the rent is thereby increased and it is not necessary to obtain the sanction of the Collector. In the absence of contract or survey rates, the landlord is entitled to varam rate under clause 3 of the section. An enquiry to determine the rate according to local usage is not necessary to enable the landlord to claim varam rates.

SECOND APPEAL against the decree of M. D. Bell, the District Judge of Kistna at Masulipatam in Appeal Suits Nos. 365 to 421 of 1906 and 394 to 490 of 1906, presented against the decision of C. A. Souter, the Head Assistant Collector of Bezwada in Summary Suits Nos. 7 to 63 of 1905 and 13 to 107, 189 and 190 of 1906, respectively.

The Hon. Mr. *V. Krishnaswami Ayyar* and *P. Nagabhushanam* for appellant.

The Hon. the Advocate-General for respondent.

* Second Appeals Nos. 902 to 958 of 1906 and 906 to 1002 of 1907.

MUNRO AND PINHEY, JJ.

VENKATA NARASIMHA NAYUDU v. KASARANEVI CHINA BAPAYYA.

JUDGMENT.—The question for decision in these second appeals is what rent is to be paid on lands cultivated with wet crops. The plaintiff appellant in the pattas tendered for fasli 1314 demanded asara or varam rates in respect of such lands. The defendants contended that they were only bound to pay the money rents fixed on the lands in fasli 1292.

The admitted facts are these: Till fasli 1283 the asara system was in force. In fasli 1284 money rents were introduced and the rates of such rents were permanently fixed in fasli 1292. At that time all the lands were dry. Wet cultivation began in fasli 1314 and the pattas now in dispute were then tendered, as the tenants refused to pay more than the rates fixed in 1292 which they had previously been paying for the lands as dry. Nothing had been done by the plaintiff to provide facilities for irrigation. In the muchilikas executed by the tenants for faslis prior to 1314 there are clauses to the effect that the plaintiff may make an extra charge if wet or garden crops are raised on dry lands. The amount of such extra charge is not however stated. If the plaintiff is entitled to demand asara rates the rates mentioned in the pattas tendered are correct. The Courts below have taken the view that the plaintiff has tendered asara pattas as a means of enhancing the rent and that as he has not done anything to justify an enhancement of the rent, and has not obtained the sanction of the Collector for the enhancement, he is only entitled to the rents fixed in fasli 1292.

For the plaintiff it is contended that inasmuch as there is no contract as to the rates of rent payable on lands cultivated with wet crops, he is entitled, under clause 3 of section 11 of Act VIII of 1865, to claim varam rates, it being admitted that no money assessment has been fixed under clause 2 of that section.

That there is no contract as to the rates of rent payable for wet cultivation is clear from the admitted muchilikas, the material clauses of which have already been referred to. The only rates fixed were for dry cultivation. The rates to be charged for wet cultivation were left undetermined. This being so the contention for the plaintiff seems to be well founded.

As to the contention that the object of the plaintiff in charging varam rates is to enhance the rent, we must observe that if the circumstances are such that under section 11 of Act VIII of 1865 the plaintiff is entitled to claim varam rates, the fact that he

thereby gets an enhanced rent is immaterial. Reference may be made to *Natesa Gramani* v. *Venkatarama Reddi*(1) where it is observed that "In the absence of contract or survey rates the "landlord is entitled under clause 3 to revert to the varam "system, an incident of which is that the landlord necessarily "shares the benefit of the tenant's improvements." There are observations in *Suppa Pillai* v. *Nagayasami Thumbichi Naicker*(2) to the same effect.

It is contended for the respondents that in fasli 1292 it was settled for ever that rents should be paid in money, that therefore varam rates cannot be reverted to, and that if the rates of money rent have not been fixed it is for the Court to fix reasonable money rates. In settling disputes regarding rates of rent the Court has to be guided solely by section 11 of Act VIII of 1865. A contract to pay rent in money, the amount payable being left undetermined, is not in our opinion a contract for rent within the meaning of clause 1 of section 11. Clause 1 of section 11 clearly refers to contracts which, on proof, can be enforced as they stand. If there is no contract as to the rate of rent, the Court must, in order to determine the rate, proceed to apply the rules contained in section 11 in the order there given. It is only when all the other rules are inapplicable that the Court can fix rates that appear to it just. Thus, though there may have been a contract to pay rent in money, the rules in section 11 may demand that rent be paid in kind.

Another contention on behalf of the respondents is that under section 11, if there are no contract or survey rates, the rates of rent must be determined according to local usage, and when such usage is not clearly ascertainable according to the rates for neighbouring lands; that it is only when either party is dissatisfied with the rates so determined that varam rates can be claimed; that in the present case there has been no enquiry as to local usage or neighbouring rates, and that therefore the plaintiff is not entitled to claim varam rates. This contention involves the absurdity that if one of the parties declares that he means to claim varam rates in any case, no matter what the result of an enquiry as to local usage etc., may be, the Court must nevertheless hold such an enquiry, an enquiry which can serve no purpose.

(1) (1907) I.L.R., 30 Mad., 510 at p. 516. (2) (1908) I.L.R., 31 Mad., 19.

This can never have been the intention of the Legislature. We have been referred to the judgment in the case of *Venkata Narasimha Naidu* v. *Lanu Lakshmayya*(1) in which the respondent was the same person as the respondent, in one of the cases now before us, and the appellant the same as the present appellant. Those appeals arose out of suits to enforce acceptance of asara pattas in respect of dry lands. It was held that there was a contract to pay rent in money at the rates fixed in fasli 1292. This judgment has no bearing on the question now under consideration as it does not deal with the rent payable on wet lands. The result is that we hold that the pattas tendered by the plaintiff were proper pattas and that the defendants must accept them. The defendants will pay the plaintiff's costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Sankaran-Nair.

YOGAMBAL BOYEE AMMANI AMMAL (DEFENDANT), APPELLANT,

v.

NAINA PILLAI MARKAYAR (PLAINTIFF), RESPONDENT.*

1909: July 6, 7, 22.

Contract Act IX of 1872, ss. 69, 70—S. 70 of the Contract Act does not apply where, the party sought to be made liable, though benefited, had no option but to enjoy the benefit.

In order to enable a party to recover money paid by him from another under section 70 of the Indian Contract Act, it is necessary that the party sought to be made liable must not only have benefited by the payment but must also have had the opportunity of accepting or rejecting such benefit. Where no such option is left to him and the circumstances do not show that he intended to take such benefit, he cannot be said to have "enjoyed such benefit" within the meaning of the section.

When the person paying is interested in making the payment, he cannot be presumed, in the absence of evidence to show that he intended to act for the other party also, to have acted for such other party.

Section 70 of the Contract Act reproduces the English Law as laid down in *Lampleigh* v. *Brathwait*, (1 Sm.L.C., 163).

(1) S.A. Nos. 83 to 86 of 1903 (unreported).

* Second Appeal No. 1163 of 1906.

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YOGAMBAL BOYEE AMMANI AMMAL v. NAINA PILLAI MAR-KAYAR.

Abdul Wahid Khan v. *Shaluka Bibi*, [(1894) I.L.R., 21 Calc., 496 at p. 504], followed.

Damodara Mudaliar v. *Secretary of State for India*, [(1895) I.L.R., 18 Mad., 88], considered.

A person paying money into Court under section 310A of the Civil Procedure Code of 1882 to set aside a sale in execution cannot recover such money from the defendant who has obtained possession of the property, when he has made the payment to protect his own interest and the circumstances do not show that he would not have made the application if the defendant had not consented.

SECOND APPEAL against the decree of F. D. P. Oldfield, Esq., District Judge of Tanjore, in Appeal Suit No. 66 of 1906, presented against the decree of C. S. Mahadeva Aiyar, District Munsif of Shiyali, in Original Suit No. 80 of 1905.

The facts for the purpose of this report are sufficiently stated in the judgment.

S. Subrahmani Ayyar for appellant.

T. Rangachariar and *A. K. Madhava Rao* for respondent.

JUDGMENT (SANKARAN NAIR, J.).—The plaintiff deposited a certain amount under section 310A, Civil Procedure Code (Act XIV of 1882) to set aside a sale in execution of a money decree against the defendant. The amount was paid to the decree-holder, the sale was set aside and the defendant is alleged to have got back the lands sold, the decree debt due by her having been extinguished by the plaintiff's payment. At the time payment was made by the plaintiff, he was in possession of the property claiming it as reversioner and also as assignee of one Lakshmana Iyer, to whom, the defendant who, according to the plaintiff, had only a life interest in the property, had assigned it on lease or mortgage; but his right to possession was disputed by the defendant on the grounds that he was not a reversioner and his right as lessee or mortgagee had been extinguished about the 12th March long before the date of payment. In a suit which was pending at the time of payment, but decided afterwards, the defendant's contention was upheld. The plaintiff now sues to recover the amount.

It was not seriously pressed upon us that section 69 of the Indian Contract Act applied. The defendant was not bound to pay the debt for which her property had been already sold and she had not disputed the validity of the sale. Does section 70 apply?

To found a right of demand the defendant must have enjoyed the benefit of the plaintiff's payment; the payment itself must

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have been lawful, and the plaintiff must have done it for the defendant not intending to do so gratuitously.

On the strength of the decision in *Syamalarayudu* v. *Subbarayudu*(1) the District Judge has held that the plaintiff's payment was lawful. I think he is right. Though it has been held that the plaintiff had no interest in the property, he believed in good faith he had an interest; the defendant was a party to the application which was successful and she cannot now be heard to say that the application was unlawful.

The next question is whether the plaintiff made the payment for the defendant expecting reimbursement and whether the defendant enjoyed the benefit of it.

In *Ram Tuhul Singh* v. *Biseswar Lall Sahoo*(2) these were the facts. The plaintiffs therein on the 18th February 1868 purchased for Rs. 8,000 in execution of a money decree, at a judicial sale after attachment, the interest of the defendants in a sum of Rs. 35,000 deposited with the Collector as their share of the surplus proceeds of an estate sold for arrears of revenue. The plaintiffs paid the sum of Rs. 8,000 into Court and it was distributed among the attaching and other execution creditors. The revenue sale was subsequently set aside, the estate restored to the defendants and the purchase money including the Rs. 35,000 restored to the purchasers at the revenue sale. Thereupon the plaintiffs sued to recover the sum of Rs. 8,000 paid to the defendant's creditors. The Judicial Committee held they were not entitled to recover. They observed, "It is not in every case in which a man has benefited by the money of another, that an obligation to repay that money arises. The question is not to be determined by nice considerations of what may be fair or proper according to the highest morality. To support such a suit, there must be an obligation express or implied to repay. It is well settled that there is no such obligation in the case of a voluntary payment by *A* of *B's* debt. Still less will the action lie when the money has been paid as here, against the will of the party for whose use it is supposed to have been paid (*Stokes* v. *Lewis*(3)). Nor can the case of *A* be better because he made the payment not *ex mero motu*, but in the course of a transaction which in one event would have turned

(1) (1898) I.L.R., 21 Mad., 143. (2) (1875) L.R., 2 I.A., 131, (3) I.T.R. 20.

out highly profitable to himself, and extremely detrimental to the person whose debts the money went to pay."

In *Abdul Wahid Khan* v. *Shaluka Bibi*(1) there was a decree against the plaintiff and the defendant as the representatives of one Muradi Bibi, the original defendant in the case. The defendant alone appealed and got the decree reversed. The plaintiff successfully claimed a moiety of the property of the deceased and the question was whether the defendant was entitled to recover his proportion of the costs from the plaintiff on the ground that the plaintiff had got the benefit of the reversal of the decree of the Judicial Commissioner. Their Lordships held, "The proceedings were taken by the defendant for his own benefit and without any authority express or implied from the plaintiffs; and the fact that the result was also a benefit to the plaintiffs does not create any implied contract or give the defendant any equity to be paid a share of the costs by the plaintiffs." The case was governed by the Indian Contract Act and the decision is binding on us.

These decisions rest on well-known principles of law. If *A* does anything for *B* under circumstances which must have shown to *B* that *A* expected payment for his work and *B* chooses to adopt it and accept the benefit then *B* is clearly liable to pay for the benefit enjoyed. In the language of the Contract Act, the doing of the work is the offer, the adoption or ratification of the act is the acceptance (*Paynter* v. *Williams*(2), *Hart* v. *Mill*(3), *Pawle* v. *Gunn*(4), *Barber* v. *Brown*(5)). A man cannot be said to adopt the act unless it is done for him. See Bowen, L.J., *Falcke* v. *Scottish Imperial Insurance Co.*(6).

It follows from what has been already stated that where *A* is himself interested in the doing of the work there is nothing to show to *B* that the work is done for him or that *A* expects any payment from him. The Courts will not therefore presume that *A* did the work for *B*. Similarly where *B* has no choice in the matter but he has perforce to take the benefit, it cannot be said that *B* adopts the act or accepts any benefit. Therefore the Courts will not hold *B* liable. Thus when a person who was not

(1) (1894) I.L.R., 21 Calc., 496 at p. 504.
(2) 1 C. & M., 810.
(3) 15 M. & W., 87.
(4) 4 Beng. (N.C.), 488.
(5) 1 C.B. (N.S.), 121, 151.
(6) (1886) 34 Ch.D., 234, 250.

the sole beneficiary of a life policy paid the premium and saved the policy from lapsing, it was held he was not entitled to repayment from the other beneficiaries *in re Leslie Leslie* v. *French*(1); so also one tenant in common of a house was held not entitled to repayment of money spent on repair from the other tenant in common, *Leigh* v. *Dickeson*(2). This is the law as stated in Smith's 'Leading Cases'—notes to *Lampleigh* v. *Brathwait*(3)—page 160.

The case of *Nobin Krishna Bose* v. *Mon Mohun Bose*(4) takes the same view. The defendant in the case adopted the payment and availed himself of it.

It appears to me that section 70 in these respects lays down the same rule. The section applies where the claimant "does anything for another person, ... not intending to do so gratuitously," and that the other person enjoys the benefit thereof. In considering this section the learned Judges observed in *Damodara Mudaliar* v. *Secretary of State for India*(5), "There can be little doubt that the statement of the law is derived from the notes to *Lampleigh* v. *Brathwait*(3) and perhaps indirectly from the Roman Law (see Stokes' 'Introduction to Contract Act'). The learned authors of Smith's 'Leading Cases,' when enumerating the instances in which the request necessary to constitute a cause of action in the case of an executed consideration may be implied —give as the second instance "where the defendant has *adopted* and *enjoyed the benefit* of the consideration"—*Lampleigh* v. *Brathwait*(3). I entirely agree. You cannot *adopt* and *enjoy* the benefit as stated herein where you have no option. It stands to reason; and the decided cases show that when a person is interested in the act he cannot be presumed to be doing it for another or expecting payment. Therefore it cannot be said that he does anything for another person. Similarly the section requires that the other person must enjoy the benefit thereof. No doubt, in one sense, when a person has the benefit of an act of another person even against his will, in fact, forced upon him, he may be said to have 'enjoyed' the benefit thereof. But having regard to the fact that the section cannot be construed to impose obligations

(1) (1883) 23 Ch.D., 552.
(2) (1885) 15 Q.B.D., 60, 65.
(3) 1 Sm.L.C., 160.
(4) (1881) I.L.R., 7 Calc., 573 at p. 576.
(5) (1895) I.L.R., 18 Mad., 88 at p. 91.

upon a person for services which though lawful he did not want to be rendered to him, and to the fact that the section only enacts the law as stated in the notes to *Lampleigh* v. *Brathwait*(1) and the cases referred to therein which require that the person to be charged must have adopted it and availed himself of it, I am of opinion that a person can be said to '*enjoy*' a benefit under this section, only by accepting a benefit when he has the option of declining or accepting. This is also consistent with principle. To hold otherwise would be to go against the decision of the Judicial Committee already noticed. It is pointed out in *Damodara Mudaliar* v. *Secretary of State for India*(2) that according to Lord Bowen, even this statement of the law in Smith's 'Leading Cases' is too wide in favor of the plaintiff. In the case before us, the application and the payment were made by the plaintiff under section 310A to protect his own interests; and there is nothing to show that the plaintiff would not have made the application even if the defendant had refused his consent. In fact in the plaintiff's petition to set aside the sale the defendant was charged with collusion with the decree-holder. There is no evidence to show that the payment was made for the defendant and in the circumstances no such presumption can be drawn. The presumption is the other way. Nor can it be said that the defendant has 'enjoyed' the benefit of the payment by the plaintiff paying off his debt as he had no option in the matter. His debt was discharged without his consent being obtained and he has not adopted it.

Mr. Rangachariar strongly relied upon the decision in *Damodara Mudaliar* v. *Secretary of State for India*(2). It was contended that it was decided therein that if two persons are interested in doing anything and one of them does it, he can recover the proportionate share of his expenses incurred in doing it from the other who has benefited by it under section 70 of the Contract Act. If such is the decision it is opposed to the decision of the Judicial Committee in *Abdul Wahid Khan* v. *Shaluka Bibi*(3). But the case does not lay down any such broad proposition. I have already pointed out that the learned Judges in that case rightly held that section 70 introduces the English Law as stated in the

(1) 1 Sm.L.C., 160. (2) (1895) I.L.R., 18 Mad., 88 at p. 91.
(3) (1894) I.L.R., 21 Calc., 496 at p. 504.

notes to *Lampleigh* v. *Brathwait*(1), and that a defendant cannot be said to 'adopt and enjoy the benefit' as stated therein when he has no option of declining or accepting it. If, therefore, in that case the Zamindar had no option but to take the benefit if he wanted to use the water of the tank as before, he would not have been liable. He must have been held liable therefore on the facts of the case, that repairs were necessary for the preservation of the tank and there would have been *no water* in the tank for irrigation but for such repairs, and when therefore the Zamindar elected to use the water available only on account of such repair, he must be taken to have adopted the plaintiff's act and enjoyed the benefit thereof. It was also found that he was a consenting party.

With reference to the first part of the section it was rightly pointed out that the fact that the defendant was benefited by a work does not necessarily show that it was done for him; and that while a plaintiff's interests in the matter may show that he was acting on his own account only, he may also intend to act for the defendant. This also is true. *Primâ facie* if the plaintiff is interested in the doing of a thing he would not be entitled to ask the Court to presume that he did it for the defendant. But by proof of special circumstances or otherwise he might show that he would not have done it if he had no reasonable grounds to expect payment from the defendant. The High Court therefore in that case called for a finding on that question. If the tank had belonged to the Zamindar only, then there would be a very strong presumption that the repair was made for him. Even as a co-owner if he had objected to the repairs he would not have been held liable. The judgment in *Damodara Mudaliar* v. *Secretary of State for India*(2) concedes it. If the tank had belonged solely to the Government, then the Zamindar would not have been liable, even if he had been benefited thereby. The Zamindar in that case could not have repaired the tank himself. This was laid down in the case of *Secretary of State for India* v. *The Jeer of Nanguneri Mutt*(3) by Benson and Bhashyam Ayyangar, JJ., where the decision in *Damodara Mudaliar* v. *Secretary of State for India*(2) was considered. In that case, a tank which

(1) 1 Sm.L.C., 160. (2) (1895) I.L.R., 18 Mad., 88 at p. 91.
(3) C.R.P. No. 273 of 1902 (unreported).

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was the sole property of Government was the source of irrigation not only for Government ryotwari lands but also for the wet inam lands of the defendant therein. The Government claim for contribution from the defendant for the repair of the tank was disallowed and the Judges held that neither section 69 nor section 70 applied.

I do not think therefore that the decision in *Damodara Mudaliar* v. *Secretary of State for India*(1) supports the plaintiff's contention. Moreover it does not refer to the ruling of the Judical Committee in *Abdul Wahid Khan* v. *Shaluka Bibi*(2). The decree of the lower Appellate Court must be reversed and the suit dismissed with costs throughout.

MUNRO, J.—I agree.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Abdur Rahim

1909. July 27. September 3.

ASHA BIBI (SECOND DEFENDANT), APPELLANT,

v.

KADIR IBRAHIM ROWTHER (PLAINTIFF), RESPONDENT.*

Muhammadan Law—Hanafi Law—Divorce—Talak need not be addressed directly to the wife to constitute a valid divorce.

According to the Hanafi Law, it is not necessary that the Talak or words of repudiation should be addressed directly to the wife to constitute a valid divorce.

The expressions mentioned in the 'Hedaya' as constituting express divorce are not exhaustive, but merely illustrative of the different forms in which the Talak may be pronounced.

The incidents of marriage and divorce under the Muhammadan Law fully discussed.

Furzund Hossein v. *Janu Bibee*, [(1879) I.L.R., 4 Calc., 588], referred to and doubted.

SECOND APPEAL against the decree of E. L. Thornton, Esq., District Judge of Trichinopoly, in Appeal Suit No. 154 of 1907, presented against the decree of K. S. Kothandarama Aiyar, District Munsif of Srirangam, in Original Suit No. 199 of 1906.

The facts for the purpose of this case are sufficiently set out in the judgment.

(1) (1895) I.L.R., 18 Mad., 88 at p. 91. (2) (1894) I.L.R. 21 Calc., 496 at p. 504.

* Second Appeal No. 896 of 1908

MUNRO AND ABDUR RAHIM, JJ.

ASHA BIBI v. KADIR IBRAHIM ROWTHER.

S. Srinivasa Ayyangar and *K. V. Krishnaswami Ayyar* for appellant.

The Hon. The Advocate-General for respondent.

JUDGMENT.—One of the defences of the appellant as defendant in a suit for restitution of conjugal rights was that she had been divorced in the irrevocable form by the respondent (plaintiff in the suit) by pronouncement of Talak three times on the 9th January 1906, that is, sometime before the institution of the suit. The District Munsif believed the evidence adduced on behalf of the defendant on the point but the District Judge in appeal did not come to a finding on the question whether Talak was in fact pronounced as alleged but being of opinion that the words of repudiation must be addressed to the wife held that as in the present case Talak is, not shown to have been addressed to the defendant it would not be effective to dissolve the marriage. We have considered the evidence as to repudiation for ourselves and we think that the Munsif's conclusion that the respondent pronounced Talak three times is supported by evidence and the probabilities of the case. The words which the respondent actually used were "Oh, Naina Mahamad Rowther! It is 4 or 4½ since I married your daughter. Yow have now brought her away. This is the Talaku for your daughter. This is the Talaku for your daughter. This is the Talaku for your daughter. Talaku once, Talaku twice, Talaku thrice, Muttalaku. Hereafter you may marry your daughter yourself or marry her to a Pallan. She has become my mother."

We have no doubt that the District Judge in holding that these words did not effectuate a divorce because they were addressed to the defendant's father, although they undoubtedly referred to the defendant took an erroneous view of the Hanafi Law which is the law of both the parties on the subject. According to the principles of that law the husband, as we shall see, has an absolute right to dissolve the marriage, and the only condition for a valid exercise of such a right is that he must be major and of sound mind at the time. The wife's consent or absence of consent to the action of her husband is immaterial and there is nothing therefore in the reason of the law why in order that a divorce pronounced by a husband should be valid the words of repudiation should be addressed to or uttered in presence of the wife. All that the law requires is that the words should

refer to the wife though if they be not communicated to her at the time a question may possibly arise as to whether she is not entitled until she comes to know of the divorce to bind her husband by certain acts such as pledging his credit for obtaining the means of subsistence. That the law on the point is as we have stated will be easily intelligible if we bear in mind the theory and the principles which constitute the Muhammadan conception of marriage as a legal institution. In Tawzih, marriage is described as "a contract which has been legalised for manifold objects such as preservation of the species, the fixing of descent, restraining men from debauchery and the encouragement of chastity, promotion of love and union between the husband and the wife and of mutual help in earning livelihood." Marriage is regarded as a contract (aqd), for no such relations as those connoted by marriage can be established between two members of the opposite sexes except by their voluntary action. In the case of minors, persons recognised by the law as guardians or curators for this purpose are authorised, subject to certain important conditions and restrictions, to enter into the contract on the minor's behalf. Marriage differs however from other contracts in one important respect; it cannot according to the Sunni law be expressed to be limited for a period of time.

As incident to a valid marriage the law imports certain rights and obligations *inter se* between the parties. The theory on which such marital rights and obligations are based is that the wife upon marriage surrenders her further marital freedom and the husband acquires a right to her connubial services (mutát) in consideration of certain obligations mostly of a pecuniary character incurred by him. Hence the husband is spoken of in the books as the owner, as it were, of her conjugal services, to secure which he is entitled to exercise over the wife a certain amount of personal authority and control. The wife has also a right to the conjugal society of the husband during the continuance of the marriage, but it cannot be said to be of the same absolute character as the corresponding right of the husband. The husband does not by marriage lose his further marital liberty though the law for reasons of policy has restricted that liberty to his having four wives at one and the same time. Neither of the parties to a marriage acquires a right to or power over the property of the other, but on the death of one partner the survivor takes a specified

share of the inheritance as an heir. The obligation of the husband consists mainly in his being made responsible for the maintenance of the wife and of the children born of the marriage according to his status in life and he is further bound to make a certain settlement of money or property called mahr or dower on the wife. In case he has more than one wife, his dealings with them all must be on a strictly just and impartial basis.

The authority with which the husband is armed over the wife is of a disciplinary nature and gives him the power to control her liberty of movement, and in cases of flagrant misbehaviour and disobedience even to inflict corporal chastisement on her, provided the exercise of his authority does not in any case infringe her right to the safety of life, limb or health nor amounts to cruelty such as by depriving her of social relations with her own people. The right to domestic authority is conceded to the husband rather than to the wife in consideration as hinted above of the pecuniary burden imposed upon the husband and also because of the presumed superiority of the male sex in judgment and discretion For the same reasons the husband is recognised as having an absolute right to put an end to the marriage by his private act. No doubt an arbitrary or unreasonable exercise of the right to dissolve the marriage is strongly condemned in the Koran and in the reported sayings of the Prophet (Hadith) and is treated as a spiritual offence. But the impropriety of the husband's conduct would in no way affect the legal validity of a divorce duly effected by the husband. Upon divorce being pronounced, the wife becomes at once entitled to be paid her dower; unless it has been paid before and after a certain period of probation she is free to marry again. In addition to the husband's right to dissolve the marriage whenever he chooses, in certain cases, such as that of the physical incapacity of the husband or the wife and of improper marriages contracted by the guardian of a minor, the aggrieved party may ask the Court to annul or set aside the marriage.

These are the ordinary incidents of a Muhammadan marriage; but as marriage among the Muhammadans is in its constitution a contract, it is open to a man and a woman entering upon marriage to define their future marital rights and liabilities *inter se* so as to considerably modify the rights and obligations that ordinarily flow from a valid marriage. For instance the wife may protect herself if she so chooses by stipulation made either before or after

marriage to the effect—it is not necessary to consider here the exact form in which such stipulations may be made—that the husband shall not exercise such control over her liberty of movement as the law otherwise vests in him or that he shall not take to himself another wife. The husband may, on the other hand, by especial stipulation free himself from liability to maintain the wife who may also release her right to the dower, or they may agree that non-payment of the dower shall not be a bar to the exercise of his marital rights. In some parts of India stipulations for the protection of the wife such as have been mentioned are of common occurrence at the time of marriage, but almost all over India generally protection of the wife against an improper exercise by the husband not only of his marital authority but also of his power to dissolve the marriage is for all practical purposes secured by fixing the dower payable to the wife at an amount quite out of proportion to the means of the husband. However that may be, the husband always has a right to dissolve the marriage at his discretion whatever be the consequences he may have to face.

The learned District Judge has cited Baillie's Digest and a decision of the Calcutta High Court, *Furzund Hossein* v. *Janu Bibee*(1) as authority for his proposition that the works of Talak in order to be effective in law must be addressed to the wife. He does not however mention the passage he relies on in Baillie's 'Digest', but presumably he relies on the passage cited in *Furzund Hossein* v. *Janu Bibee*(1) and other passages of a similar significance. It has been urged by the learned vakil for the appellant that this decision is not an authority for the view propounded by the District Judge. It is not quite easy to ascertain the exact nature of the proposition intended to be laid down there by Mitter and McLean, JJ., but their decision, having regard to the facts of that case, seems to involve two propositions, that the Muhammadan law has prescribed certain formulas for divorce which must be strictly observed if the divorce is in the Sureeh or express form and that the direct form of speech is of the essence of those formulas. We are unable to assent to either of those propositions. The learned Judges quote from Hamilton's 'Hedaya' the passage "Talak Sureeh or express divorce

(1) (1879) I.L.R., 4 Calc., 588 at p. 591.

is where a husband delivers the sentence in direct or simple terms as if he were to say 'I have divorced you' or 'you are divorced', which effects a Talak Bijai or divorce reversible" as an authority for this view of the law. 'Hedaya' itself is undoubtedly a book of supreme authority on Hanafi law and if it has laid down that a Sureeh or express divorce to be effective must be couched in the direct form of speech as Hamilton is understood to suggest, one would feel the greatest hesitation in holding the law to be otherwise. But 'Hedaya' lays down no such proposition which as we have pointed out would be inconsistent with the principles governing the Muhammadan law of divorce. At the beginning of the chapter in which the question as to how divorce may be effected is considered the passage in the original literally translated would run thus:—'divorce is of two kinds, Sureeh (usually translated as express) and Kinayah (usually translated as ambiguous). Sureeh or express divorce is his words (*i.e.*, is constituted by words of the husband). 'Thou art Táliqun' (or divorced) and Mutallagatun (another combination of the root letters t, l and q also meaning divorced) and 'I have divorced thee'. With these a reversible divorce is effected. Because these words are used in divorce (*i.e.*, in pronouncing divorce) and are not used in others (*i.e.*, other connections) and are therefore Sureeh and reversibility is attached on the authority of the text (meaning a passage in the Koran). "And it does not require Kiyat (*i.e.*, proof of intention to use the word in the sense of divorce.) Because it is express in that connection by reason of preponderance of usage." In plain English what is meant is that divorce may be effected either by use of words which are regarded in law as Sureeh or explicit such as 'I have divorced thee,' etc., or by words of equivocal meaning technically called Kinayah. If the words which the law regards as clearly and explicitly meaning dissolution of the marriage tie by the husband have by usage acquired that meaning, such as the different forms of the word Talak, then it is not necessary to prove that the husband by using such an expression meant to convey divorce. In Muhammadan jurisprudence the distinction between Sureeh and Kinayah is this: when a person expresses his legal act whether it be a contract, release of rights or dissolution of legal relations in spoken words, the meaning of which is unmistakable either because the expressions used have acquired a particular significance by long usage or

otherwise, the law will take him to mean what his words convey and will neither permit him to say that he meant something else nor entertain such a question at all. When on the other hand the language used is ambiguous, it is open to the person using it to say what he meant and the circumstances may be taken into account to ascertain his meaning (See Tawzíh' Cal. Ed., p. 110 and, Talwit Constantinople Ed., pp. 137—9 and Fatawa Alamgiri Búláq Ed., Vol. I, p. 374). This rule, it may be observed, is not without a parallel in the rules of the English law regarding the interpretation of deeds. The word 'Talak' or rather the different formations of the root letters t, l and q, has acquired a clear and definite meaning as denoting dissolution of the marriage tie by declaration of the husband. It is not only used in that sense in the Koran and the sayings of the Prophet, but habitually by the people as a matter of usage although its root meaning is "Setting free" or "letting loose." Hence in law the word 'Talak' and its variations are regarded as having the force of a Sureeh expression so that when a man uses the expression with reference to his wife he cannot afterwards be allowed to say that he meant not divorce but something else. On the other hand if a man were for instance to say to his wife "Thou art not my wife" or "I am not thy husband" or on being asked by a third person "hast thou a wife" answers "no", there would be no divorce unless he meant it (see Fatawa Alamgiri Búláq Ed. Vol. I, p. 375). This is all that is meant by the express (Sureeh) or ambiguous (Kinayah) forms of divorce and nothing turns upon the direct or indirect form of speech. If therefore when Mr. Hamilton speaks of direct and simple words he means thereby that the words of divorce in order to be Sureeh or express must be addressed to the wife, then he is laying down a proposition for which there is really no warrant in the 'Hedaya' or any other authoritative writing on Muhammadan law or in the principles of the Muhammadan law of divorce. Mr. Hamilton's 'Hedaya' as is well known is not a translation of the original Hedaya in Arabic, but of a certain commentary of it prepared in Persian especially for the use of Mr. Hamilton, who apparently was unfamiliar with Arabic, by certain Moulvies of Calcutta. This Persian Commentary is not ordinarily available and is seldom, if ever, used among the Muhammadans nor ever referred to as an authority. Mr. Hamilton's translation of it has however found vogue in the Courts and

is constantly relied on as authority on questions of Hanafi law, though often under the wrong impression that it is a translation of the 'Hedaya' itself. But no statement in Mr. Hamilton's book which is not to be found in the original 'Hedaya' can be accepted as an authoritative exposition of the Muhammadan law on a particular point unless it agrees with the principles of that law or with what is laid down by well-known Muhammadan Jurists of authority on the subject.

The next question to be considered with reference to the ruling in *Furzund Hossein* v. *Janu Bibee*(1) is whether the expressions mentioned in the 'Hedaya' as constituting express divorce are exhaustive of the forms of such divorce or are mere illustrations of the ways in which the different combinations of the root-word t, l and q may be used. On reading the passage from 'Hedaya' cited above one would *primâ facie* be led to think that the phrases in question were meant to be exhaustive of the forms of such divorce, but that is not so as pointed out in Fathul Kadar, Vol. 3, page 350 (printed at Maimania Press, Cairo), a most authoritative Commentary on 'Hedaya.' The *primâ facie* meaning of the passage would be that there were no Sureeh forms of divorce except those mentioned but that is not what is meant; and later on the author (*i.e.* of Hedaya) mentions taliq the infinitive form of t, l, q as among the express terms of divorce although not mentioned before. And the language of the Kauz (a treatise of great authority on the Hanafi law) which is to the effect "*for instance*, 'thou art Táliqun (divorced) and Muttallagatun (divorced)' and 'I have divorced thee (tallaqtoke)' is better . . . ." That this is so can admit of no doubt if once we remember that the only question in connection with a word or phrase being either Sureeh or Kinayah is whether the law does or does not regard it as clearly and unmistakably expressive of the meaning of the man the legal significance of whose act is in dispute. And we are not aware that the Muhammadan law in this connection pays any regard to the fact of the speech being in the direct or indirect form. Similarly by the definition of Talak given in Fatawa Alamgiri quoting from Bahmr Ráiq and cited in *Furzund Hossein* v. *Janu Bibee*(1) from Baillie's "Digest" at p. 205 what is meant by the passage 'Repudiation

(1) (1879) I.L.R., 4 Calc., 588 at p. 591.

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or Talak as the term is defined in law is a release from the marriage tie either immediately or eventually by the use of especial words' is not that the law gives effect to a divorce only if some special or particular words are used, but that Talak denotes dissolution of the marriage tie when it is effected by words of the husband conveying that meaning as distinguished from the setting aside by the Court of a marriage on grounds like those mentioned above (see "Bahmr Ráiq", Egyptian Ed., Vol. II, p. 252).

The learned Judges also rely upon another passage in Baillie's "Digest," viz., 'Its pillar is the expression.' "Thou art repudiated" or the like. But with great respect it is difficult to see how that passage affords any authority for the proposition that the words of repudiation must be directly addressed to the wife, since the expression within inverted commas is cited as a mere illustration. We may mention that the ruling in *Furzund Hossein* v. *Janu Bibee*(1) has been considered in two recent cases of *Sarabai* v. *Rabiabai*(2) and *Ful Chand* v. *Nazab Ali Chowdhry*(3). In *Sarabai* v. *Rabiabai*(2) Batchelor, J., observes that if *Furzund Hossein* v. *Janu Bibee*(1) be understood to lay down that a pronouncement of divorce in order to be valid must be made directly to the wife, he is not prepared to follow the ruling because the Muhammadan law nowhere lays down such a condition. We quite agree in that view. In *Ful Chand* v. *Nazab Ali Chowdhry*(3) Stephen and Doss, JJ., also held that the absence of the wife makes no difference to the validity of a divorce otherwise duly effected, but they think that in *Furzund Hossein* v. *Janu Bibee*(1) there is no express decision to the contrary.

The result is that the defendant having been in our opinion validly divorced by the plaintiff the latter's suit for restitution of conjugal rights fails. The appeal will therefore be allowed and the judgment of the lower Appellate Court set aside and that of the Munsif restored. The appellant will have her costs throughout. We may mention that in the view we have taken it becomes unnecessary to consider the other questions raised by the appellant, viz., whether the plaintiff has been guilty of such cruelty as would disentitle him to restitution.

(1) (1879) I.L.R., 4 Calc., 588 at p. 591. (2) (1906) I.L.R., 30 Bom., 537 at p. 544. (3) (1909) I.L.R., 36 Calc., 184.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Miller.

OTTAPPURAKKAL THAZHATE SOOPI (FIFTIETH DEFENDANT), APPELLANT,

v.

CHERICHIL PALLIKKAL UPPATHUMMA AND OTHERS (PLAINTIFFS NOS. 1 TO 3, AND DEFENDANTS NOS. 1 TO 27, LEGAL REPRESENTATIVE OF TWENTY-EIGHTH DEFENDANT, NOS. 29, 31 TO 34, 36, 38 TO 49, 51 TO 56 AND LEGAL REPRESENTATIVE OF THIRTY-SEVENTH RESPONDENT), RESPONDENTS. *

1900. April 8.

Civil Procedure Code, Act XIV of 1882, s. 103—Section not applicable where plaintiff in former suit is not the plaintiff in the latter suits—Limitation Act, XV of 1877, sched. II, art. 120—Right to sue for declaration accrues when cause of action complete.

Section 103 of the Code of Civil Procedure bars a subsequent suit only when the plaintiff in the latter suit actually was, or represented by the plaintiff in the former suit.

Where the plaintiff in the latter suit was a contesting defendant in the former, section 103 does not bar the latter suit.

The right of junior members of a tarwad to sue for a declaration that an alienation by the karnavan is not binding on the tarwad accrues the moment the document is completed and not when the plaintiff obtains knowledge of the alienation, and in the absence of fraudulent concealment a suit for such declaration will be barred under schedule II, article 120 of the Limitation Act, at the expiry of six years from such date.

SECOND APPEAL against the decree of W. W. Phillips, District Judge of North Malabar, in Appeal suit Nos. 349 and 386 of 1906, presented against the decree of M. R. Narayanaswami Ayyar, District Munsif of Badagara, in Original Suit No. 451 of 1904.

The plaintiffs who were three female members of the Cherichil Tarwad sued for a declaration that a 'Melchench' or lease granted by the first defendant, the Karnavathi of the Tarwad to defendants Nos. 48 and 49 on the 5th April 1898, was not binding on the Tarwad. Other reliefs were also claimed in the plaint which was presented on the 8th February 1906.

Another 'Melchench' or lease was granted to the fiftieth defendant by the first defendant on the 12th August 1900. A suit

* Second Appeal No. 116 of 1908.

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(Original Suit No. 3 of 1901) was brought by some other members of the Tarwad to question the validity of that lease; and the first plaintiff was the seventh defendant in that suit. That suit was dismissed for default.

The District Munsif granted the declaration prayed for. On appeal it was contended by defendants that the suit was barred by limitation and that the dismissal of Original Suit No. 3 of 1901 for default barred the present suit. Both the pleas were overruled and a decree in favour of plaintiffs was passed. The fiftieth defendant appealed to the High Court.

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

C. Madhavan Nair for first to third respondents.

J. L. Rosario for first respondent.

V. Ryru Nambiar for sixteenth respondent.

C. Govindan Nair for thirty-first respondent.

JUDGMENT.—The first contention on behalf of the appellant (fiftieth defendant) is that the suit is barred by section 103 of the Civil Procedure Code of 1882. This can be so only if the plaintiffs in Original Suit No. 3 of 1901 are also plaintiffs in the present suit: the first plaintiff now was, however, sixth defendant in the suit of 1901 and unless she can be regarded as having been also a plaintiff in that suit, section 103 cannot apply to the case. She was not only a defendant but a contesting defendant: the written statement in which she joined (exhibit IX-*b*) shows that she did not join in the prayers of the then plaintiffs, but opposed them, and it is difficult to see on what principle they can be held to have represented her. Neither the plaintiffs' profession to be seeking money for the Tarwad, nor the fact that, if they had succeeded in removing the Karnavati and obtaining a declaration that the property was improperly alienated and was at the disposal of the new Karnavati, the Tarwad might have benefited—neither of these things will make the Tarwad the plaintiff in the suit. This contention fails.

Then it is contended that the plaintiffs cannot now recover possession of the property and this, we think, is a sound contention. It was not argued in this Court that the District Judge was right in his view that exhibit II must fall with exhibit I, and we have no doubt that he was wrong, and that exhibit II came into operation on the failure of exhibit I. But it was argued that exhibit II must fail of its own weakness, the District Judge

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holding it a fraud on the Tarwad and a perpetuation of the invalid transaction effected by exhibit I. The conclusion of the District Judge is, however, that it stands in the way of the plaintiffs' claim to immediate possession, because the money borrowed from the fiftieth defendant was necessarily required at the time for Tarwad purposes: and in the absence of any finding that the Karnavati could at the date of exhibit II have raised the money on better terms than she did this conclusion is justified. The District Judge would clearly have agreed with the District Munsif on the question of the plaintiffs' right to possession had he not been of opinion that exhibit II must necessarily fall with exhibit I. Mr. Rosario argued his memorandum of objections inviting us to overrule *Chandu* v. *Raman*(1) and to hold that the debt for which exhibit II was executed was not binding on the Tarwad property. We however follow *Chandu* v. *Raman*(1) and dismiss the memorandum of objections.

The last question is, whether the District Munsif was right in declaring the invalidity of exhibit I? We think the contention that the declaration is barred by article 120, schedule II of Act XV of 1877, must prevail. The lower Courts have held that the plaintiffs' right to sue accrued only when the alienation by the first defendant came to their knowledge, but neither Court relies on section 18 of the Limitation Act. In the absence of a finding of fraudulent concealment the knowledge or ignorance of the plaintiffs does not seem to be material. The right to sue accrues as soon as the cause of action is complete and there remains no obstacle to the institution of a suit. That time arrived on the date of exhibit I. The suit for a declaration as a separate relief is therefore barred by limitation. In the result the decrees of both Courts are reversed and the suit is dismissed, but in the circumstances the parties must bear their own costs.

(1) (1888) I.L.R., 11 Mad., 378.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Abdur Rahim.

1909. July 12, 27.

SANKARA SUBBAN PATTAR'S SON, SIVARAMAKRISHNA PATTAR AND OTHERS (DEFENDANTS NOS. 1, 2 AND 4), APPELLANTS,

v.

MANGALASERI KUNHU MOIDEEN MUSALIAR AND ANOTHER (PLAINTIFF AND THIRD DEFENDANT), RESPONDENTS.*

Negotiable Instruments Act XXVI of 1881, s. 16—Endorsement, what constitutes—Holder in due course—Bill payable on demand, when overdue.

Section 16 of the Negotiable Instruments Act does not lay down any specific form of words for an indorsement.

A promissory note payable on demand was executed on 18th December 1901. On the 12th September 1904, the payee received the amount due on the note from one S and the following was indorsed on the note by the payee: "I have this day received from you, S, the sum of . . . . due for principal and interest and assigned this note to you with power to recover the amount due under it by showing the same."

No demand for payment was made before the 12th September 1904

Held, that S was an indorsee of the promissory note, that the promissory note was not overdue on the date of indorsement and that S was entitled as holder in due course to sue on the note.

SECOND APPEAL against the decree of S. Raghunathaiya, Subordinate Judge of South Malabar at Palghat, in Appeal Suit No. 194 of 1906 presented against the decree of A. Srinivasa Ayyangar, District Munsif of Chowghat, in Original Suit No. 676 of 1904.

The facts for the purpose of this case are sufficiently stated in the judgment.

T. R. Ramachandra Ayyar for appellants.

J. L. Rosario for first respondent.

JUDGMENT.—On the 18th December 1901 the first defendant executed the promissory note (exhibit A) promising to pay on demand to the third defendant or order Rs. 1,000 with interest. On the 12th September 1904 the following entry signed by the third defendant was made upon the note:—"I have this day received in cash from you Mangalasheri Kunhu Moidu Musaliar . . . . Rs. 1,169 made up of Rs. 1,000 being principal due

* Second Appeal No. 1065 of 1906.

under this note and of Rs. 169 interest accumulated up to date, and assigned to you this note with power to recover the amount due under it, by showing the same." The assignee is the plaintiff who sued on the note. The defence was that the suit is not maintainable by reason of the agreement contained in the separate document (exhibit I) executed on the same date as exhibit A by the third defendant in favour of the first defendant. The Subordinate Judge held that plaintiff was a holder in due course, and that even apart from his position as holder in due course he was entitled to recover. The only question which we need consider is whether the plaintiff is a holder in due course. That the plaintiff paid consideration for the transfer is found by the Subordinate Judge. That the plaintiff had any notice of the agreement contained in exhibit I was not alleged by the defendants in their written statements, and no issue was raised on this subject. It is contended however that there is no indorsement on the note, so that the plaintiff is not an indorsee of the note, and that even if the entry on the note is construed to be an indorsement, the indorsement was not made before the amount mentioned in the note became payable, the note being payable on demand. We think that the indorsement on the note which has been set out above is an indorsement in full within the meaning of section 16 of the Negotiable Instruments Act. Under that section if the indorser in addition to signing his name adds a direction to pay the amount to a specified person the indorsement is said to be in full. The section does not lay down that any specific form of words is to be used. It is sufficient if the words used can be properly construed as a direction of the nature mentioned, and we think that the words used in the present case can be so construed. A similar view was taken in the case of *Srinivasa Pillay* v. *Venkatammal*(1). The plaintiff is therefore an indorsee of the note. As to the remaining contention, it is not alleged that there was any demand for payment prior to the indorsement, or that there is any other circumstance to show that the promissory note was overdue when indorsed to the plaintiff. This being so we think that the indorsement to the plaintiff was made before the amount of the promissory note became payable. Vide *Commundum Mohideen Saib* v. *Oree Meera Saib*(2) where the English cases on the subject

(1) C.R.P., No. 603 of 1906, (unreported).
(2) (1873) 7 M.H.C.R., 271.

MUNRO AND ABDUR RAHIM, JJ.

SIVARAMA-KRISHNA PATTAR v. MOIDEEN MUSALIAR.

are referred to, and *Van Ingen* v. *Dhunna Lall*(1). The plaintiff thus possesses all the characteristics of a holder in due course as defined in section 9 of the Negotiable Instruments Act, and his suit cannot be resisted. The appeal fails and is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Abdur Rahim.

1909. February 19, 22. March 8.

N. P. N. M. CHITHAMBARAM CHETTIAR (PETITIONER—PLAINTIFF), APPELLANT,

v.

KRISHNA AIYANGAR AND OTHERS (RESPONDENTS—DEFENDANT), RESPONDENTS.*

Indian Companies Act, VI of 1882, *s.* 76—*Alteration of memorandum of association by articles—To what extent a company can by resolution alter articles.*

Under section 76 of the Indian Companies Act anything which appears in the articles of association but is not provided for in the memorandum of association may be altered by a special resolution.

Where the articles of association provide for matters which need not, under section 8 of the Companies Act, be contained in the memorandum of association and which are not either expressly or impliedly dealt with by such memorandu m, the portions of the articles dealing with such matters cannot be treated as part of the memorandum and can be altered by a special resolution of the compan y.

Rights which have their origin in a contract outside the articles, the terms of which contract are found in or referred to in such articles, can be altered by such alteration of the articles unless it is proved that one of the terms of such contract was that such rights should not be affected by an alteration of the articles.

Facts are sufficiently stated in the judgment.

APPEAL against the order of K. Ramanatha Ayyar, Subordinate Judge of Tinnevelly, dated 8th July 1908, in Miscellaneous Petition No. 7 of 1908 in Original Suit No. 58 of 1907.

P. R. Sundaram Ayyar, K. Srinivasa Ayyangar and *R. Ranga-swami Ayyangar* for appellant.

Joseph Satya Nadar for fifth respondent.

The Hon. The Advocate-General, and *C. V. Anantakrishna Ayyar* for eighth respondent.

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(1) (1882) I.L.R., 5 Mad., 108.

* Civil Miscellaneous Appeal No. 143 of 1908.

MUNRO AND ABDUR RAHIM, JJ.

CHITHAM-BARAM CHETTIAR v. KRISHNA AIYANGAR.

JUDGMENT.—The Tinnevelly Bank, Limited, was incorporated in 1896. According to the memorandum of association the appellant and another, their heirs, executors and administrators were to be Secretaries of the Bank, but from 1902 the appellant alone has been doing duty as Secretary. The duties and emoluments of the Secretaries are set out in the articles of association but not in the memorandum of association. On the 1st November 1907 the shareholders at an ordinary general meeting decided to appoint a certain person as managing agent of the Bank with powers of superintendence over the appellant. The appellant was also deprived of the keys of the Bank safe. The appellant therefore filed Original Suit No. 58 of 1907 against seven Directors of the Bank and the person appointed managing agent as above mentioned. He prayed among other things that the keys might be delivered over to him, that a permanent injunction might be issued to the defendants restraining them from interfering with the performance of his duties as Secretary, and that the eighth defendant's appointment as managing agent might be declared invalid. He also filed on interlocutory application for a temporary injunction, praying that the defendants might be restrained from doing any acts to prejudice his position and standing as Secretary of the Bank, and that the eighth defendant might be restrained from in any way dealing with the funds of the Bank. There were other prayers which it is agreed are not now material. After the filing of the above suit and interlocutory application an extraordinary general meeting was held on the 12th February 1908 in pursuance of the resolution of the 1st November 1907, and the special resolution (exhibit X) was passed and duly confirmed on the 8th March 1908 by exhibit X (*a*). By exhibit X the articles of association were modified, and the powers and emoluments of the Secretary curtailed. Thus the pay of the Secretary was reduced from Rs. 250 to Rs. 25 a month, most of his powers were transferred to the newly appointed agent, and it was provided that the duties of the secretary should be determined and varied by the Directors as they might from time to time think fit. Now although the resolution exhibit X was passed after the suit and application for temporary injunction were filed, it is manifest that if the resolution was within the powers of the Company the appellant is no longer entitled to claim the powers and emoluments which he

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originally possessed, and which by obtaining an injunction he seeks to maintain. The Court in those circumstances would certainly not now grant the injunction prayed for. The question for determination therefore is whether the resolution exhibit X is a valid resolution. It is argued for the appellant that the resolution is invalid, because in effect it alters the memorandum of association, and because it amounts to a breach of contract by the Company with regard to the terms upon which the appellant took up the secretaryship.

The resolution exhibit X does not alter the memorandum of association. It is no doubt true that, although the condition inserted in the memorandum of association that the appellant and another, their heirs, etc., shall be secretaries of the Bank is not one of the things which under section 8 of the Indian Companies Act VI of 1882 a memorandum of association is bound to contain, nevertheless the restrictions placed by section 12 of the Act upon modification of the conditions contained in the memorandum of association apply to this condition also. Vide *Ashbury* v. *Watson*(1). But exhibit X does not purport to cancel the appointment of the appellant as secretary to the Bank or to take away the right of his heirs, etc., to succeed him in that office. It is contended however that as a condition regarding the appellant's appointment as secretary appears in the memorandum of association without setting out the secretary's powers, that portion of the contemporaneous articles of association which sets out the powers, etc., of the secretary must be read as part of the memorandum of association. In support of this contention the following passage from Lindley on Companies, Vol. I, 6th edition, page 163, is quoted : "If the memorandum is ambiguous, or silent on a matter which the Act does not require to be stated therein, contemporaneous articles may be looked at to explain its meaning or to control or rebut an inference which might otherwise be drawn from its silence." In the present case there is question of ambiguity. The question is one of silence with regard to the powers of the secretary. The case on which the relevant portion of the above passage is based is *Harrison* v. *Mexican Railway Co.*(2), and what is relied upon is that portion of the head note which says "if the memorandum and articles of association of a Company are silent

(1) (1885) 30 Ch.D., 376. (2) (1875) 19 Eq., 358.

on the subject, it is an implied condition that the shareholders are entitled to rank equally as regards dividend, without preference or priority between themselves ; but such implication will be rebutted if the articles of association, contemporaneous with the memorandum, contain clear provisions as to the preference or priority of classes of shares." The law as above set out is what was stated by Sir G. Jessel to be the effect of the second decision of Vice-Chancellor Kindersley in *Hutton* v. *Scarborough Cliff Hotel Company*(1), a decision which was overruled in *Andrews* v. *Gas Meter Company*(2), where it was pointed out that if the memorandum of association expressly or impliedly prescribed equality among the shareholders the articles of association even though contemporaneous could not override the memorandum of association in that particular. There is therefore no reason so far as the present contention is concerned for departing from the ordinary rule that anything which appears in the articles of association but is not provided for by the memorandum of association may be altered by special resolution under section 76 of the Act. We cannot therefore read that portion of the articles of association which sets out the powers of the secretary as part of the memorandum of association, and as therefore not liable to be altered by special resolution under section 76.

The remaining question is whether the resolution exhibit X is invalid because it amounts to a breach of contract by the company with regard to the terms upon which the appellant accepted the post of secretary. It is contended that it was only upon the terms set out in the articles of association as they originally stood that the appellant agreed to be secretary. It is not pretended that there is any direct evidence of the alleged agreement, nor have we been asked to have evidence recorded regarding it. What we are asked to do is to infer the agreement from the admitted facts. Under the articles of association each secretary is to hold at least 50 shares of the Bank, and from this we are asked to infer that the appellant would never have taken up 50 shares and the post of secretary unless it was understood that his emoluments and powers as originally fixed in the articles of association were not to be reduced by any subsequent alteration of the articles. The law applicable to the question is thus laid

(1) 2 D. & S., 521. (2) (1897) 1 Ch.D., 361.

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down in Lindley on Companies, Vol. I, 6th edition, at page 463: "If the rights which it is proposed to alter are not merely incidental to membership, and are not conferred only by the articles but are dependant wholly or in part on a contract outside the articles, of which the terms are to be found in the articles or by reference to them, the power to alter such rights by an alteration of the articles depends upon whether such alteration is or is not consistent with the real bargain between the parties, or in other words, whether there was any express or implied agreement between them that a subsequent alteration of the articles should not affect the terms of the contract. But when considering contracts referring to revocable articles it must not be assumed that the contract involves as one of its terms that the articles shall not be altered and the terms of the contract thereby varied. If there is any such agreement these rights cannot be altered by an alteration of the articles; if there is no such agreement they can be so altered, provided the alteration does not affect rights which have ripened into claims for something already done under the contract in its original form." Now it is a very significant circumstance that, while the appellant's right to the post of hereditary secretary is safeguarded by being made one of the conditions of the memorandum of association, his powers and emoluments are set out only in the articles. This seems to us to indicate *primâ facie* that while the Company was prepared to have hereditary secretaries it meant to retain in its hands full power of control, so to be able to limit the secretaries' powers to such as experience showed they might safely be entrusted with, and their emoluments to such as their merits or the position of the Company warranted. The powers and emoluments of the secretaries being set out only in the articles of association which are ordinarily alterable, the appellant must fail unless he proves the agreement he sets up. We do not think there is anything in the facts which would justify us in inferring the existence of such an agreement. The probabilities seem to us to point the other way. As to the condition that each secretary should hold at least 50 shares it is to be observed that condition is abolished by exhibit X. We are of opinion that exhibit X is a valid resolution, and dismiss this appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Wallis, Mr. Justice Miller and Mr. Justice Sankaran-Nair.

SUBRAMANIA CHETTY (FOURTH DEFENDANT), APPELLANT,

v.

MAHALINGASAMI SIVAN AND OTHERS (PLAINTIFFS AND DEFENDANTS NOS. 1 TO 3), RESPONDENTS.*

1909. August 18.

Revenue Recovery Act (Madras) II of 1864, ss. 3, 35—'Defaulter' who is—Defaulter means registered pattadar—Contract Act, s. 69.

Where one person is the real owner of a share in land and another is the registered proprietor of the whole, the latter and not the former is the 'defaulter' within the meaning of the Revenue Recovery Act; and where the latter as mortgagee of a share of the land not owned by the former has paid the arrears of revenue due on the whole land and the former has paid the revenue of his share, he cannot, being himself the defaulter, recover the amount from the former under section 35 of the Revenue Recovery Act.

The latter cannot recover under section 69 of the Contract Act as the former is not bound by law to pay the money which the latter has paid.

APPEAL under section 15 of the Letters Patent from the judgment of Munro, J., dated the 29th October 1908, differing from Pinhey, J., and dismissing Civil Revision Petition No. 50 of 1908.

The facts are sufficiently stated in the judgment of Mr. Justice Pinhey, which is as follows:—

PINHEY, J.—In fasli 1316 the plaintiff who is the registered pattadar, but no longer the real owner of the land in suit, paid in the capacity of mortgagee the balance of land revenue due on the land to release it from attachment.

He sued defendants Nos. 1 to 4, the real owners for the amount so paid under section 35 of Act II of 1864. Defendants Nos. 1 to 3 were *ex parte*. The Subordinate Judge gave a decree as prayed.

On behalf of defendant No. 4 it was proved that he had paid the remaining one-quarter of the revenue due and that he separately enjoyed one-quarter of the land. The respective payments were made on the undermentioned dates: payments by the fourth defendant on the 2nd February, the 11th March and the 19th April 1907; and payment by the plaintiff on the 4th May 1907.

* Letters Patent Appeal No. 96 of 1908.

It was proved that before the first of these payments, that is, on the 31st December 1906, the fourth defendant had obtained against the plaintiff a decree for separate registry of his one-quarter share of the land. The following facts are also admitted; that defendants Nos. 1 to 4 were members of an undivided family when the land was sold by the plaintiff, the first defendant and also when the first defendant executed a simple mortgage in respect of it back to the plaintiff, that after the execution of this mortgage partition was effected and defendant No. 4 got his separate one-quarter share; that it has recently been held that is, in March 1908 (?) that the mortgage does not bind the fourth defendant.

Under section 35 of Act II of 1864 any sum paid by a *bonâ fide* mortgagee is a *charge on the land* and further constitutes a debt from the defaulter. The question is whether the plaintiff can recover anything from the fourth defendant. I am clearly of opinion that the plaintiff cannot recover. The plaintiff is himself the 'defaulter' within the meaning of Act II of 1864.

It was owing to his opposition and not through any default of the fourth defendant that transfer of registry was not effected. He contested the suit brought by the fourth defendant with the view of securing such transfer and it was while he was acting in contempt of the decree passed in that suit that he made the payment for which he now seeks to make the fourth defendant liable.

On the facts set forth it would in my opinion be clearly inequitable to grant the plaintiff a decree against the fourth defendant. I think it would also be illegal.

Assuming that the plaintiff be regarded as mortgagee and not defaulter, it is only if the fourth defendant is held to be a 'defaulter' within the meaning of Act II of 1864 that the plaintiff can recover the money as a debt.

The authority for the view that the real owner is also a 'defaulter' within the meaning of the Revenue Recovery Act is *Srinivasa Thathachar* v. *Rama Ayyan*(1).

That decision was one by Muthusami Aiyar and Best, JJ. The question was not then discussed but an earlier decision was accepted as authority. The earlier decision was *Seshagiri* v. *Pichu*(2) decided by Kernan and Muthusami Aiyar, JJ. A reference to this earlier decision shows that though the two Judges agreed as to the final decision to be arrived at in that case they held in fact diametrically opposite views on the question now in issue. Kernan, J., explicitly stated that the 'defaulter' was the tenant to Government and that "fourth defendant (in that case) the real owner, is not a defaulter."

(1) (1894) I.L.R., 17 Mad., 247. (2) (1888) I.L.R., 11 Mad., 452.

It was Muthusami Aiyar, J., alone who held that the real owner was also 'a defaulter' within the meaning of the Act.

There is in my opinion nothing in Act II of 1864 to justify this view, and a different and I think, more correct pronouncement was recently made by Subramania Ayyar, J., in *Boja Sellappa Reddy* v. *Vridhachala Reddy*(1). At page 38 the learned Judge makes the following observation: "Where land is assessed to revenue the owner thereof cannot by virtue of his ownership alone be held as compellable to pay the revenue. The right of the Government to proceed for the recovery of revenue is regulated by the Revenue Recovery Act. The property of the landholder, that is, the registered holder as well as the land on which the arrear is due may be seized, and sold, and such holder may also be arrested and confined. But as against an owner of land who is not the registered holder, the same remedies are not available and neither his property, other than the land in regard to which the arrear accrued, nor his person can be proceeded against. No doubt if the land liable for the revenue is sold in due course of legal process the unregistered owner's right to the land would be lost. But that shows nothing more than that it would be to his interest to pay up the arrears of revenue consequently, such arrears cannot be said to be what the owner is bound by law to pay within the meaning of section 69 of the Indian Contract Act."

From this more recent exposition of the law it is clear that the real owner cannot be a 'defaulter' for he is not bound by law to pay at all and he cannot be made personally liable under Act II of 1864.

Now section 5 of Act II of 1864 expressly makes the defaulter personally liable to Government and several subsequent sections declare how the liability may be enforced. I can scarcely regard that interpretation of a statute as satisfactory which postulates the existence of a second class of 'defaulters' to whom

(1) (1907) I.L.R., 30 Mad., 35.

several of the most important sections of the Act cannot be applied.

On the grounds of policy also it is clear that the framers of Act II of 1864 did not intend that the real owner should be considered a 'defaulter.'

The maintenance of correct registers by the Collector is essential for the proper collection of land revenue with a minimum of trouble to all concerned. To ensure this result it is necessary that a transfer of real ownership should be promptly followed by a transfer of patta. The view that the word 'defaulter' refers to the registered landholder and to him alone is calculated to encourage such prompt transfer of registry. The view adopted in *Seshagiri* v. *Pichu*(1) has the opposite effect. If the registered owner and the real owner are equally defaulters and equally liable, a transfer of registry becomes almost superfluous and a waste of time.

The present case affords an illustration of the evils resulting from the decision in *Seshagiri* v. *Pichu*(1). If the plaintiff is regarded as the defaulter and the fourth defendant as merely one having an interest in the land, the fourth defendant is entitled to recover from the plaintiff the whole sum he paid to save the land from attachment. If the plaintiff had known this he would have insisted on a prompt transfer of registry instead of opposing the fourth defendant's application for transfer and forcing him to file a suit to obtain it. In my view the plaintiff is the only defaulter and he cannot excuse himself from liability on the plea that he is also a mortgagee.

In my opinion the decree of the Subordinate Judge should be modified by exonerating the fourth defendant and this petition should be allowed with costs throughout.

Under section 575, Civil Procedure Code, the revision petition is dismissed with costs.

Munro, J., having delivered a judgment, differing from Pinhey, J., the revision petition was dismissed.

Appellant appealed under clause 15 of Letters Patent.

T. V. Seshagiri Ayyar for appellant.

The respondents were not represented.

JUDGMENT.—We agree with Mr. Justice Pinhey that the fourth defendant in this case is not a defaulter within the meaning of the

(1) (1888) I.L.R., 11 Mad., 452.

Revenue Recovery Act, 1864. The word is not defined in that Act, but reading it along with Regulation XXVI of 1802 we think the term 'defaulter' applies only to the registered pattadar. Regulation XXVI of 1802, section 3, provides: "Transfers of land made by individual persons, without being so registered in the registers of the Collectors, shall not be valid in the Court of Adalat; and such transfers of land being unregistered, shall not exempt the persons in whose names the entire estates are registered from paying the revenue due to Government from such lands." The effect of this section is that unregistered transfers are invalid against Government, although valid as between private parties (*Mangamma* v. *Timmapaiya*(1)), and so the registered pattadar remains the landholder within the meaning of the Revenue Recovery Act and the person liable to pay the revenue under section 3, and becomes a defaulter within the meaning of the Act if he does not so pay. The suit therefore fails in so far as it is based on section 35 of the Act. The respondent then seeks to support the judgment on the ground that the case is covered by section 69, Indian Contract Act. He contends that although he may not be the mortgagee of the share the appellant obtained on partition, he is the mortgagee of the shares of the other defendants. In that case the appellant is not bound by law to pay the revenue which the plaintiff has paid and this contention fails.

The appeal is allowed and the order of this Court and the decree of the Subordinate Judge's Court are reversed so far as the fourth defendant-appellant is concerned, and the suit is dismissed as against him with costs throughout.

(1) (1866) 3 M.H.C.R., 134.

APPELLATE CRIMINAL.

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

1909. February 22, 23.

GIDDIGADU

v.

EMPEROR.*

Evidence Act I of 1872, s. 30—Confession of co-accused not to be acted upon without corroboration—Misdirection to jury.

The confession of a co-accused is on an even lower footing than the evidence of an accomplice and a conviction based on such a confession alone is bad in law.

Section 30 of the Evidence Act only provides that such a confession is to be an element in the consideration of all the facts of the case, but it does not do away with the necessity for other evidence.

It is the duty of the Judge, when there is no other evidence than the confession of a co-accused to direct the jury accordingly and tell them to acquit the accused; and his omission to do so is a misdirection which will vitiate a conviction.

CRIMINAL APPEAL by the fourth prisoner against the sentence of S. G. Roberts, Sessions Judge of Kurnool Division, in case No. 41 of the Calendar for 1908. The facts for the purpose of this report are sufficiently set out in the judgment.

No one appeared for appellant.

The Public Prosecutor for respondent.

JUDGMENT.—In this case there is absolutely no evidence against the appellant (the fourth accused) except the confessions of his co-accused which implicate him also. The Sessions Judge in his charge to the jury has instructed them "it is a rule of law that where a person confesses a crime and implicates himself, if he implicates the persons who have been tried along with him to the same extent as he implicates himself, then if you accept his statement as being true and voluntarily given as against himself, *you can safely accept it as true as against the other persons.*" He gave no caution as to the necessity in such a case for corroboration as against the person implicated. We think that there was a plain misdirection and that it materially prejudiced the accused. The rule of law is contained in

* Criminal Appeal No. 806 of 1908.

section 30 of the Indian Evidence Act, and it does not go at all so far as the Sessions Judge states. It merely says "when more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court *may take into consideration* such confession as against such other person, as well as against the person who makes such confession."

The wording of the section shows that such a confession is merely to be an element in the consideration of all the facts of the case, but does not do away with the necessity for other evidence.

The statement of a co-accused is of less probative force than the evidence of an accomplice, for it is affected by all the inherent weakness of such evidence, and it cannot be tested, as such evidence can, by cross-examination, nor is it given under the sanction of an oath. It is a general rule of practice that it is not safe to convict upon the uncorroborated evidence of an accomplice, and the confession of a co-accused is on an even lower footing. Conviction on such a confession alone has long been held to be a case of "no evidence and bad in law." (*Proceedings, dated 24th January* 1873(1), *Reg* v. *Hulagu*(2) and *Empress* v. *Ashootosh Chuckerbutty*(3).) The Sessions Judge should have directed the jury accordingly, and told them to acquit the fourth accused.

We set aside his conviction as bad in law, and direct that he be acquitted.

(1) 7 M.H.C.R., App. 15. (2) (1876) I.L.R., 1 Mad., 163.
(3) (1879) I.L.R., 4 Calc., 483 (F.B.).

APPELLATE CRIMINAL—FULL BENCH.

Before Sir Ralph Sillery Benson, Officiating Chief Justice, Mr. Justice Miller, Mr. Justice Munro, Mr. Justice Sankaran-Nair and Mr. Justice Abdur Rahim.

1909. July 16. August 25. October 8.

OTTUPURA NARAYANAN SOMAYAJIPAD, PETITIONER IN CRIMINAL REVISION CASE No. 567 OF 1908,
CHITRAM NAMBUDIRI, PETITIONER IN CRIMINAL REVISION CASE No. 568 OF 1908,
TIRUMITTAKOTT PISHARATH RAGHAVA PISHAREDDI, PETITIONER IN CRIMINAL REVISION CASE No. 67 OF 1909

v.

EMPEROR, RESPONDENT.*

Criminal Procedure Code, Act V of 1898, ss. 439, 476, 200—Power of High Court to interfere under s. 439 with proceedings of Subordinate Criminal Courts under s. 476.

The High Court has power under section 439 of the Criminal Procedure Code to interfere on grounds other than want of jurisdiction, when a Criminal Court has taken action under section 476, Criminal Procedure Code.

The words "as if upon complaint made and recorded under section 200" introduced in the Code of 1898 were not intended to effect any change in the revisional power of the High Court.

***Eranholi Athan* v. *King-Emperor*, [(1903) I.L.R., 26 Mad., 98], overruled.**

PETITIONS, under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the order of R. H. Ellis, Special Assistant First-class Magistrate of Malappuram, in Calendar Case No. 85 of 1908 in so far as it directs the prosecution of the fifth, sixth and third prosecution witnesses for offences under sections 211, 109 and 193 of the Indian Penal Code.

These cases first came on for hearing before Munro and Abdur Rahim, JJ., when the Court made the following Order of Reference to the Full Bench: —

ORDER OF REFERENCE TO FULL BENCH (MUNRO, J.).—These are applications to revise the orders of the Special Assistant Magistrate of Malappuram directing under section 476, Criminal Procedure Code, the prosecution of the petitioners for certain

* Criminal Revision Cases Nos. 567, 568 of 1908 and 67 of 1909.

BENSON, J.J., MILLER, MUNRO, SANKARAN-NAIR AND ABDUR RAHIM, JJ.

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offences. The preliminary objection is taken that the Magistrate's orders are not open to revision by this Court.

In *Eranholi Athan* v. *King-Emperor*(1) the Full Bench answered in the negative the question "whether the High Court as a Court of Revision, has power, under section 439 of the Code of Criminal Procedure, 1898, to interfere when a Court has taken action under section 476 of the Code of Criminal Procedure." The ground of the decision was that when action is taken under section 476, such action is not to be regarded as an order but as the lodging of a complaint. This view has not been accepted by any of the other High Courts, and in *Aiyakannu Pillai* v. *Emperor*(2) the Full Bench treated the proceedings of the Court taking action under section 476 as an order liable, if made without jurisdiction, to be revised by the High Court. As doubt is thus cast upon the correctness of the decision in *Eranholi Athan* v. *King-Emperor*(1) we refer to the Full Bench the question "whether the High Court, as a Court of Revision, has power under section 439, Criminal Procedure Code, to interfere, on grounds other than want of jurisdiction, when a Criminal Court has taken action under section 476 of the Criminal Procedure Code?"

ABDUR RAHIM, J.—I agree that the Full Bench ruling in *Eranholi Athan* v. *King-Emperor*(1), (Sir Arnold White, C.J., Benson and Moore JJ.) laying down that a Magistrate's action under section 476, Criminal Procedure Code, cannot be revised under section 439, Criminal Procedure Code, because such action is not to be regarded as an order but as the lodging of a complaint ought to be reconsidered, because the principle of this decision, it seems to me, has been clearly departed from in *Suryanarayana Row* and *Balaramayya* v. *Emperor*(3) (Subrahmania Ayyar, Offg. C.J., and Boddam, J.), *Rahimadulla Sahib* v. *Emperor*(4) (Sir Arnold White, C.J., Wallis and Miller, JJ.) and *Aiyakannu Pillai* v. *Emperor*(2), (Sir Arnold White, C.J., Wallis, Miller, Sankaran-Nair and Pinhey, JJ.), for in all these cases the action taken under section 476, Criminal Procedure Code, was treated as an order liable under certain circumstances to be revised by the High Court. No doubt in those cases the proceedings of the lower Court under section 476, Criminal Procedure Code,

(1) (1903) I.L.R., 26 Mad., 98. (2) (1909) I.L.R., 32 Mad., 49.
(3) (1906) I.L.R., 29 Mad., 100. (4) (1908) I.L.R., 31 Mad. (140 F.B.).

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were held to be subject to revision on the ground that such proceedings were had without jurisdiction but it strikes me that the action of a Criminal or a Civil Court under section 476, Criminal Procedure Code, could hardly be said to be without jurisdiction if it was merely a complaint and not a judicial order or proceeding. Further, though no doubt the High Court can quash or set aside proceedings taken upon a complaint, or the Court to which a complaint is made may refuse to take action upon it, how can the High Court revise the complaint itself and quash it or set it aside? I think therefore that in the decisions referred to the view enunciated in *Eranholi Athan* v. *King-Emperor*(1) has not found acceptance. Under the old Criminal Procedure Code a Full Bench of this Court had held (see *Queen-Empress* v. *Srinivasalu Naidu*(2)) that the High Court acting under section 439, Criminal Procedure Code, has the power to revise an order passed under section 476, Criminal Procedure Code, and in two cases reported in Allahabad Weekly Notes of 1908, pages 22 and 27, the learned Judges of the Allahabad High Court have decided that such power is retained under the present Criminal Procedure Code. In *Eranholi Athan* v. *King-Emperor*(1), however, it is laid down that the legislature has now altered the law on the point by laying down in sub-section (2) of section 476, Criminal Procedure Code, that "such Magistrate shall thereupon proceed according to law and *as if upon complaint made and recorded under section* 200 . . . ." But as it appears to me that the correctness of this ruling requires to be re-considered having regard to a number of later decisions of this Court especially the Full Bench case of *Aiyakannu Pillai* v. *Emperor*(3) proceeding upon a different view of the scope of section 476, Criminal Procedure Code, as amended, I venture with the greatest deference to suggest that the use of the words in italics does not show that the legislature intended thereby that the action of a Court under section 476, Criminal Procedure Code, should be regarded only in the light of a complaint and not as an order within the meaning of section 439, Criminal Procedure Code, but that all that was intended by those words was to indicate to the Magistrate to whom the proceedings have been forwarded, under section 476, Criminal Procedure Code, the procedure he has to adopt in dealing with the

(1) (1903) I.L.R., 26 Mad., 98. (2) (1898) I.L.R., 21 Mad., 124.
(3) (1909) I.L.R., 32 Mad., 49.

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case. And besides, upon principle, jurisdiction expressly conferred can only be withdrawn by express words or if by words of implication when the inference is irresistible.

These cases again came on for hearing in due course before the Full Bench constituted as above.

Dr. *S. Swaminadhan*, *J. L. Rosario* and *S. Ranganatha Ayyar* for petitioners in Criminal Revision Case Nos. 567 and 568 of 1908 and 67 of 1909.

The Public Prosecutor, *contra* in all the cases. The Court expressed the following

OPINION.—We think that the answer to the question referred for our decision must be in the affirmative.

In the case of *Queen-Empress* v. *Srinivasulu Naidu*(1) it was held by a Full Bench of this Court that, where action was taken by a Magistrate under section 476 of the Code of 1882, such action was to be regarded not merely as the lodging of a complaint by the Magistrate but was a proceeding which was tantamount to an "Order" of the Court and was therefore subject to revision by the High Court under section 439 of the Code.

The decision of this Court in the case of *Eranholi Athan* v. *King-Emperor*(2) proceeded on the ground that the legislature in 1898 by the addition of the words "and as if upon complaint made and recorded under section 200" in sub-section (2) of section 476 intended to make it clear that, when action is taken under sub-section (1) such action is not to be regarded as an order but merely as the lodging of a complaint.

We think that this view is erroneous. The addition in sub-section (2) appears to have been introduced in order to give legislative effect to the decision of the Full Bench of the Allahabad High Court in *Ishri Prasad* v. *Sham Lal*(3) and in order to remove the doubts which previously existed as to whether an order under section 476 could be treated as a complaint within the meaning of sections 190 and 195 (*c*), Criminal Procedure Code, and also as to whether the Magistrate to whom the case was sent was bound under section 200 to examine the complainant, *i.e.*, the presiding officer of the Court upon oath.

(1) (1898) I.L.R., 21 Mad., 124. (2) (1903) I.L.R., 26 Mad., 98.
(3) (1885) I.L.R., 7 All., 871.

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The Allahabad High Court in the case referred to held that the order of the Court "was a sufficient complaint within the meaning of section 195."

The words "as if upon complaint made and recorded under section 200" introduced in the Code of 1898 gave effect to this view, and at the same time section 200 was amended by having the words "subject to the provisions of section 476" prefixed to it. The effect of the two amendments was that the order of the Court under sub-section (1) was to be regarded as a complaint and was to be treated as having been recorded under section 200. (See the judgment of Banerji, J., *in re Bhup Kunwar*(1).)

This being, as we think, the correct view to take of the addition made in the Code of 1898, there is no reason to attribute to the legislature any intention to alter the previously existing law as to the revisional powers of the High Court. If such an intention existed, we think that so important a change would have been effected directly by including orders under section 476 among the orders which are declared by section 435 (3) not to be proceedings within the meaning of that section and, therefore, not subject to revision by the High Court, or by some other express words. We may add that the amendment made in 1898 to section 537 to the effect that no order of a competent Court shall be altered on appeal or revision *on account of any irregularity in proceedings taken under section* 476 unless it has, in fact, occasioned a failure of justice, implies that if it has, in fact, occasioned such failure it is subject to appeal or revision.

For these reasons our answer to the reference made to us is that the High Court, as a Court of Revision, has power under section 439, Criminal Procedure Code, to interfere, on grounds other than want of jurisdiction, when a Criminal Court has taken action under section 476, Criminal Procedure Code.

(1) (1904) I.L.R., 26 All., 249 at p. 262.

ORIGINAL CIVIL.

Before Mr. Justice Wallis.

IN THE MATTER OF C. L. CANTHOM & Co., INSOLVENT.* 1909. March 1.

Indian Insolvency Act, 11 and 12 Vic., c. 21, s. 39—Right of set off exists against Official Assignee in respect of bills discounted before and dishonoured after insolvency.

Under sections 39 and 40 of the Indian Insolvency Act, anything can be set off in India which can be set off in England under the Bankruptcy law in force for the time being. Mutual credits which may be set off include credits which have a natural tendency to terminate in debt and not merely credits which must terminate in debts. Claims in respect of bills discounted for the Insolvent before insolvency and dishonoured by the makers after insolvency, can be set off under section 39 of the Indian Insolvency Act.

Miller v. National Bank of India, [(1892) I.L.R., 19 Calc., 149], dissented from. *Young v. Bank of Bengal*, [(1836) 1 Moo. I.A., 87], referred to and explained. *Alsager v. Currie*, (2 M. & W., 751), followed.

THE facts for the purpose of this case are fully set out in the judgment.

C. F. Napier for the Official Assignee.

Nugent Grant for the Chartered Bank.

JUDGMENT.—In this case, the Official Assignee has taken out a garnishee summons calling on the Chartered Bank to show cause why they should not deliver to him Rs.1,330-9-3, being the balance of the insolvents' current account and four trade bills dated the 11th August 1908. According to the agreed statement of facts, these four bills had been sent to the Bank to be discounted on the 11th August, but the Bank had not discounted them on 13th August, the date of the vesting order. As regards these bills it seems clear that no credit or debt had arisen in respect of them on the date of the insolvency and that the Bank can have no claim to set them off. Nor can the Bank claim to retain them by virtue of their lien as Bankers. Such lien under section 170 of the Indian Contract Act is only for the general balance of account, and the balance at the date of insolvency was in the insolvents' favour. The Official Assignee is therefore entitled to succeed as regards these four notes. As regards the sum of Rs. 1,330-9-3, the Bank claim a set off in respect of certain promissory notes payable to the insolvents which the insolvents indorsed to the Bank and the

* Insolvent Petition No. 167 of 1908.

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Bank discounted prior to the insolvency and which have since been dishonoured by the makers. According to the decision of Mr. Justice Trevelyan in *Miller* v. *National Bank of India*(1) there is no right of set off under section 39 of the Indian Insolvency Act in respect of a bill or note which has been discounted for the insolvent but has not been dishonoured until after the date of the insolvency, as if the bill is honoured by the acceptor or the note by the maker, there will be no debt due from the insolvent; and according to the view taken by the learned Judge, it is only claims which of their nature terminate in debts that can be set off under section 39 of the Indian Insolvency Act. As this case had not been cited before me on the first argument, I directed the case to be re-argued. Mr. Napier for the Official Assignee now contends that this decision is in accordance not only with the leading case of *Rose.* v. *Hart*(2), but also with *Young* v. *Bank of Bengal*(3) a decision of the Privy Council on the earlier Indian Act and he invites me to follow these decisions rather than late English cases such as *Alsager* v. *Currie*(4) which go to show that mutual credits which may be set off include credits which have a natural tendency to terminate in debts, and not merely credits which must necessarily terminate in debts. After such consideration as I have been able to give to the authorities I am unable to follow the decision in *Miller* v. *National Bank of India*(1). In the course of his judgment the learned Judge observed that there is nothing in the Indian Act to permit everything provable being set off and I was at first much influenced by this as rendering the late English cases inapplicable to section 39 of the Indian Insolvency Act. This ruling, however, is opposed to the decision of the Privy Council in *Young* v. *Bank of Bengal*(3) already cited in which it was held that under section 36 of 9 Geo. 4, c. 73, the law of set off under the Indian Act was entirely assimilated to the English Act then in force 6 Geo. 4, c. 16. S. 36 of 9 Geo. 4 has, in the present Act, been split up into two sections 39 and 40, but these sections substantially reproduce the language of section 36 of the previous Act. Construing the

(1) (1892) I.L.R., 19 Calc., 146.
(2) 2 Sem. L.C. (9th Ed.) 324; 8 Taunt, 499.
(3) (1836) 1 Moo. I.A., 87.
(4) 12 M. & W., 751.

WALLIS, J.

IN THE MATTER OF CANTHOM.

present sections in the way in which that section was construed by the Privy Council in *Young* v. *The Bank of Bengal*(1) I hold that anything may be set off in India which can be set off in England under the Bankruptcy Law for the time being. In this case the Bank is undoubtedly entitled to prove in respect of the bills discounted by it and dishonoured after insolvency and this being so, it is entitled to set them off, and the present case is on all fours with *Alsager* v. *Currie*(2).

Further, even if we confine ourselves to the language of section 39 of the present Act, I do not think Lord Brougham's judgment in *Young* v. *Bank of Bengal*(1) can be relied as showing that a credit does not arise within the meaning of the section when a bill has been discounted and is outstanding at the date of the insolvency. On the contrary at the bottom of page 149 he observes "supposing the notes discounted then due *or supposing them not due* it would have been a case of credit given to Palmer & Co. by them (the Bank) and of debt due by them to Palmer & Co. and so clearly within the statute." The specific statement that discounting bills is a case of giving credit within the meaning of the section appears to show that some of the general observations in the judgment were not intended to apply to a case such as this; and besides Parke, B., who was one of the members of the committee who heard *Young* v. *Bank of Bengal*(1) explained that decision in *Alsager* v. *Currie*(2) as proceeding upon the ground that no credit of any kind had been given by Palmer & Co. to the Bank before the date of the insolvency and this was the ground taken in Sir William Follett's argument for the appellant which contains one of the fullest and clearest statements of the statute and case law as to mutual credits to be found anywhere.

In the result I hold on this part of the case that the Bank is entitled to set off its claim in respect of the notes discounted before insolvency and since dishonoured.

Official Assignee's costs out of the estate.

David & Brightwell, Solicitors for Chartered Bank.

Short & Bewes, Official Assignee.

(1) (1836) 1 Moo. I.A., 87.
(2) 12 M. & W., 751.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Krishnaswami Aiyar.

1909. November 17, 18, 25.

GANGINENI KONDIAH (PLAINTIFF), APPELLANT,

v.

GOTTIPATI PEDDA KONDAPPA NAIDU (DEFENDANT), RESPONDENT.*

Limitation Act XV of 1877—Sch. II, arts. 49, 145—Where depositary refuses on demand to return thing deposited, art. 145 and not art. 49 applies.

Where moveable property is deposited and the depositary on demand by the depositor refuses to return the thing deposited, the period of limitation applicable to a suit to recover such property is that provided in article 145 and not that in article 49 of the Limitation Act.

The fact that the possession after demand and refusal is wrongful does not make article 49 applicable.

Obiter. Where a thing is deposited for safe custody, the depositor has the right to demand the return of the thing at any time, although the deposit might have been for a term.

SECOND APPEAL against the decree of T. M. Rangachariar, District Judge of Nellore, in Appeal Suit No. 144 of 1906, presented against the decree of R. Narasimham Aiyangar, District Munsif of Kavali, in Original Suit No. 170 of 1905.

The facts for the purpose of this case are sufficiently set out in the judgment.

K. Ramachandra Ayyar for the Hon. The Advocate-General for appellant.

T. V. Seshagiri Ayyar and *P. Nagabhushanam* for respondent.

JUDGMENT.—The question is whether article 145 or article 49 applies to the suit. It is assumed for the purpose of this judgment that there was a deposit by the plaintiff's father with the defendant of a certain jewel. It is found that there was a demand and refusal more than three years before suit. If article 49 applies, the suit is clearly barred. If, on the other hand, the article applicable is 145, the suit is in time. The decisions in *Administrator-General of Bengal* v. *Kristo Kamini Dassee*(1), and *Narmadabai* v. *Bhavani Shankar*(2), are clear authorities in favour

* Second Appeal No. 1055 of 1907.

(1) (1904) I.L.R., 31 Calc., 519. (2) (1902) I.L.R., 26 Bom., 490.

of the applicability of article 145. It is argued for the respondent that article 145 has no application to a case where there has been a demand for the return of the deposit and a refusal by the depositary. In such a case it is said the possession of the defendant which was lawful from the commencement of the deposit becomes wrongful on refusal to return, and therefore the suit becomes one "for other specific moveable property or for compensation for wrongfully detaining the same" and the period of three years provided by article 49 begins to run from the date when the detainer's possession becomes unlawful. We are unable to agree with this contention. Article 145 is the special article dealing with a suit against a depositary to recover moveable property deposited and the period of thirty years provided by it runs from the date of the deposit. Article 49 on the other hand deals generally with a suit for other specific moveable property and it seems to us to have no application where the specific provision contained in article 145 applies. The former article was for the first time introduced into the Limitation Act of 1877. Article 48 of this Act replaced the provisions of articles 47 and 48 of the Limitation Act of 1871, with a slight modification. Assuming that article 49 of the Act of 1877 might cover certain of the cases which fell within the scope of article 48 of the Act of 1871, there is no doubt that it comprises within it several cases for which there was no provision in the specific articles dealing with moveable property in the Act of 1871. But the introduction of this practically new article into the category of articles dealing with the withholding of moveable properties whether such withholding was a tort or a breach of contract cannot be deemed to provide for the cases where the possession of moveable property is transferred to another by reason of a confidential relation such as is involved in a deposit. But apart from the foregoing reasoning it is *primâ facie* clear that all actions for the recovery of a deposit of moveable property are, by the express words of article 145, comprised within it. No exception is made as regards deposits where demand and refusal make the continuance of possession unlawful. The article includes suits against a pawnee for recovery of moveable property. It cannot be contended for a moment that if a pawnee refuses to return the pledge on demand, and thereby makes his possession wrongful there is any other article applicable to the case. There is no reason therefore for

making any distinction in the case of the suit for return of the deposit. It is further necessary to bear in mind the provisions of article 133 of the Limitation Act. It runs as follows:—"To recover moveable property conveyed or bequeathed in trust, deposited or pawned and afterwards bought from the trustee, depositary or pawnee for a valuable consideration . . . . . twelve years from the date of the purchase." This is obviously an abridgment in favour of the purchaser for valuable consideration of the period provided in article 145 in cases of deposit and pledge, and an enactment of a special period of twelve years in the case of a purchaser from a trustee when under section 10 there would be no limitation at all in a suit against the trustee himself. (See Muttusami Ayyar, J., in *Muthu* v. *Kambalinga*(1) and Mitra on 'Limitation,' page 1009.) It is impossible to argue that against the purchaser from a depositary or pledgee there is always a period of twelve years from the date of the purchase no matter whether there has been a demand and a refusal but that against the depositary or pawnee himself who stands in a quasi-fiduciary relation the period of limitation is curtailed to three years under article 49, the detention becoming unlawful after demand and refusal. Articles 133 and 145 have come down from the Limitation Act of 1859 in which the corresponding provisions were section 5 and section 1, clause 15. It would have been impossible to suggest when the Limitation Acts of 1859 and 1871 were in force that the shorter period of six years under the residuary clause 16, section 1 of the Act of 1859 or article 118 of the Act of 1871 was applicable to a suit against a depositary after demand and refusal. No change of legal theory is discernible in the mind of the legislature as regards such a suit in the Act of 1877. The conclusion therefore appears to be inevitable that in a case of deposit of moveable property whether there has been a demand and refusal or not, a suit for its recovery must fall within article 145. It was suggested however in the course of argument that such a view might involve the hardship of preventing the recovery of the deposit altogether where under the terms of the agreement of deposit the article was to remain with the depositary for thirty years or more. If the depositor cannot claim back the deposit before the expiry of the

(1) (1889) I.L.R., 12 Mad., 316 at p. 318.

period, it must be admitted that the difficulty pointed out is real. But is he precluded from claiming back the deposit before the time stipulated? The answer to this question depends upon an exact understanding of the nature of deposit. A deposit is a gratuitous bailment. (See Halsbury's 'Laws of England,' Volume I, section 1074.) In Sohm's 'Institutes of Roman Law', page 292, it is said "Depositum arises when A delivers a moveable thing to B for the purpose of gratuitous safe custody," and again at page 293 "The depositary is not interested in the contract. He derives no benefit from the transaction. . . . . The depositor on the other hand is interested in the transaction; it is for his benefit that the contract exists." In Sandar's 'Justinian' we have the following:—"Here (in deposit) the benefit is entirely on the side of the person who commits the thing to the care of one who receives it gratuitously . . . . . He has, however, no right to make use of the thing." It is further pointed out that "as it is deposited for the benefit of the person depositing it, that person can reclaim it *when he pleases* and need not like the *commodans* wait for the expiration of the time agreed on." Domat in his Civil Law in sections 691, 692 and 697 defines a deposit, and states it as the obligation of the depositary even when a term has been agreed upon to return it when demanded. He says "a deposit is a covenant by which one person gives to another something to keep which he is to restore whenever the depositor shall think fit to call for it. The deposit ought to be gratuitous for otherwise it would be a hiring and the letting to hire where the depositary would let out his care . . . . . Since it is the nature of the deposit that the things are not deposited for the behoof of the depositary, as things lent are for the use of the borrower, but for the bare advantage of the depositor, he may take back the thing deposited *whenever he pleases even although the time of restitution were regulated by the contract.*" (See also Halsbury's 'Laws of England,' Volume I, section 1084.) If this was the view adopted by the Indian Legislature as regards the relation between the depositor and the depositary there would be no place for the suggestion of the hardship already referred to in the case of a deposit for a term, for even in such a case it would be competent to the depositor to claim back the deposit the very next day after the deposit. The Indian Contract Act passed by the Indian Legislature shortly after the Limitation Act of 1871 gives no

definition of deposit though it is one of the species of bailments dealt with in chapter IX of the Act. Section 162 refers to the termination of a gratuitous bailment by the death of the bailor or bailee. Section 158 refers to bailment for safe custody where the bailee is to receive no remuneration. But neither of these sections has anything to say as to the time at which the bailee is bound to return the thing bailed. Section 159, however, goes on to provide that the lender of a thing *for use* may at any time require its return if the loan was gratuitous even though he lent it for a specified time or purpose. It is an *a fortiori* case that the bailee is bound to return a mere deposit for safe custody at any time irrespective of the time specified in the contract. If this view be correct, there can be no doubt that the suggested hardship, in the application of article 145 to cases of deposit for a term exceeding thirty years, cannot possibly arise. In Pollock and Mulla's notes to section 159, a query is put whether an express *contract not to recall* a thing gratuitously lent before the expiration of a certain term, would not be good in British India notwithstanding the section. It is true that there would be no difficulty about the consideration in such a case for the mere acceptance of the deposit would be a sufficient consideration for the promise not to recall it before the expiration of the term. The question whether in the case of a bailment upon a promise not to recall the thing gratuitously lent for thirty years or more, the application of article 145 may not create a hardship, need not make us pause in the application of the article to all cases of suits for the return of moveable property deposited. The above conclusion is no doubt opposed to the *obiter dictum* of Collins, C.J. and Benson, J., in *Ramakrishna Reddy* v. *Panaya Goundan*(1). But we are unable for reasons already set forth to agree with it. *Subbakka* v. *Maruppakkala*(2) has no bearing on the question now under consideration.

Reference was made in the course of the argument to the English Law. There is no provision in the English Law corresponding to article 145. The statute 21 Jac.I., Ch. 15, provides a period of six years next after the cause of action in all actions of detinue. Under this provision a depositary whose detention of the goods becomes wrongful on refusal to deliver after demand, can

(1) (1899) 9 M.L.J., 51. (2) (1892) I.L.R., 15 Mad., 157.

plead the statute successfully if six years have elapsed from the time when the cause of action arises. In *Wilkinson* v. *Verity*(1) approved of by the Court of appeal in *Miller* v. *Dell*(2), it was held that where goods were bailed by the plaintiffs to the defendant for safe custody and the defendant wrongfully sold them, the time ran from the date of the demand for the return of the goods which the defendant refused. This view is in accordance with the opinion of the celebrated Jurist, Pothier. (See 'Pothier on Contracts' by Evans, Volume II, page 126.) He says "where a man deposits money in the hands of another to be kept for his use the possession of the custodee ought to be deemed to be the possession of the owner until an application and refusal or other denial of the right; for until then there is nothing adverse and I conceive that upon principle no action should be allowed in these cases without a previous demand; consequently that no limitation should be computed further back than such demand." This was accepted by North, J., *in re Tidd*(3), as a correct statement of the English Law on the subject. However correct this may be as a statement of the principle on which a rule of limitation should rest as regards an action against a depositary for the return of the deposit, there can be no question that it is not the foundation on which the article 145 of the Limitation Act rests. We have to apply the Law in India as we find it. We must therefore hold that the District Judge is wrong in dismissing the suit as barred by Limitation.

The decision of the lower Appellate Court is reversed and the suit remanded for disposal according to law. The costs will abide and follow the result.

(1) (1871) L.R., 6 C.P., 206. (2) (1891) 1 Q.B., 468.
(3) (1893) 3 Ch., 154 at p. 156.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Abdur Rahim.

1909. August 25, 26. September 28.

SADAGOPA CHARIAR (PLAINTIFF), APPELLANT,

v.

RAGHUNATHA CHARIAR AND OTHERS (DEFENDANTS), RESPONDENTS.*

Decree, transfer of—Transfer takes effect from date of transfer and not from date of its recognition by Court.

Where a decree is transferred by an instrument in writing, such transfer takes effect from the date of such instrument and not from the date of its recognition by the Court.

Puthiandi Mammed v. *Avalil Moidin*, [(1897) I.L.R., 20 Mad., 157], considered.

The transfer of a decree may, in the absence of a contract to the contrary, be regarded as conditional upon the Court granting the transferee permission to execute. The transferee, before repudiating the transfer, is bound to do all that is reasonably necessary to obtain such permission.

SECOND APPEAL against the decree of F. D. P. Oldfield, District Judge of Tanjore, in Appeal Suit No. 821 of 1906, presented against the decree of K. S. Lakshmi Narasiyer, District Munsif of Valangiman, in Original Suit No. 271 of 1905.

The facts for the purpose of the report of this case are sufficiently set out in the judgment.

S. Srinivasa Ayyangar and *N. R. K. Thathachariar* for appellant.

The Hon. The Advocate-General and *T. Gopaladesika Chariar* for second and third respondents.

T. Rangaramanuja Chariar for first respondent.

JUDGMENT.—The only question which need be considered is whether the suit is maintainable. The first defendant owed money to the plaintiff. To discharge the debt the first defendant on the 28th January 1904, transferred to the plaintiff by assignment in writing under exhibit B, the decrees in Original Suits Nos. 61 and 62 of 1902 on the file of the District Munsif's Court of Valangiman. On the 22nd April 1904 these decrees were attached before judgment by the Subordinate Judge's Court of Kumbakonam in a suit brought by a third party against the first defendant. The plaintiff did not apply for execution of the decrees

* Second Appeal No. 1289 of 1907.

MUNRO AND ABDUR RAHIM, JJ.

SADAGOPA CHARIAR v. RAGHUNATHA CHARIAR.

until 1905. His application to the District Munsif of Valangiman in respect of the decree in Original Suit No. 61 was dismissed on the 27th March 1905 on the ground that the decree had been attached by the Subordinate Judge's Court. The application in respect of the decree in Original Suit No. 62 was put in on the 13th July 1905, and was dismissed by the District Munsif on the 18th July, because the plaintiff's pleader did not press it. On the 27th July 1905 the plaintiff repudiated the assignment under exhibit B, and then brought the suit, out of which the second appeal arises, to recover the original debt. The District Munsif gave the plaintiff a decree, but the District Judge dismissed the suit. Under section 486, Civil Procedure Code (Act XIV of 1882) an attachment before judgment is effected in the manner provided for the attachment of property in execution of a decree for money. When therefore the decrees in Original Suits Nos. 61 and 62 on the file of the District Munsif were attached before judgment by the Subordinate Judge's Court, the District Munsif was bound under the second paragraph of section 273, Civil Procedure Code (Act XIV of 1882) to stay execution until the attachment was cancelled. The District Munsif dismissed the plaintiff's application for execution not on any ground affecting the validity of the transfer of the decrees, but simply because he had no power at the time to allow execution. The plaintiff was not, however, left without a remedy. Under section 487, Civil Procedure Code (Act XIV of 1882) it was open to him to present a claim to the attaching Court, and, if he had done so and had established his transfer, it would have been the duty of the attaching Court to withdraw the attachment, in which case it would have been open to the plaintiff to apply again under section 232, Civil Procedure Code (Act XIV of 1882) for the execution of the decrees. We say it would have been the duty of the attaching Court to withdraw the attachment in the case supposed, because by the assignment in writing the property in the decrees passed to the plaintiff, so that the decrees were no longer liable to be attached as the property of the first defendant.

It has been suggested on the strength of certain observations in *Puthiandi Mammed* v. *Avalil Moidin*(1), that the property in the

(1) (1897) I.L.R., 20 Mad., 157.

decrees had not passed to the plaintiff prior to the attachment before judgment, because he had not obtained permission to execute the decrees under section 232, Civil Procedure Code (Act XIV of 1882). We do not think it necessary to read the decision in the case quoted as laying down—a thing it does not do in plain terms—that when a decree has been transferred by assignment in writing the property in the decree does not pass to the transferee at the time of the assignment, but passes only after the transfer has been recognised by the Court. If, however, the learned Judges did intend to lay down such a proposition, we should, with great respect, be unable to agree with them. There is nothing in section 232, Civil Procedure Code, to suggest anything of the kind. On the other hand it can be gathered from the section itself that the completion of the transfer does not depend upon any recognition by the Court, for it begins by saying "If a decree be transferred by assignment in writing," thus assuming that there has been a complete transfer. In *Badri Narain* v. *Jaikishen Das*(1) it was held that a person who, within the meaning of section 232, Civil Procedure Code, is a transferee of a decree is a representative within the meaning of section 244, Civil Procedure Code, *quâ* the decree, of the party to the suit under whom he, by assignment in writing, has derived title to the decree, and that it is the assignment in writing, and not the recognition by the Court, which makes such transferee a representative of a party to the suit. This decision was followed by this Court in *Virasami Rowth* v. *Boli Naikan*(2) which was approved in *Subbuthayammal* v. *Chidambaram Asari*(3).

Now there can be no doubt that the plaintiff having taken the assignment under exhibit B in discharging of the debt due to him, was not entitled to repudiate it without good cause. When the decrees were attached before judgment, it was his property that was attached, and it was clearly his duty when he became aware of the attachment to take steps to have the attachment removed by presenting a claim to the attaching Court on the strength of exhibit B. No doubt the transfer of a decree may, in the absence of anything to the contrary, be regarded as conditional upon the Court granting permission to the transferee to execute and it

(1) (1894) I.L.R., 16 All., 483. (2) C.M.S.A., No. 60 of 1899 (unreported).
(3) (1902) I.L.R., 25 Mad., 383.

seems to us that it was upon this principle that *Puthiandi Mammed* v. *Avalil Moidin*(1) was decided. The transfer in that case was not recognised by the Court and the plaintiff was in consequence unable to obtain the full fruits of the assignment to him. But the transferee is bound to do all that is reasonably necessary in order to obtain the permission of the Court. Until he had at least preferred a claim to the attaching Court and that had been rejected, the plaintiff was not entitled to treat the assignment under exhibit B as ineffectual. We therefore think the suit is not maintainable and dismiss the appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Sankaran-Nair.

1909. July 7, 8. August 19.

DAVID NADAR (PLAINTIFF), APPELLANT,

v.

MANIKKA VACHAKA DESIKA GNANA SAMBANDA PANDARA SANNADI (DEFENDANT), RESPONDENT.*

Review—Power of Collector to review his own order.

The Collector has no power to review his own order refusing to interfere with an order passed by his subordinate, confirming a sale for arrears of land revenue.

SECOND APPEAL against the decree of H. Moberly, District Judge of Tanjore, in Appeal Suit No. 1336 of 1905, presented against the decree of C. S. Mahadeva Iyer, District Munsif of Shiyali, in Original Suit No. 300 of 1904.

The facts for the purpose of this case are fully stated in the judgment.

T. Rangachariar, *B. Panchapagesa Sastry* and *R. Kuppusami Ayyar* for appellant.

T. Narasimha Ayyangar for respondent.

JUDGMENT.—The suit lands were purchased by the plaintiff at an auction sale for arrears of revenue on the 12th June 1901. The sale was confirmed by the Deputy Collector on the 16th

(1) (1897) I.L.R., 20 Mad., 157.
* Second Appeal No. 651 of 1906.

MUNRO AND SANKARAN. NAIR, JJ.

DAVID NADAR v. MANIKKA VACHAKA DESIKA GNANA SAMBANDA PANDARA SANNADI.

August 1901 and on the 10th October 1901, the plaintiff was put in possession under section 40 of the Revenue Recovery Act by the District Munsif. An application was made to the Collector on the 8th May 1902 to set aside the sale, but the Collector by his order of the 6th September 1902 declined to interfere. A review petition was then presented on the 8th October 1902, and the Collector passed an order cancelling the attachment. This order is not happily worded but we have no doubt that the Collector by his order meant that the sale was cancelled. The defendant then applied to the District Munsif for restitution and the District Munsif put him in possession of the lands. The plaintiff now sues to recover possession of the lands. The point for determination is whether the Collector after declining to interfere with the sale was entitled to review his own order. The power of review which, it is contended, the Collector has, is not granted by any statute, and we are not aware of any principle on which it can be held that he has power to review his own order. Assuming that under Regulation 7 of 1828, the Collector has power to interfere with an order passed by his subordinate confirming a sale, a power which under that Regulation is subject to no limit of time, we are certainly not prepared to go further and say that a Collector has power to review his own orders and that too without limit of time. No clear authority has been quoted in support of the existence of such power of review. The cases of *Badaricharya* v. *Ramachandra* and *Ramsing* v. *Babu Risansing*(1) are cases under a special Act and came before the Court under section 622 of the Civil Procedure Code (Act XIV of 1882). We are not prepared to hold on the strength of those decisions that the Collector has the power of review contended for. We also hold that the suit is neither barred by limitation nor by *res judicata*. We therefore reverse the decrees of the Courts below and give the plaintiff a decree for possession with costs throughout. Under order XX, rule 12 (1) (*c*), we direct the District Munsif of Shiyali to hold an enquiry as to the amount of mesne profits due from the institution of the suit till the occurrence of one of the three events specified in order XX, rule 12 (1) (*c*), and to decree that sum to the plaintiff.

(1) (1895) I.L.R., 19 Bom., 113 and 116.

APPELLATE CIVIL.

Before Sir Ralph S Benson, Officiating Chief Justice, and Mr. Justice Sankaran-Nair.

COOPPOOSAMI CHETTY (PLAINTIFF), APPELLANT,

v.

DURAISAMI CHETTY AND OTHERS (DEFENDANTS), RESPONDENTS.*

1909. September 3, 7.

Defamation—Words imputing loss of caste, when actionable—Privilege—Caste usage.

It is open to one member of a caste to refuse to associate with another for what he considers to be an infringement of caste rules; and no Court can call upon him to assign a reason for not associating.

It is not however open to one member to call another an outcaste.

The caste or the majority of them may expel a member from the caste. The Courts will interfere if he is so expelled without being given a proper opportunity for explanation.

Words which impute unworthiness to remain a member of the caste are defamatory and give rise to a cause of action; and where the words used are ambiguous, it must be decided on evidence whether they were intended to bear a libellous meaning.

Where a libellous communication is made regarding a member of a caste, the mere fact that the person making such communication is a member of the caste, will not of itself suffice to make the communication privileged.

APPEAL against the decree of C. V. Kumaraswami Sastriar, City Civil Judge of Madras, in Original Suit No. 64 of 1908.

The facts of this case are fully stated in the judgment.

The Hon. Mr. *V. Krishnaswami Ayyar* and *C. Narasimha Chariar* for appellant.

S. Subrahmania Ayyar for first to fifth respondents and *T. Narasimha Ayyangar* for sixth to ninth respondents.

JUDGMENT.—The plaintiff who it is alleged belongs to Vanuva class, a sub-division of the Vaisya community, married in June 1905 with the sanction of the caste Guru one of his daughters to one Venugopala Chetty, a High Court Vakil, who also is alleged to belong to the same sub-division. The plaint alleges that the defendants in collusion with others "intending to disgrace the

* City Civil Court Appeal No. 29 of 1908.

plaintiff and to cause it to be believed that the marriage connection was improper and low and that the plaintiff thereby became an outcaste, falsely and maliciously from time to time performed or caused to be performed prayaschittam or purification ceremony to various persons that dined in the plaintiff's house or ousted or caused to be ousted such persons from private houses when assembled for feasts, etc.," and, after referring to a few instances, states finally on the occasion of the death of the mother of one Vilvapathi Chetti and Rukmangatha Chetti, plaintiff himself attended the karmanthiram ceremony on invitation when the defendants intending to injure the plaintiff, his name and credit, and to cause it to be believed that plaintiff became an outcaste, falsely and maliciously spoke and published of the plaintiff, the words following, "Prayaschittam must be performed as Cooppoosami Chetty attended the karmanthiram, and openly caused prayaschittam to be performed to Rukmangatha Chetty falsely and maliciously meaning and intending thereby that the plaintiff was an outcaste" and it is also alleged that the plaintiff has been injured in credit and reputation, and has lost his position as a kariasthan of the community. The plaintiff therefore sues for damages. The suit was dismissed by the City Court Judge on the ground that the plaint does not disclose any cause of action. The plaintiff appeals. The only question, therefore, for consideration is whether, if the facts stated in the plaint are proved, the plaintiff would be entitled to any relief.

The Judge is of opinion that every member of a caste is entitled to have his own views about the propriety or otherwise of the conduct of another person as regards real or supposed caste customs or usages, and if the defendants and certain other members of the caste 'boycott' the plaintiff and his friends for what they considered to be his transgression of caste rules, a Civil Court has no jurisdiction to interfere. This power to 'boycott' implies also the power to indicate the course which the plaintiff and others who associate with him must adopt if they wish to purge themselves of what was in the defendants' eyes a caste offence, and to associate with them. They were therefore entitled to insist upon prayaschittam by the plaintiff. The Judge further held that prayaschittam does not necessarily imply that plaintiff is outcaste. It may be required for any transgression of caste rules, and as there is no allegation in the plaint that the defendants called the

plaintiff an outcaste, he held that the suit was not maintainable and dismissed it.

The Judge is, of course, right in holding that it is open to the defendants to refuse to associate with the plaintiff, on account of what they consider to be a breach of any caste rule. In fact they might do so without being called upon by the Courts to give any reason. They might also impose any conditions they liked upon the plaintiff if the latter wished to associate with them. But the question before us is very different.

It is conceded before us and it is established by decided cases that it is defamatory to call a person an outcaste. A caste, no doubt, is a voluntary association of persons for certain purposes. It is open to a person to leave it. But every Hindu, at any rate the majority of them, are born into some caste or other. Their status and their relations towards the other castes are defined and fixed by the caste to which they belong. Their matrimonial relations, their laws of inheritance and generally their religious and social rights and duties also are determined by their caste. That many of these duties are only of imperfect obligation and not legal makes no difference so far as the question before us is concerned. A person cannot be deprived of the membership of the caste except in accordance with caste usage. The caste as a body, or the majority of them, may no doubt expel him, but if they do so without giving him an opportunity of explanation, the Civil Courts will interfere. *Krishnasami* v. *Virasami*(1). The decided cases show that their procedure must be in accordance with usage and that the excommunication must not be opposed to natural justice. Words, therefore, which are intended to bring about disastrous consequences resulting from the loss of caste, such as deprivation of religious and social communion, by imputing unworthiness to any person to continue a member of his caste, are *primâ facie* defamatory and give rise to a cause of action. They certainly may lower him in the estimation of his own caste and of other castes. Prayaschittam by itself, it is true as stated by the Judge, may not indicate any kind of excommunication. But prayaschittam for a caste offence as a condition for readmission into religious or social communion certainly implies provisional excommunication which is removed when prayaschittam is

(1) (1887) I.L.R., 10 Mad., 133.

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performed. Where the meaning of the imputation is ambiguous, evidence is admissible to explain its meaning. The plaint, in our opinion, alleges that prayaschittam was insisted upon in this case on account of the plaintiff being an outcaste and the plaintiff is entitled to prove that this is the meaning of the words used. As observed by Lord Blackburn in *Capital and Counties Bank* v. *Henry* (1): "If the words were reasonably capable of a meaning which in the opinion of the Court would be libellous on the plaintiffs personally, I think there can be no doubt that it ought to have been left to the jury to say whether the words bore that meaning."

That the defendants are members of the same caste makes no difference at this stage of the suit, when we are not considering the question of privilege. A man may be excommunicated or otherwise punished for a caste offence. But that jurisdiction must be exercised only by the caste and "with due care and in conformity to the usage of the caste." If the caste by a majority arrive at a certain conclusion as pointed out by the learned Chief Justice in *Thiagaraya* v. *Krishnasawmi*(2), it would be intolerable to allow a few dissentients to circulate defamatory statements about a person, because they believed that in a caste dispute a wrong conclusion was arrived at." The caste may delegate its powers in respect of caste offences wholly, or in part, to a Raja as in the case of *Vallabha* v. *Madusudanan*(3) or to a Guru, *Ganapati Bhatta* v. *Bharati Swami*(4), the *Queen* v. *Sankara*(5) where Muthusami Ayyar, J., points out that if the majority of the caste had accepted the widow marriage as valid, there would have been no need to take the consent of the Guru. In such cases it would be in accordance with caste usage that any purely caste offence should be inquired into and dealt with by the Raja or Guru to whom the power is delegated. It is not for a Civil Court to impose an ecclesiastical head on any caste or any member of the caste. As pointed out in *Tholappalacharlu* v. *Venkatacharlu*(6) it is entirely within the option of any individual member of a caste and therefore also within the option of the caste whether he or they will submit to the Guru or not. But so long as he continues a member of the caste he

(1) (1882) L.R., 7 A.c., 777.
(2) (1892) I.L.R., 15 Mad., 217.
(3) (1889) I.L.R., 12 Mad., 495.
(4) (1894) I.L.R., 17 Mad., 222.
(5) (1883) I.L.R., 6 Mad., 384.
(6) (1896) I.L.R., 19 Mad., 62 at p. 64.

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submits to its rules and traditions and to the jurisdiction of the caste or the Guru, to whom the powers may have been delegated to inquire into his conduct so far as caste offences are concerned. But this in no way implies that any member of a caste like the defendants is entitled to take the matter into his own hands and denounce the plaintiff as an outcaste. He has to prove that his statements were privileged communications. And for that purpose may rely upon his membership of the caste, to show his interest or duty. But that in itself does not render his statements privileged communications.

On the ground then that the words complained of are capable of being understood to imply that the plaintiff was an outcaste, and as it is open to the plaintiff to prove that the words were, in fact, intended to convey that imputation having regard to the time and place and manner of utterance and all other relevant facts which may be duly proved, we are of opinion that the plaint does disclose a cause of action and that the suit is therefore maintainable.

We accordingly reverse the decree of the lower Court and remand the suit for disposal according to law.

Costs will abide the result.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Abdur Rahim.

1909. July 5, 6, 23.

SIVACHIDAMBARA MUDALIAR AND ANOTHER (FIRST AND FOURTH DEFENDANTS), APPELLANTS,

v.

KAMATCHI AMMAL AND OTHERS (PLAINTIFF, SECOND AND THIRD DEFENDANTS AND SECOND DEFENDANT'S LEGAL REPRESENTATIVE), RESPONDENTS.*

Limitation Act XV of 1877 s. 23, Sched. II, art. 36, 115, 116—Transfer of Property Act, ss. 76, 92—Mortgagor's right to compensation for property not delivered to him is based on a continuing obligation and time does not run till redemption—Time runs under art. 36 of Limitation Act from date of tort and not from date of knowledge.

Under section 92 of the Transfer of Property Act, the mortgagor on paying the mortgage debt is entitled to be put in possession of the mortgaged properties and the obligation to do so is a continuing obligation on the mortgagee which cannot cease so long as the right of redemption is not barred.

* Civil Miscellaneous Appeal No. 155 of 1907.

The right of the mortgagor under section 76 of the Transfer of Property Act to have accounts taken and to debit the mortgagee with the loss caused to the mortgaged property is cumulative and does not take away the remedy under section 92 of the Act.

Where the mortgagee in possession who is bound by the terms of the mortgage deed to pay the Government revenue due on the land neglects to do so and the mortgaged land is sold, a suit for compensation by the mortgagor, brought more than six years after such sale and less than six years from the date of the decree in the redemption suit brought by the mortgagor, is not barred under articles 115 and 116 of the Limitation Act read with section 23 of the Act.

The express covenant in the mortgage deed by the mortgagee to pay the Government revenue only states in words the liability of the mortgagee under section 76 of the Act and does not curtail the general obligation of the mortgagee under the Act.

In suits for compensation for tort to immoveable property, the period of limitation prescribed in article 36 of Schedule II of the Limitation Act runs from the date of the tort and not from the time when the plaintiff has knowledge of such tortious act.

APPEAL against the order of F. D. P. Oldfield, District Judge of Tanjore, dated the 4th day of February 1907, in Appeal Suit No. 574 of 1906, presented against the decree of J. Sundaranana Row, District Munsif of Tirutturaippundi, in Original Suit No. 272 of 1905.

The facts of this case appear in the judgment.

G. Krishnaswami Ayyar for appellant.

T. Subrahmania Ayyar and *T. V. Vaidyanatha Ayyar* for respondents.

JUDGMENT.—The question is whether the plaintiff's, first respondent's, claim for damages, in respect (1) of certain items of landed property mortgaged by her to the first defendant, first appellant, by a registered deed of usufructuary mortgage and wrongfully suffered by the latter to be sold in default of payment of arrears of revenue which he was under an obligation to pay and (2) of certain trees wrongfully cut by the first appellant during the time he was in possession of the mortgaged property, is barred. We agree with the District Judge that the suit is not barred in so far as it seeks compensation for loss of the land which the mortgagee failed to deliver to the mortgagor when the latter obtained a decree for redemption against the former on the 5th November 1902 and on paying the full amount due under the mortgage. Other properties mortgaged under the deed were delivered to the mortgagor. The first respondent filed the

present suit on the 6th November 1905, *i.e.*, within six years of the institution of the redemption suit, Original Suit No. 291 of 1901, and the date of the decree in that suit, but more than six years after the revenue sale. The learned pleader for the appellants contends that time began to run from the date of the sale because by a covenant in the deed of mortgage the mortgagee covenanted to pay the Government revenue, and the loss arose from a breach of that covenant. He therefore urges that the mortgagor was bound to sue for the loss sustained by her within six years of that breach or she might at the time the decree for redemption was passed have asked that accounts might be taken and the mortgagee debited with the loss under section 76 of the Transfer of Property Act if that gave the mortgagor further time, but she was not entitled to any more time. As regards section 76 of the Transfer of Property Act we are clearly of opinion that it provides a cumulative remedy, and is not intended to operate as a bar to any other remedy which the mortgagor might have under the law. The mortgagee was under an obligation under section 92 of the Transfer of Property Act on being paid the debt due to him to put the mortgagor into possession of the property, and that is in the nature of a continuing obligation which cannot be said to cease so long as the mortgagor's right to redeem is not barred. That being so, the case falls under articles 115 and 116 of the Limitation Act (XV of 1877) read with section 23 of that Act. But it is argued that the obligation of the mortgagor to pay the Government revenue is embodied in an express covenant in the mortgage deed, but the covenant only states in so many words the liability of the mortgagee under the law as enacted in section 76 of the Transfer of Property Act, and it has not been shown to us that the covenant in any way curtails the general obligation of the mortgagee which must be taken to be an implied term of the contract.

As regards the claim in respect of the trees cut by the first appellant the case seems to us to be covered by the general article (36) of the Limitation Act (XV of 1877) relating to suits for compensation in tort, and the starting point of limitation would be the date of the cutting of the trees which admittedly took place sometime before 1901. That section provides two years, and this portion of the claim must therefore be held to be barred. The learned Judge in the lower Appellate Court seemed

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to think that because the first respondent had no knowledge of the cutting before she instituted the suit for redemption, time would run only from the date of her knowledge. But under article 36, the time from which the period begins to run is the date of the alleged malfeasance or misfeasance, and the knowledge of the plaintiff has nothing to do with the question. The decree of the lower Appellate Court will therefore be modified so far that the order of remand made by it will hold good only in respect of the plaintiff's first respondent's claim for the loss of the land. Each party will bear their own costs of the appeal.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Abdur Rahim.

1909. March 9, 10.

MUTHUKUMARASAMI ROWTHER MINDA NAYINAR, MINOR, BY HIS NEXT FRIEND KACHY KALYANA RANGAPPA KALAKKA THOLA ODAYAR (PETITIONER, SECOND DEFENDANT), APPELLANT,

v.

KUPPUSAMI AIYANGAR AND OTHERS (COUNTER-PETITIONERS Nos. 1, 3, 4 AND 5—PURCHASERS), RESPONDENTS.*

Sale, order for stay of—Order becomes effective only when communicated to the lower Court.

An order by the Appellate Court for stay of sale takes effect only when communicated to the lower Court; and a sale by the lower Court after the passing of the order but before the order was communicated is valid.

Beseswari Chowdhurany v. *Horrosundar Mozumdar*, [(1892) 1 Calc. W.N., 226], followed.

Hukum Chand Boid v. *Kamalanand Singh*, [(1906) I.L.R., 33 Calc., 927], not followed.

APPEAL against the order of T. V. Anantan Nair, Subordinate Judge of Kumbakonam, in Execution Application No. 962 of 1906, in Original Suit No. 33 of 1893.

The facts of the case are fully set out in the judgment.

T. Natesa Ayyar for appellant.

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* Civil Miscellaneous Appeal No. 218 of 1907.

WHITE, C.J., AND ABDUR RAHIM, J.

MUTHUKUMARASAMI ROWTHER MINDA NAYINAR v. KUPPUSAMI AIYANGAR.

K. Srinivasa Ayyangar for second respondent and *S. Muthia Mudaliyar* for fourth respondent.

JUDGMENT.—It is admitted that when the sale took place the order for stay made by this Court had not been communicated to the Subordinate Court.

We think the order only became effective when communicated to the Subordinate Court. On this question we prefer to follow the judgment of the Calcutta High Court in *Beseswari Chowdhurany* v. *Horrosundar Mozumdar*(1) rather than the later judgment in *Hukum Chand Boid* v. *Kamalanand Singh*(2).

There is authority for the proposition that a sale in violation of an order for stay is an irregularity (see "Freeman on Execution," articles 32, 33). Though we are not prepared to say the view of the Subordinate Judge that the sale was an irregularity was wrong, we prefer to rest our judgment on the ground stated.

The appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Abdur Rahim.

1909. August 13, 25.

KALIAPPAN SERVAIKARAN (PLAINTIFF-PETITIONER), APPELLANT,

v.

VARADARAJULU (MINOR) BY HIS NEXT FRIEND SINGARAVELU THEVAR AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, *s.* 252—*Decree against assets of deceased in the hands of representative is a decree against representative—Such decree executable only against such representative or his representative.*

In a suit brought against A the widow of a deceased person as his representative, a decree was passed directing the recovery of the sum sued for from the estate of the defendant's deceased husband in her hands. Another person B brought a suit against A to establish his title to the property of the deceased and having obtained a decree in his favour took possession of the estate.

The decree-holder sought to execute the decree against B under section 252 of the Code of Civil Procedure:

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(1) (1892) 1 Calc. W.N., 226. (2) (1906) I.L.R., 33 Calc., 927.

* Civil Miscellaneous Second Appeal No. 18 of 1906.

Held, that the decree was not against the estate but against A, the legal representative and was capable of execution only against A and her representatives *Subbanna* v. *Venkatakrishnan*, [(1888) I.L.R., 11 Mad., 408], followed.

APPEAL against the order of F. D. P. Oldfield, District Judge of Tanjore, in Appeal Suit No. 798 of 1907, presented against the order of T. S. Thiagaraja Aiyar, District Munsif of Mannargudi, in Execution Petition No. II, Execution Petition Register No. 354 of 1907 (Original Suit No. 47 of 1906).

The facts for the purpose of this case are sufficiently stated in the judgment.

C. V. Anantakrishna Ayyar for appellant.

G. S. Ramachandra Ayyar for respondents.

JUDGMENT.—The appellant sued in Original Suit No. 47 of 1906 to recover the amount due on a pronote executed by one Muthuchella, the deceased. He made the widow of Muthuchella defendant in the suit, and, on the 23rd March 1906, got an *ex parte* decree empowering him to recover the amount due under the note "from the estate of the defendant's deceased husband in her hands." The decree also directed the defendant to pay the appellant a certain sum for his costs. The deceased Muthuchella left daughters but no son. Prior to the institution of Original Suit No. 47 of 1906, above referred to, Varadarajulu, son of one of the daughters, brought a suit (Original Suit No. 14 of 1904) against the widow of the deceased and others to establish a will executed by the deceased in his favour and to recover the property bequeathed to him thereunder. The suit was dismissed on the 27th September 1905, and it was while an appeal was pending in the District Court that the decree in Original Suit No. 47 of 1906 was obtained. The District Court upheld the will and gave the plaintiff Varadarajulu a decree on the 27th August 1906. Varadarajulu took delivery through the Court of the properties decreed to him The appellant then put in Execution Petition No. 351 of 1907 in Original Suit No. 47 of 1906 and prayed that Varadarajulu might be added as second defendant as representative of the widow, the original sole defendant, and that execution might proceed against the properties of the deceased Muthuchella. The District Munsif ordered Varadarajulu to be brought on record as representative of the deceased Muthuchella's estate and allowed execution to proceed. On appeal the District Munsif's order was set aside.

The argument before us is that the decree in Original Suit No. 47 of 1906 was a decree against the estate of the deceased Muthuchella; that at the time that suit was brought the widow was the proper person to represent the estate, Varadarajulu's suit having been dismissed in the first Court; and that as Varadarajulu was subsequently found to be the proper person to represent the estate he cannot object to being brought on record in execution, and to execution proceeding. This argument is based upon a misconception. When a person is sued as the legal representative of a deceased person for the recovery of a debt due by the deceased, and a decree is given for money to be paid out of the assets of the deceased in the hands of the legal representative, the decree is none the less a decree against the legal representative. Section 252, Civil Procedure Code, makes this clear. It refers to the legal representative as the judgment-debtor and it makes him personally liable under certain circumstances. It follows that such a decree can only be executed against the legal representative who was made defendant in the suit or his or her representatives. Varadarajulu is not a representative of the widow, and the decree obtained against her cannot be executed against him. This view is supported by *Subbanna* v. *Venkatakrishnan*(1) in which the cases bearing on the point are considered. There the plaintiff got a decree against the mother of one Subbaraya as his legal representative on a bond executed by him being unaware that Subbaraya had left an adopted son. It was held that the plaintiff was not entitled to execute the decree as against the estate of Subbaraya in the hands of the adopted son. There is no material distinction between the facts of that case and the facts of the present case. In that case the plaintiff believed that the mother was the heir of the deceased. In the present case all that the plaintiff can say is that he believed the widow was the heir of the deceased. The fact that his belief may have been based on the circumstance that Varadarajulu's suit failed in the first Court can make no difference in principle. (*Sudindra* v. *Budan*(2)) has no application to the present case. There the decree was against a mutt, and not against the person on the record representing the mutt. As was pointed out in *Babajirao Gambhirsing* v. *Laxmandas Guru*

(1) (1888) I.L.R., 11 Mad., 408. (2) (1886) I.L.R., 9 Mad., 80.

MUNRO AND ABDUR RAHIM, JJ.

KALIAPPAN SERVAIKARAN v. VARADARAJULU.

Raghunathdas(1) "a math, like an idol, is in Hindu Law a judicial person capable of acquiring, holding and vindicating legal rights, though of necessity it can only act in relation to those rights through the medium of some human agency. When the property is vested in the math, then litigation in respect of it has ordinarily to be conducted by, and in the name of, the manager, not because the legal property is in the manager, but because it is the established practice that the suit would be brought in that form (see *Maharanee Shibessouree Debia* v. *Mothooranath Acharjo*(2), *Juggodumba Dossee* v. *Puddomoney Dossee*(3), *Rupa Jagshet* v. *Krishnaji Govind*(4), *Manohar* v. *Lakhmiram*(5) and *Kondo* v. *Babaji*(6)). But a person in whose name a suit is thus brought has in relation to that suit a distinct capacity: he is therein a stranger to himself in his personal and private capacity in a Court of law." As has already been shown the decree in the present case is not against the estate but against the legal representative. This appeal fails and is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Miller.

1909. March 31.

VYTHINADA AIYAR (FIRST DEFENDANT—RESPONDENT), APPELLANT,

v.

VYTHINADA AIYAR *alias* NARAYANAPPA AIYAR, INSANE REPRESENTED BY M. R. SRINIVASA AIYAR, NEXT FRIEND (PLAINTIFF—PETITIONER), RESPONDENT.*

Compromise after decree, execution of—Adjustment of mesne profits after decree enforceable by execution—When decree becomes incapable of execution.

Where, in a suit for land and mesne profits, the decree leaves the amount of mesne profits undetermined, the suit to that extent remains undisposed of and it is open to the parties to adjust that portion of the suit by a lawful compromise; and a decree made in accordance with the terms of such compromise can be enforced by execution.

(1) (1904) I.L.R., 28 Bom., 215 at p. 223. (2) (1869) 13 M.I.A., 270 at p. 274.
(3) (1875) 15 Beng. L.R., 318 at p. 330. (4) (1885) I.L.R., 9 Bom., 169.
(5) (1888) I.L.R., 12 Bom., 247. (6) (1881) P.J., 337.

* Civil Miscellaneous Second Appeal No. 39 of 1908.

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Where such compromise provides that the amount of mesne profits must be recovered by execution first against certain land, execution cannot be taken against the person of the judgment-debtor, merely because the land is not immediately available for sale in execution. It must be shown that the obstacle is one which cannot be removed.

APPEAL against the decree of F. D. P. Oldfield, District Judge of Tanjore, in Appeal Suit No. 83 of 1908, presented against the order of C. S. Venkataramana Rau, District Munsif of Mannárgudi, in E.P. No. 4 E.P.R. 467 of 1907 in Original Suit No. 36 of 1900.

In a suit for partition by the plaintiff a decree was passed awarding his share in the family properties and mesne profits from date of suit to be determined in execution. On a petition being presented for ascertaining the amount of mesne profits, the parties entered into a compromise by which the amount of mesne profits was fixed and it was provided that the amount should be recovered by execution first against certain land. The plaintiff in execution attached such land but the attachment was raised in a claim petition by a third party. Plaintiff thereupon applied for execution against the person of the first defendant. The District Munsif dismissed the application.

On appeal, the District Judge reversed the order and allowed execution.

Defendant appealed to the High Court.

The Hon. the Advocate-General for appellant.

T. R. Venkatrama Sastri and *V. Purushothma Aiyar* for respondent.

JUDGMENT.—We are unable to accede to the contention that it was beyond the power of the Court to execute as a part of the decree the agreement of the parties that the mesne profits should be recoverable by execution first against the land described as the third sethi land.

The amount of mesne profits was left undetermined by the decree and to that extent the suit remained undisposed of. In effect there still remained one issue for disposal, and it was open to the parties to adjust that part of the suit by a lawful compromise. The cases to which the Advocate-General drew our attention support this view of the matter, (*Radha Prasad Singh* v. *Lal Sahab Rai*(1), *Muhammad Umarjan Khan* v. *Zinat Begam*(2)

(1) (1891) I.L.R., 13 All., 53 at p. 65. (2) (1903) I.L.R., 25 All., 385.

BENSON AND MILLER, JJ.

VYTHINADA AIYAR v. VYTHINADA AIYAR.

and *Ánando Kishore Dass Bakshi* v. *Anando Kishore Bose*(1)). The decree made in terms of this compromise can be executed. We do not agree with the District Judge that it has become impossible to fulfil the contract. No doubt there is an obstacle which prevents the immediate execution of the decree by sale of the land, but, until it is shown that that obstacle cannot be removed, the execution cannot be said to have become impossible. In deed it was not contended before us that the contract is impossible of fulfilment but that we ought to construe the agreement as containing a condition that if the land is not immediately available for execution the plaintiff is entitled to proceed with his other remedies. We are unable to read this condition into the razinama.

The application for execution against the person of the first defendant was therefore in our opinion premature and we allow the appeal with costs here and in the lower Appellate Court and restore the District Munsif's order dismissing the petition.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Abdur Rahim.

1909. September 1.

ENDOORI VENKATARAMANIAH (DEFENDANT—JUDGMENT-DEBTOR), APPELLANT,

v.

VENKATACHAINULU AND ANOTHER (TRANSFEREE DECREE-HOLDER AND PLAINTIFF), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, *s.* 232—*Transfer of portion of decree valid—Decree for maintenance, assignability of.*

The transferee of a portion of a decree is a transferee of the decree within the meaning of section 232 of the Code of Civil Procedure of 1882.

The transfer of a decree for maintenance to the extent of the arrears, that had accrued due up to the date of transfer, is valid and may be recognised by the Court if the judgment-debtor will not be prejudiced by such recognition.

APPEAL against the order of A. L. Haunay, District Judge of Vizagapatam, in Appeal Suit No. 30 of 1908, presented against the order of T. N. Lakshmana Row, District Munsif of

(1) (1887) I.L.R., 14 Calc., 50 at p. 53.

* Civil Miscellaneous Second Appeal No. 84 of 1908.

BENSON AND ABDUR RAHIM, JJ.

ENDOORI VENKATA-RAMANIAH v. VENKATA-CHAINULU.

Vizagapatam, in Execution Petition No. 607 of 1907 and Miscellaneous Petition No. 1081 of 1907 (Original Suit No. 563 of 1877).

The second respondent had obtained a decree for maintenance against the appellant. She transferred the decree so far as it related to the arrears accrued due to the first respondent who applied under section 232 of the Civil Procedure Code of 1882 to be recognised as the transferee decree-holder. His application was rejected by the District Munsif. On appeal the District Court set aside the order of the Munsif and allowed the application.

The judgment-debtor appealed to the High Court.

S. Srinivasa Ayyangar for appellant.

V. Ramesam for first respondent.

JUDGMENT.—In this case what was transferred was not the whole maintenance decree but only that portion of the decree which related to arrears of maintenance that had already accrued due, that being the only portion of the decree which could be transferred. The question is whether the transfer should be recognised by the Court under section 232 of the Code of Civil Procedure. It is contended that the transfers contemplated in section 232 of the Code of Civil Procedure are transfers of the whole decree, and that a transfer of a portion cannot be recognised. *Kishore Chand Bhakat* v. *Gisborne & Company*(1), which was approved in *Muthunarayana Reddi* v. *Balakrishna Reddi*(2), is against this view and we are prepared to follow it. The transfer then may be recognised if the Court thinks the case a proper one. We see no reason in this case why the transfer should not be recognised. The transfer is of all the arrears due up to the date of the transfer and it is not shown that the judgment-debtor will be in any way injured by the recognition of the transfer. As to the contention that a decree for maintenance cannot be transferred, that contention can have no force in so far as the transfer of the decree in respect of arrears accrued is concerned, and that is all that has been transferred. The appeal is dismissed with costs.

(1) (1890) I.L.R., 17 Calc., 341. (2) (1896) I.L.R., 19 Mad., 306.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Abdur Rahim.

1909. August 25.

HAJEE SHAIK MEERA ROWTHER (APPELLANT), PETITIONER,

v.

THE PRESIDENT OF THE CORPORATION OF MADRAS (RESPONDENT), RESPONDENT.*

City Municipal Act (Madras) III of 1904, s. 120—'Exercising a trade,' what amounts to.

Where a person has a servant at A, who purchases piece-goods there and forwards them to B, where they are sold and the profits are earned, such person 'exercises his trade' within the meaning of section 120 of the Madras City Municipal Act at B and not at A.

There may be kinds of business in which the buying of goods is the most important part of the business and in such cases it cannot be said that the profits are earned elsewhere.

CASE stated under section 176 of the Madras City Municipal Act by Messrs. J. R. Coombes and P. Rajaratnam Mudaliar, Second and Third Presidency Magistrates, Georgetown, Madras, in Criminal Case No. 37342 of 1908.

The facts are sufficiently stated in the judgment.

T. Narasimha Ayyangar for *C. R. Tiruvenkatachariar* and *K. R. Krishnaswami Ayyangar* for *T. Narasimhachariar* for appellant.

P. Duraiswami Ayyangar for respondent.

JUDGMENT.—In this case the question is whether the appellant exercises his trade in the town of Madras within the meaning of section 120 of the Madras City Municipal Act, III of 1904. Under that section a man is not liable to pay any profession tax if he carries on a trade elsewhere, but only does some act in Madras incidental to the exercise of such trade. On the other hand it is not necessary that all the acts incident to the carrying on of his trade should be done in Madras to make him liable under section 120. The question therefore is whether the appellant, who is a trader in piece-goods and has a shop in Tinnevelly where he sells the goods and earns his profit, can be said to carry on the trade here because he buys his goods at Madras through a servant who forwards them to Tinnevelly. He has no office here, and the

* Referred Case No. 1 of 1909.

servant who buys the goods, so far as it appears merely carries out his orders. No doubt in certain kinds of business the buying of the goods may be the most important and difficult part of the business, and it is not a conclusive test in such cases that profits are earned elsewhere. There can be no doubt, however, on the facts of this case that the appellant carries on his trade in Tinnevelly and not in Madras. In holding this we follow the principle laid down in *Sulley* v. *The Attorney General*(1), *San Paulo Brazilian Railway Company (Limited)* v. *Carter*(2) and *Lovell and Christmas (Limited)* v. *Commissioner of Taxes*(3). The answer to the reference will therefore be that the appellant is not liable to be taxed under section 120 of the Municipal Act.

MUNRO AND ABDUR RAHIM, JJ.

HAJEE SHAIK MEERA ROWTHER v. THE PRESIDENT OF THE CORPORATION OF MADRAS.

APPELLATE CRIMINAL.

Before Mr. Justice Benson and Mr. Justice Miller.

1909. April 22.

THE CROWN PROSECUTOR (APPELLANT),

v.

MOONOOSAMY AND OTHERS (ACCUSED).*

City Police Act (Madras) III of 1888, s. 75—Arrack shop is a place of "public resort" within section.

The public have a right, under the terms of the license granted to arrack shopkeepers, to resort to such shops and such shops are places of public resort within the meaning of section 75 of the Madras City Police Act III of 1888.

APPEAL under section 417 of the Code of Criminal Procedure against the judgment of acquittal passed on the accused in Criminal Case No. 23186 of 1908 by Mir Sultan Mohiuddin, Esq., Presidency Magistrate of Egmore.

JUDGMENT.—The accused were charged by the police with an offence punishable under section 75, Madras City Police Act III of 1888, in that they were drunk and disorderly in a certain arrack shop. The Presidency Magistrate acquitted the accused

(1) (1860) 5 H. & N., 711.
(2) (1895) 1 Q.B., 580.
(3) (1908) A.C., 46.
* Criminal Appeal No. 172 of 1909.

BENSON AND MILLER, JJ.

THE CROWN PROSECUTOR v. MOONOO-SAMY.

on the ground that an arrack shop is not "a place of public resort" within the meaning of section 75. The Crown Prosecutor on behalf of Government appeals against the acquittal on the ground that the Magistrate's decision on the question is erroneous and that the decision is of general importance from the point of view of public order and good conduct. We think that the view of the Presidency Magistrate is erroneous.

The words of the section are—

"Whoever is found drunk and incapable of taking care of himself, is guilty of any riotous, disorderly or indecent behaviour in any street or thoroughfare, in any place of public amusement or resort, or on board any passenger boat or vessel, and whoever is guilty of any violent, disorderly or indecent behaviour in any Police Court, office or station, shall be liable on conviction to fine not exceeding fifty rupees, or to imprisonment not exceeding one month, or to both."

The Magistrate is clearly wrong in supposing that the doctrine of *ejusdem generis* should be applied in considering the scope of the section. The words "boat or vessel" cannot possibly be regarded as *ejusdem generis* with street or thoroughfare, and there is no more reason for construing "any place of public amusement or resort" with reference to that doctrine than there is for applying the same doctrine to the words "boat or vessel." We think that if the words of section 75 be read in connection with section 23 of the Act and with due advertence to the mischief which the section is intended to prevent and to the terms of the license under which the shop is kept open, it will be clear that an arrack shop is "a place of public resort" within the meaning of the section. An arrack shop is on a very different footing from an ordinary private shop. The vend of arrack is a State monopoly and is subject to control by the State. Under the terms of the license the shopkeeper is bound to keep his shop open unless authorised by the Collector to close it permanently or temporarily, and he is also bound to maintain a supply of arrack as prescribed. This connotes a right on the part of the public to resort to the shop to satisfy their legitimate requirements in regard to arrack. Under section 23, a Police officer is bound to use his best endeavours "to apprehend disorderly characters" and for that purpose may without a warrant "enter and inspect any drinking shop, gaming house or other place of resort of loose or disorderly characters."

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THE CROWN PROSECUTOR v. MOONOO-SAMY.

The public have a right to resort to arrack shops and we think that it is place of public resort within the meaning of the section.

It is now six months since the accused were discharged, and the Crown Prosecutor does not press that their retrial should be now ordered as the offence was a petty one. He only desires to have the question of law correctly settled. We therefore set aside the order of acquittal as made under an erroneous view of the law, but do not think it necessary to order a retrial of the accused.

APPELLATE CRIMINAL.

Before Mr. Justice Miller.

VELU TAYI AMMAL AND OTHERS, PETITIONERS,

v.

CHIDAMBARAVELU PILLAI, RESPONDENT.*

1909. August 13, 18, 19, 24.

Criminal Procedure Code—Act V of 1898, ss. 437, 119—Power to order further inquiry under s. 437 does not extend to order of discharge under s. 119.

The power conferred by section 437 of the Criminal Procedure Code to order further inquiry cannot be exercised in the case of orders of discharge under section 119 of the Code, where the Magistrate before making the order of discharge, has called upon the person, into whose conduct the inquiry is made, to establish his defence.

The word 'discharged' in section 437 must be read as equivalent to 'discharged within the meaning of sections 209, 253 and 259 of the Code.'

PETITION, under sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the order of J. F. Bryant, Additional District Magistrate of Madura, in Criminal Revision Case No. 34 of 1908, preferred against the order of M. Saketharam Naidu, Sub-Divisional Magistrate of Dindigul in Miscellaneous Case No. 13 of 1908.

At the instance of the counter-petitioner, notices were issued under section 107, Criminal Procedure Code, by the Sub-Divisional Magistrate to the four petitioners calling upon them to shew cause why they should not be bound over to keep the peace for one year as they were likely to cause a breach of peace by interfering with the possession of a palace by counter-petitioner.

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* Criminal Revision Case No. 104 of 1909.

MILLER, J.

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The Sub-Divisional Magistrate recorded evidence and heard vakils on both sides and passed orders discharging the four petitioners under section 119 of the Criminal Procedure Code.

The counter-petitioner thereupon moved the Additional District Magistrate who directed a fresh inquiry under section 437 of the Criminal Procedure Code.

The petitioners presented petition under sections 435 and 439 of the Code to the High Court.

T. Rangachariar and *K. Parthasarathy Ayyangar* for petitioners.

The Public Prosecutor, *contra.*

T. Subramania Ayyar and *P. S. Subramania Ayyar* for respondent.

ORDER.—The only cases so far as I know in which a Magistrate is authorised by the Criminal Procedure Code to discharge a person whose conduct is under enquiry before him are those provided for in sections 209, 253, 259, 119 and 484 of the Code.

I am not concerned with section 484 but it might be difficult, I think, to hold that section 437 is applicable to the case of a person discharged under that section.

The discharge under sections 209, 253 and 259 is made before the accused is called on to establish his defence before a Court which is competent to try and determine the case, and in cases in which a charge must be drawn up before any order can be made against the accused or penalty imposed upon him. Section 437 undoubtedly applies to disposals under sections 253 and 259, and may be applicable to a disposal under section 209 also.

The discharge under section 119 is a different matter. It may be made after the defence has been fully heard, no charge need be drawn up before the case is disposed of under section 118, and, if the accused (as I call him for convenience) is in custody there is no discharge but an order of release.

The question is, does section 437 apply to this case?

I think not. For the reasons which I am about to give, I think I shall give effect to the real intention of the Legislature if I read the word 'discharged' in section 437 as equivalent to 'discharged within the meaning of sections 209, 253 and 259 of the Code.'

It is clear to me that the legislature would not have made a distinction between an order of release and a discharge if they

MILLER, J.

VELU TAYI AMMAL v. CHIDAMBARA-VELU PILLAI.

had not intended that the two should be regarded as different things. They have not made any such distinction in sections 209, 253 and 259. If then these two things are different it is impossible, I think, to apply section 437 to the 'discharge.' The Code does not authorise its application to a release which is not a discharge and it would be absurd to make the jurisdiction under section 437 depend upon the question whether or not the accused (I use the expression again for convenience only) was in custody at the time of the disposal of the case by the Magistrate. I am not prepared to attribute such an absurdity to the framers of the Code, especially when, as here, it is easy by giving a non-technical sense to the word 'discharge' to bring the procedure in regard to inquiries under chapter VIII into harmony with the provisions of the Code in analogous cases.

There is no difficulty in holding that the 'discharge' of section 119 is merely a 'permission to depart'; the word 'charge' as applied to offences is used in two senses in the Code: in chapter XIX and in sections 210 and 254 it is the formal statement of the case which the accused has to meet, in section 253 it is used in the popular sense of 'accusation.'

Similarly discharge may have two meanings, and section 119 indicates that its meaning in that section is non-technical. The record is completed by the entry required by the section: the Magistrate then permits "the person in respect of whom the inquiry is made" to depart if he is not in custody and if he is in custody directs the custodian to give the necessary permission.

Now this may be done after the Magistrate has been satisfied after hearing evidence for the defence that the execution of a bond is unnecessary, and it seems to me that it would be wrong in principle to permit a 'further inquiry' in such a case. The inquiry is into conduct and so is analogous to an inquiry into an offence; and it is to be made in the manner prescribed for conducting the trial of an offence (section 117 (2)).

When a person accused of an offence has by evidence adduced on his behalf satisfied a Magistrate competent to try him and punish him if he is guilty, that he ought not to be convicted, the Code does not contemplate a 'further enquiry' by order of a superior Magistrate. The High Court alone can interfere in that case.

MILLER, J.

VELU TAYI AMMAL v. CHIDAMBARA-VELU PILLAI.

I am unable to see any reason why a difference should be made in the analogous case of an inquiry under chapter VIII. When after hearing the defence evidence the Magistrate is satisfied that the execution of a bond is unnecessary, a 'further inquiry' into the case is to my mind an inappropriate remedy if the Magistrate is thought to be wrong.

It may be that the law does not prohibit the taking of new proceedings under the chapter on the same materials, but that is a different matter on which I need not express an opinion.

I am thus fortified in the conclusion at which I had arrived by the process of *reductio ad absurdum* by a consideration of the matter on the general principles of the Code, and I have no doubt that the legislature did not intend, and that I ought not to hold that the jurisdiction given by section 437 should be applied to cases under chapter VIII, at any rate, where before making an order under section 119 the Magistrate has called on the person into whose conduct the inquiry is made to establish his defence. It might perhaps be possible by analogy to apply section 437 to disposal under section 119, made in circumstances resembling those in which a discharge is made under section 253, but the case before me is not such a case. The defence has been heard and the Magistrate is satisfied that a bond is unnecessary.

I must therefore set aside the order of the District Magistrate as made without jurisdiction.

I am asked on behalf of the original complainant (so to style him) to interfere under section 439 but the Public Prosecutor does not support this request, and I agree with him that it is unnecessary to order a *de novo* inquiry. There is clearly nothing to prevent the taking of fresh action under chapter VIII if the conduct of the petitioners hereafter is such as to render that course necessary or desirable.

APPELLATE CRIMINAL.

Before Mr. Justice Wallis and Mr. Justice Munro.

AMBAKKAGARI NAGI REDDY AND OTHERS (ACCUSED), PETITIONERS,

v.

BASAPPA OF MEDIMAKULAPALLI (COMPLAINANT), RESPONDENT.*

1909. February 9.

Criminal Procedure Code—Act V of 1898, s. 250—In appeals under s. 250, notice to accused not imperative.

In appeals under section 250 of the Criminal Procedure Code, it is not imperative that notice should be given to the accused.

PETITION, under sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the judgment of G. Suryanarayana Naidu, First-class Deputy Magistrate of Gooty, in Criminal Appeal No. 63 of 1908, presented against the judgment of T. Muthusawmy Pillai, Second-class Magistrate of Gooty Taluk, in Criminal Case No. 379 of 1908.

The facts for the purpose of this case are sufficiently set out in the judgment.

C. Sidney Smith for petitioners.

S. Renganadha Ayyar for respondent.

The Public Prosecutor for the Crown.

ORDER.—We think that it would be much better if, in cases of appeal under section 250, notice were given to the accused as he is the party prejudiced if the appeal is allowed and the order for compensation rescinded. Section 250 (3), however, provides that there shall be an appeal from an order under the section as if such complainant or informant had been convicted on a trial held by such Magistrate, and section 422 provides explicitly for cases in which notice of appeal is to be given to the Public Prosecutor and the accused, but says nothing of any notice being given to persons in the position of the petitioners. In *Emperor* v. *Palaniappavelan*(1) there was no notice to the Public Prosecutor which was clearly required by section 250 read with section 422, and the interference of the High Court in revision may be supported on this

* Criminal Revision Case No. 607 of 1908.

(1) (1906) I.L.R., 29 Mad., 187.

ground. But in this case we can see no illegality and we are not prepared to interfere. We may observe that, if the appeal succeeds, the petitioners will not be called on to refund as section 250 (4) provides that the compensation shall not be paid to him until the appeal is decided. The petition is dismissed.

APPELLATE CRIMINAL.

Before Sir Ralph Sillery Benson, Officiating Chief Justice, and Mr. Justice Abdur Rahim.

KRISHNA REDDY AND OTHERS, PETITIONERS,

v.

EMPEROR, RESPONDENT.*

Criminal Procedure Code—Act V of 1898, s. 195—Superior Court has no jurisdiction to order further inquiry by Subordinate Court.

A superior Criminal Court to which an appeal has been preferred under section 195 of the Criminal Procedure Code against an order of an inferior Criminal Court granting sanction, has no power to take or call for further evidence. The power to do so given by section 428 is limited to appeals under that chapter.

PETITION, under sections 195 (*b*), 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the order of L. E. Buckley, District Magistrate of Salem, in Criminal Revision Case No. 81 of 1908, presented against the order of the Stationary Second-class Magistrate of Namakkal in Miscellaneous Case No. 10 of 1908.

The facts for the purpose of this case are sufficiently set out in the judgment.

K. Ramanath Shenai for petitioners.

The Public Prosecutor, *contra*.

ORDER.—In the case of *Rama Aiyar* v. *Venkatachella Padayachi*(1) it was held that a District Judge had no jurisdiction to order further enquiry by a District Munsif in regard to a matter dealt with by him under section 195, Criminal Procedure Code. It was held that such jurisdiction was not inherent, because not incidental to the proper exercise of the powers given

* Criminal Revision Case No. 83 of 1909.

(1) (1907) I.L.R., 30 Mad., 311.

to the District Court by the section, nor were they given by any section of the Civil or Criminal Procedure Code.

Though that was in a Civil Court and the present case arose in a Criminal Court, we think the same reasoning must be held applicable. The power to take, or call for, further evidence given by section 428, Criminal Procedure Code, is expressly limited to appeals under that chapter, *i.e.*, under chapter 31 of the Code. Section 195 is not part of that chapter nor does the section itself give any power to call for further evidence.

We must therefore hold that the District Magistrate had no power to make the order calling for further evidence. We set aside the order and direct the District Magistrate to restore the case to his file and deal with it according to law.

APPELLATE CIVIL.

Before Sir R. S. Benson, Officiating Chief Justice, and Mr. Justice Sankaran-Nair.

CARALAPATHI CHUNNA CUNNIAH AND OTHERS (DEFENDANTS), APPELLANTS,

v.

COTA NAMMALWARIAH (PLAINTIFF), RESPONDENT.*

1909. August 25.

Indian Succession Act, X of 1865, ss. 82, 187—Will—Bequest to widow, how to be construed.

Section 187 of the Succession Act does not debar a defendant from relying on a will, in respect of which no Probate or Letters of Administration have been taken out, as he is not seeking to establish a right as executor or legatee.

In a case to which the Hindu Wills Act applied, a testator made a bequest to his widow in the following terms:—"I give all the remaining properties of every sort which fell to my share to my wife Andalu. Therefore, the aforesaid Andalu herself should enjoy all the remaining properties":

Held, on the construction of the will, that the widow took only a limited estate. The operation of the ordinary rule of Hindu Law that a bequest to a wife, without words creating an absolute estate, conferred only a limited interest, was excluded by section 82 of the Succession Act. The fact that the donee was a widow, the absence of words of inheritance, and of words conferring powers of alienation were not sufficient to show that she took only a restricted interest.

* Original Side Appeal No. 12 of 1908.

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CARALAPATHI CHUNNA CUNNIAH v. COTA NAMMALWA-RIAH.

These circumstances, however, coupled with the recital in the will that she should "enjoy" the estate, indicated the intention of the testator that she should have no powers of alienation.

APPEAL from the judgment and decree of J. Boddam, dated 29th January 1908, in the exercise of the ordinary original civil jurisdiction of this Court in Civil Suit No. 200 of 1906.

The facts of this case are fully set out in the judgment.

The Hon. The Advocate-General and *K. Srinivasa Ayyangar* for appellants.

The Hon. Mr. *V. Krishnaswami Ayyar* and *V. V. Srinivasa Ayyangar* for respondent.

JUDGMENT.—It was first argued before us that the defendants are not entitled to claim under the will as they have not taken out Probate or Letters of Administration. Section 187 of the Indian Succession Act is relied upon. But it has been decided that a defendant is not precluded by that section from relying upon a will as he is not seeking to establish a right as executor or legatee (See *Janaki* v. *Dhanu Lall*(1)).

The next question is whether under the will left by Cota Theperumaliah who died in 1874, his widow took an absolute estate or only a widow's estate. After making certain bequests the testator made the gift in question in the following terms:—"I give all the remaining properties of every sort which fell to my share to my wife Andalu. Therefore my aforesaid wife Andalu herself should enjoy all the remaining property." Under section 82 of the Succession Act "where property is bequeathed to any person, he is entitled to the whole interest of the testator therein, unless it appears from the will that only a restricted interest was intended for him." This is undoubtedly in conflict with the rule that where a husband bequeaths immovable property to his wife without words expressly creating an absolute estate, she takes only a widow's interest. This rule is based on the fact that a Hindu presumably knows that widows do not take absolute estates of inheritance which they are entitled to alienate. We cannot now apply this rule to cases to which section 82 applies. We can restrict the widow's interest therefore only if the other terms of the will justify such restriction. The circumstances that she is a widow, that there are no words of inheritance,

(1) (1891) I.L.R., 14 Mad., 454.

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or words authorising her to alienate, are not in themselves sufficient to show that the widow takes only a restricted estate, as in such cases there is no presumption to be raised under section 82; the words themselves showing that she took an absolute estate. But we may take the circumstances into consideration in construing the other provisions of the will. The recital in the will that his wife should "enjoy" the property is important to indicate the intention of the testator. He does not leave any specific property to his wife and without words of inheritance or words empowering her to alienate which are usually inserted when it is intended to give an absolute estate, he leaves the property to her to 'enjoy.' We are inclined, therefore, to think he did not intend that his widow should have the power to alienate the estate. At the time of the will and of his death, he had a nephew and daughters and it is not likely that he intended to enable the widow to alienate the estate to strangers. We therefore dismiss the appeal and the memorandum of objections with costs.

APPELLATE CIVIL.

Before Sir R. S. Benson, Officiating Chief Justice, Mr. Justice Miller and Mr. Justice Sankaran-Nair.

IN THE MATTER OF DESU MANAVALA CHETTY, APPELLANT.* 1908. July, 16, 19. 1909. August 20.

Court Fees Act VII of 1870, s. 19-I (1) and III schedule—"Property held in trust not beneficially"—Undivided share of deceased coparcener not 'property held in trust not beneficially'—Surviving coparcener applying for Letters of Administration liable to pay court-fees on the value of share of deceased coparcener.

Under the Mitakshara Law as administered in this part of India, an undivided coparcener has power to mortgage or alienate his undivided share and he can at any time enforce partition of his own share. He cannot therefore be said to hold his own share of the undivided property "as trust-property," not beneficially or with general power to confer a beneficial interest in it, within the meaning of these words as used in Annexure B of the form for valuation in Schedule III of the Court Fees Act, although, as regards the shares of others, he may be said to so hold them.

* Original Side Appeal No. 43 of 1908.

BENSON, C.J., MILLER AND SANKARAN-NAIR, JJ.

IN THE MATTER OF DESU MANAVALA CHETTY.

Where a surviving coparcener governed by the Mitakshara Law, applies for Letters of Administration in respect of property standing in the name of a deceased coparcener, which was joint family property of the applicant and the deceased, he is bound to include in the valuation of the property, the value of the share to which the deceased was entitled at the moment of his death and he cannot under section 19-I (1) of the Court Fees Act, obtain Letters of Administration to the joint family property, unless he includes such share in the valuation and pays the proper *ad valorem* court fees upon it.

In the goods of Pokermull Augurwallah, [(1896) I.L.R., 23 Calc., 980], referred to—not followed.

In the goods of Brindbun Ghose, [(1873) 11 B.L.R., App. 39], followed.

APPEAL from the judgment of Boddam, J., dated the 30th day of April 1908, in the original Testamentary jurisdiction of this Court in original petition No. 149 of 1907.

The facts of this case are set out in the judgment.

P. R. Sundara Ayyar and *H. Sitaramaswami* for appellant.

The Hon. The Advocate-General on behalf of Government.

JUDGMENT—THE OFFICIATING CHIEF JUSTICE.—In this case one Manavala Chetty prayed for Letters of Administration in respect of property standing in the name of his deceased father, Emberumanar Chetty, but forming the joint ancestral property of the undivided Hindu family of which the petitioner and his late father were the only members. He stated that though his father's share in the property passed to him by survivorship, he was obliged to take out Letters of Administration because part of the property consisted of shares in certain companies which in accordance with their articles of association, refused to recognise his title to the shares unless he obtained such letters. He claimed to be exempt from payment of stamp duty on the letters on the ground that his father was in possession of the property, and held it as manager of, and trustee for, the family. The learned Judge who heard the application decided that Letters of Administration could be granted only on payment of the ordinary duty. Against this decision the petitioner appeals.

Section 19-I (1) of the Court Fees Act, 1870, as amended by Act XI of 1899, provides that "no order entitling the petitioner to the grant of Probate or Letters of Administration shall be made upon an application for such grant until the petitioner has filed in the Court a valuation of the property in the form set forth in the third schedule, and the Court is satisfied" that the proper fee has been paid "on such valuation."

BENSON, C.J., MILLER AND SANKARAN-NAIR, JJ.

IN THE MATTER OF DESU MANAVALA CHETTY.

That form consists of an affidavit with two annexures, in one of which, annexure A, is to be specified the property and credits of the deceased, and in annexure B, is to be set forth the items which the applicant "is by law allowed to deduct." Among these items are "property held in trust not beneficially or with general power to confer a beneficial interest" and "other property not subject to duty." The question is, whether the property for which the petitioner seeks Letters of Administration can be said to come under either of these categories, and, if so, whether wholly or partially. The petitioner contends that the property was trust property in the hands of the deceased, and he relies on the decisions in the cases of *In the goods of Pokurmull Augurwallah*(1) and *The Collector of Kaira* v. *Chunilal*(2), and also on two unreported decisions of this Court. It is to be observed that in the Calcutta cases there was no argument and the decision proceeded on a statement drawn up by the taxing officer in which great stress was laid on the fact that under the Mitakshara Law (as administered in Bengal) "an undivided coparcener cannot dispose of his share in the joint property, unless in case of necessity, without the consent of his coparceners." In neither the note of the taxing officer nor in the order of the Court, is there any reference to the words "not beneficially or with general power to confer a beneficial interest" which follow the words "property held in trust," in annexure B. In the case of *The Collector of Kaira* v. *Chunilal*(2), the chief question considered was whether the limited grant sought for in that case could be granted at all. The character of the property as trust property was not discussed in the judgment, but was held to be concluded by the decision in *In the goods of Pokurmull Augurwallah*(1). In neither of the unreported cases in this Court was the question argued. In the earlier of them (*In re T. Swaminatha Aiyar deceased*), the question was raised by the taxing officer in a "note for orders" in which he referred to *In the goods of Pokurmull Augurwallah*(1), as supporting the petitioner's contention that the ancestral joint property was held by the deceased as trust property and therefore not liable to duty on taking out Letters of Administration, and the learned Chief Justice accepted the suggestion of the taxing officer. In the later case, no "note for orders" is forthcoming but Wallis, J.,

(1) (1896) I.L.R., 23 Calc., 980. (2) (1905) I.L.R., 29 Bom., 161.

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seems to have followed the precedent "*In re Swaminatha Aiyar.*" Thus it would seem that the two precedents in this Court, and also the Bombay case followed the decision in *In the goods of Pokurmull Augurwallah*(1). But in this Presidency, differing from Bengal, it has long been held that under the Mitakshara Law as administered in this part of India an alienation by sale or mortgage by an undivided member of his interest in the joint family property, is valid (*Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya*(2)). He can also at any time enforce partition of his own share. That being so, it seems impossible to hold that the property in the present case was held by the deceased, so far at least as his own share in it was concerned, "as trust property, not beneficially or with general power to confer a beneficial interest in it." He could have claimed partition, or he could have sold or mortgaged his undivided share and have applied the proceeds to any purpose he pleased. In my opinion, therefore, the interest of the deceased in the joint family property in the present case, does not come within the category of "property held in trust, not beneficially or with general power to confer a beneficial interest"; nor do I think that it is possible to hold that it comes within the only other category in annexure B which the vakil for the petitioner argues is applicable; viz., "other property not liable to duty." These words must refer to some exemption from liability enacted by the Statute Law, as, for example, under section 19-C, of the Court Fees Act or under an authority conferred by the Statute Law, as, for example, an exemption by Government under the authority conferred by section 35 of the Court Fees Act; but no such exemption is alleged in the present case.

In the goods of *Brindabun Ghose deceased*(3), two brothers were the only coparceners in a joint Hindu family. One of them, Brindabun, died; and the other, *Bristodoss*, applied for and obtained Letters of Administration in respect of Brindaban's half share in the joint family property on payment of *ad valorem* duty on such half share, and Sir R. Couch, C.J., held that Bristodoss' half share "should be treated as trust property and be exempted from the two *per centum ad valorem* fee."

(1) (1986) I.L.R., 23 Calc., 980. (2) (1902) I.L.R., 25 Mad., 690.
(3) (1873) 11 B.L.R., App. 39; (S.C.) 19 W.R., 230.

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A similar view was taken by Petheram, C.J., in the case of property held in common by Europeans with right of survivorship (*In the goods of Froeschman*(1)).

I think that the view taken in these cases is that which we should follow. The deceased, Emberumanar Chetty, cannot be said to have held his own share of the joint family property in trust and not beneficially, though he may be said to have held his son's share in that way. If, therefore, the son desires Letters of Administration to the joint family property he must pay the *ad valorem* duty on so much of the property as was not "property held on trust not beneficially or with general power to confer a beneficial interest"; that is, on the father's share in the property, or to be more exact, on the share which his father was entitled to claim at the moment before his death. This interpretation of the words is not, I think, open to any objection on principle; nor will its adoption entail any practical difficulty, at least in this Presidency.

I would therefore modify the order of the learned Judge, and, with reference to section 19 I (1) of the Court-fees Act (as amended by Act XI of 1899), I would inform the appellant that no order entitling him to Letters of Administration will be made on his application until he shall have filed in Court a valuation of the property corrected in accordance with the view stated above and has paid the proper fee on such valuation. If this is done, an order will issue for the grant of Letters of Administration to the petitioner.

MILLER, J.—I have no doubt that the applicant is a person to whom Letters of Administration may be granted under section 23 of the Probate and Administration Act. He is a person who, by the personal law of the deceased and himself, would be entitled to the whole or part of the estate of the deceased. He would take his father's property if his father died intestate leaving property.

And it seems clear to me that the ancestral joint family property passing to the applicant by survivorship, is "property of the deceased" within the meaning of the Act (section 4), and therefore included in the "Property and Credits" of section 77, that is to say, in the "estate" of the definition of administrator

(1) (1893) I.L.R., 20 Calc., 575.

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in section 3. Inasmuch then as this property does not in the present case "pass by survivorship" to any one other than the applicant, there seems to be no doubt that the applicant is entitled to Letters of Administration which will vest it in him.

As to the question whether he is entitled to deduct this property before valuing the estate for duty, both parties seem to be content to take it that the applicant's share of it is exempt from duty, as being property held by the deceased "in trust not beneficially": the share of the applicant is one half; that is what he would have got, if the property had been divided just before the death of the deceased; and the contest between the Advocate-General and Mr. Sundara Ayyar is as to the other half which on the supposed division would have become the separate property of the deceased. Both sides, as I understood the argument, accepted Annexure B in Schedule III of the Court-fees Act as containing an exhaustive description of the classes of property on which duty is not leviable: it was not suggested that there exists any notification under section 35 of the Court-fees Act, which could affect the decision in this case.

Mr. Sundara Ayyar contends that the share in dispute is either "property held in trust not beneficially" or else other "property not liable to duty."

It is, he argues, other property not liable to duty, because (1) under the Act there is nothing else which that description can properly be made to include, and (2) it will not in all cases vest in the administrator. If it does not vest in the administrator, it is unreasonable to levy duty on it, and if duty is not leviable in that case, uniformity requires that it should not be leviable where it does vest in the administrator.

As to the first argument, even without section 35 which seems to give power to the Government to declare any class of property "property not liable to duty," I do not think we should be justified in reading the heading in Annexure B as declaring the existence of property not described in the other headings, and yet, not liable to duty. The existence of the heading does not involve the existence of any class of property which can fall under it.

As to the second argument; it is Mr. Sundara Ayyar's contention that property of the deceased will vest or will not vest in the administrator according as he is or is not a person to whom the property passes by survivorship. If that is not unreasonable,

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I fail to see why it is unreasonable to levy duty on all that vests in the administrator, though that may differ with the person entitled to administer. I accept Mr. Sundara Ayyar's contention that the former proposition is the law, and I fail to see why I should hold that the latter is not.

Then remains the question, whether the property is "property held in trust not beneficially." In the earlier cases in the Calcutta High Court, the share of the deceased seems to have been treated without argument as not exempt (*vide In the goods of Brindabun Ghose*(1)); but later in Calcutta (*In the goods of Pokurmull Augurwallah*(2)) and in Bombay (*The Collector of Kaira* v. *Chunilal*(3)) the whole property seems to have been treated as exempt, no question being argued as to the share of the deceased himself; and in this Court the Chief Justice has decided, apparently without contest, in accordance with this view, and has been followed by Wallis, J., also in a case in which Government was not represented.

I prefer the older view. I take it that one principal reason for the exemption from duty, of property vested in the deceased as a trustee, is that the beneficiary, out of whose pocket the payment would come, acquires nothing by the trustee's death. That consideration certainly does not apply to the applicant in the present case. However, the test laid down by the Act is, whether or not the property was held "beneficially" by the trustee. The deceased could use his share as security on which to borrow money for himself, and could at any time demand that it be carved out of the whole and placed at his disposal by a partition. A trustee cannot as such do these things with trust property, and in so far as the deceased was able to do them, he can, I think, properly be considered to hold "beneficially."

It was suggested that the heading in the annexure should be read as meaning property which, taken as a whole, is held "not beneficially"; for instance if the deceased held land of which $\frac{99}{100}$ths belonged to himself, and $\frac{1}{100}$th was held for the benefit of another, so long as the $\frac{1}{100}$ th is not divided off from the rest, the whole property is held "as a trustee not beneficially." I see nothing in the language of the schedule to require this

(1) (1873) 11 B.L.R., App. 39; 19 W.R., 230. (2) (1886) I.L.R., 28 Calc., 980.
(3) (1905) I.L.R., 29 Bom., 161.

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construction and there is no more difficulty in entering in the annexure "one undivided half share in such and such lands and houses," and in calculating its value for duty, than there is in making a similar entry and calculation in, say a proclamation of sale.

I agree therefore in the order which the learned Chief Justice proposes to make.

SANKARAN-NAIR, J.—I agree with the conclusion that the deceased did not hold the property as a trustee and that the appellant can obtain Letters of Administration only on paying the proper fee on the share of the deceased which he got by survivorship.

APPELLATE CIVIL.

Before Sir R. S. Benson, Officiating Chief Justice, and Mr. Justice Sankaran-Nair.

1909. July 13.

VELAYUDA NAICKER AND OTHERS (DEFENDANTS), APPELLANTS,

v.

HYDER HUSSAN KHAN SAHIB AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Transfer of Property Act IV of 1882, s. 84—Tender, what amounts to.

Under section 84 of the Transfer of Property Act, interest ceases to run on the principal amount from the date of tender; it is not necessary that the mortgagor should, after such tender, always keep the money ready for payment.

APPEAL presented against the decree of C. V. Kumaraswami Sastri, City Civil Judge of Madras, in Original Suit No. 73 of 1907.

The plaintiffs effected a usufructuary mortgage of plaint house in favour of the defendants on the 15th May 1903 for Rs. 300 carrying interest at 21 per cent. per annum. On the 27th September 1904, the plaintiffs again borrowed of the defendants Rs. 200 on a pro-note which carried interest at 30 per cent. per annum and created a further charge on the said house for the said amount. On the 21st September 1905, the second plaintiff tendered the sum of Rs. 520-8-0 which was then due to the defendants

* City Civil Court Appeal No. 26 of 1907.

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under the two transactions, which the first defendant refused to receive and the plaintiffs alleging that they were not liable to pay interest after the date of tender, sued for redemption of the mortgage on payment of the amount due by them to the defendants.

The lower Court passed a decree for redemption disallowing interest from date of tender.

Defendants appealed to High Court.

R. Kuppuswami Ayyar for appellants.

Messrs. *Venkatasubba Rau* and *Radhakrishnayya* for respondents.

JUDGMENT.—The Judge has found, and his finding is not disputed before us, that there was a genuine and unconditional offer by the agent of the mortgagor to pay the mortgagee the amount due to him. The agent had the money with him. The mortgagee refused to receive the amount that was so tendered. Under section 84 of the Indian Transfer of Property Act interest on the principal money shall cease to run from the date of the tender, and the Judge has disallowed interest from such date.

It is contended before us that it is proved in this case that the money tendered to the mortgagee was received from a person who had agreed to purchase the property from the mortgagor after redemption and as he received back his money after the mortgagee refused to accept the tender, it cannot be said that the plaintiff, mortgagor, from that date always kept the money ready for payment and that therefore the interest must run on, and the cases of *Gyles* v. *Hall*(1), *Satyabadi Behara* v. *Harabati*(2) and *Jagat Tarini Dasi* v. *Naba Gopal Chaki*(3) are relied upon.

We are bound by the terms of section 84 of the Transfer of Property Act and, as already pointed out, under that section "interest *shall* cease from the date of tender." The word *tender* does not in itself imply that he must have been always ready to pay the money. It is not alleged in this case that there was a subsequent demand by the mortgagee for the amount and that the mortgagor failed to pay.

We therefore think the Judge is right in disallowing interest and we dismiss the appeal with costs.

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(1) (1726) 2 P. Wms., 378. (2) (1907) I.L.R., 34 Calc., 223 at p. 229.
(3) (1907) I.L.R., 34 Calc., 305.

APPELLATE CIVIL.

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

1909. August 13, 16, 17, 18, 19, 20. September 3.

NATESA CHETTI *alias* CHIDAMBARAM CHETTY AND ANOTHER (DEFENDANTS), APPELLANTS IN ALL APPEALS,

v.

VENGU NACHIAR (PLAINTIFF), RESPONDENT IN APPEAL SUIT No. 158 OF 1907,

SELLA NACHIAR (PLAINTIFF), RESPONDENT IN APPEAL SUIT No. 159 OF 1907,

BOOTHAKKA NACHIAR (PLAINTIFF), RESPONDENT IN APPEAL SUIT No. 160 OF 1907.*

Civil Procedure Code, Act XIV of 1882, *s.* 375—"*Relates to the suit*," *construction of—Res judicata—Wrong decision on question of law, no bar to subsequent decision—Registration Act, ss.* 3, 17—*Provisions of Act do not relate to judicial proceedings—Provisos, effect of—Transfer of Property Act, ss.* 107, 108 (*b*)—*Possession of right to recover rent, how given.*

The words "relates to the suit" in section 375 of the Code of Civil Procedure mean "relates to the matter of the claim in the case" and there is nothing in the section to restrict the relief granted in the compromise to what is prayed in the plaint or less.

Where the parties to a suit litigate as lessor and lessee for the ownership and possession of land, it is open to the parties to provide by compromise in what manner such land should be owned and enjoyed and such provision, although different from and even inconsistent with the plaint, "relate to the suit" within the meaning of section 375 of the Code.

Venkatappa Nayanim v. *Thimmappa Nayanim*, [(1895) I.L.R., 18 Mad., 410], not followed.

Muthu Vijaya Raghunatha Udayana Thevar v. *Thandavarayn Tambiran*, [(1899) I.L.R., 22 Mad., 214], not followed.

Joti Kuruvetappa v. *Izari Sirusappa*, [(1907) I.L.R., 30 Mad., 478], followed.

An order or decree based on a mistake of law does not operate as *res judicata* in a subsequent proceeding in which the operation of such decree or order is not called in question.

Mangalathammal v. *Narayanaswami Aiyar* [(1907) I.L.R., 30 Mad., 461], referred to.

The provisions of the Registration Act do not apply to proper judicial proceedings whether consisting of pleadings filed by the parties or orders made by the Court. A compromise petition is a pleading filed by the parties and can be sued on although not registered.

Bindesri Naick v. *Ganga Surani Sahu*, [(1898) I.L.R., 20 All. 171], followed.

Cases which are clearly outside the scope of an enactment cannot be brought within it by any inference drawn from the terms of a proviso.

* Appeals Nos. 158, 159 and 160 of 1907.

Decrees and orders generally are outside the scope of sub-section 1 of section 3 of the Registration Act. Decrees and orders relating to leases, which are governed by clause (*d*) of sub-section (1) to section 17 cannot be brought within sub-section (1) of section 3 merely because sub-section 2 of section 17, which is in the nature of a proviso, expressly exempts certain orders and decrees relating only to clauses (*b*) and (*c*) of sub-section (1) to section 17 of the Act.

When the subject-matter of a lease is the rents and profits of land, the possession which a lessor, under section 108 (*b*) of the Transfer of Property Act, is bound to give the lessee, is sufficiently given by giving notice of the lease to the ryots or other persons in occupation and requiring them to attorn and pay rent to the lessee. Attornment by the tenants and actual receipt of rent is not necessary to give the transferee possession of the rent. Such notice will amount to delivery of possession, only where the transferor himself has possession to give and not where he is himself out of possession.

APPEALS against the decree of S. Ramaswami Aiyangar, Subordinate Judge of Madura (East), in Original Suit Nos. 1, 2 and 3 of 1906, respectively.

The facts for the purposes of this report are set out in the judgment.

P. R. Sundara Ayyar, *S. Srinivasa Ayyangar* and *C. V. Ananthakrishna Ayyar* for appellants.

The Hon. the Advocate-General, *K. N. Ayya and K. Yegnanarayana Adega* for respondents.

JUDGMENT.—In these suits the plaintiffs seek to recover rent alleged to be due to them respectively under a compromise entered into between themselves on the one hand, and their sister and the defendants' father on the other, in Original Suit No. 18 of 1901 on the file of the Subordinate Court of Madura, East. The plaintiffs in these suits and their sister are the daughters of the late Raja of Sivaganga. The Raja granted a permanent lease of six villages to his wife, and his wife in turn leased five of the 6 villages to the European lessees to whom the Raja had leased the bulk of the Zamindari and who are commonly known as the Sivaganga lessees. As stated in the plaint filed by the defendants' father in Original Suit No. 18, the Sivaganga lessees paid her the rent for six faslies or Rs. 60,000 in advance in 1891. The plaintiffs' mother died in 1892, and in 1900 her youngest daughter, the present plaintiffs' sister, claimed to succeed to the six villages as heiress to her mother and to the exclusion of her sisters the present plaintiffs, on the ground that she was the sole unmarried daughter at the time of her mother's death. For the

assertion of this claim she sought the assistance of the defendants' father, a leading Nattukottai Chetti, in the Madura District and in October 1900 he advanced her Rs. 30,000 on a mortgage of her interest in the villages, Exhibit A, and took a lease of them from her, Exhibit B, and in February 1901, joined with her as second plaintiff in Original Suit No. 18 of 1901, against her sisters, the present plaintiffs, for the purpose of asserting her rights and his rights as lessee under her in the suit villages. The present plaintiffs in their written statement, Exhibit N, set up that their mother took nothing under the permanent lease which they alleged was executed by the late Raja *benami* for his own benefit, but they alleged a subsequent family settlement by which they and their sister were entitled on his death to succeed each to one-fourth share in the villages. While the suit was pending the minor Raja through the Court of Wards applied to be made a party for the purpose of asserting his claim to the six villages, but his application was rejected on the 5th August 1901, Exhibit O. Subsequently on the 10th March 1902 the suit was compromised on the terms, speaking broadly, that the first plaintiff was to give up her exclusive claim to the six villages and that the three defendants, the present plaintiffs, were to accept the lease, Exhibit B, executed by her in favour of the second plaintiff, the present defendants' father, and each be entitled to one-fourth of the rent payable thereunder. One of the terms of the compromise was that the four sisters were to send yadasts or notices to the Sivaganga lessees to pay the rent due under the lease of the five villages to the second plaintiff and this admittedly was done. The Sivaganga lessees however failed to pay any rent to the second plaintiff apparently in consequence of a notice, Exhibit I, dated the 23rd June 1902, from the Court of Wards demanding the rent on behalf of the minor Zamindar and threatening a suit if it was not paid. No such suit was instituted, but the Sivaganga lessees refused to pay their rent of the five villages to the defendants' father and the defendants after him without an indemnity, and they, in their turn, refused to pay the plaintiffs their share of the rent due to them, and after an unsuccessful attempt to recover their rent in execution of the decree in Original Suit No. 18, Exhibit H 1, the present suits were instituted by these plaintiffs for the purpose of recovering their respective shares of the rent.

The defendants contended that the plaintiffs were not entitled to sue, because the compromise had not been registered and also because of their failure to give possession of the rent payable by the Sivaganga lessees in respect of the five villages and also that by a subsequent agreement no rent was payable to the plaintiffs until the defendants had recovered the rent payable by the Sivaganga lessees. The Subordinate Judge overruled all these contentions and gave the plaintiffs decrees. These contentions were again raised before us on appeal. Before coming to the objection for want of registration it will be convenient to deal with certain contentions which were raised as to the scope and effect of the decree, Exhibit D. In the first place, it was said that the compromise did not relate to the suit within the meaning of section 375, Civil Procedure Code, in so far as it constituted the second plaintiff in the suit a lessee under the first plaintiff and the defendants in the suit (the present plaintiffs and their sister), and entitled the defendants in the suit to recover rent from the second plaintiff, as no such reliefs were sought in the plaint, and that therefore this part of the compromise could not be covered by the decree. It is quite true that no such reliefs were sought and that this test was laid down as applicable to compromises in *Venkatappa Nayanim* v. *Thimma Nayanim*(1), and applied in *Muthu Vijaya Raghunatha Udayana Tevar* v. *Thandavaraya Tambiran*(2); but in a later case *Joti Kuruvetappa* v. *Izari Sirusappa*(3), it was held that "relates to the suit" in section 375 means "relates to the matter of the claim in the case" and that there is nothing in the section to restrict the relief granted in the compromise to what is prayed in the plaint or less. We entirely agree with this view which is also in accordance with the decisions of the Calcutta High Court in *Purna Chandra Sarkar* v. *Nil Madhub Nandi*(4), and *Ramdhari Kuar* v. *Kekan Lal Choudhry*(5), and *Gurdeo Singh* v. *Chandrikah Singh*, and *Chandrikah Singh* v. *Rashbehary Singh*(6). In Original Suit No. 18 the first and the second plaintiffs were litigating as lessor and lessee for the ownership and enjoyment of the six villages, and the compromise provided how the six villages were to be owned and enjoyed by

(1) (1895) I.L.R., 18 Mad., 410 at p. 414.
(2) (1899) I.L.R., 22 Mad., 214.
(3) (1907) I.L.R., 30 Mad., 478 at p. 480.
(4) (1901) 5 C.W.N., 485.
(5) (1908) 13 C.W.N., 217.
(6) (1909) I.L.R., 36 Calc., 183 at p. 222.

the parties to the suit. Such a compromise in our opinion clearly relates to the suit, and might properly be covered by the decree.

It is next objected that this part of the compromise was not in fact embodied in the compromise decree, Exhibit D. The duty of the Subordinate Judge under section 375 was to pass a decree in accordance with the compromise in so far as it related to the suit, and to refuse to pass a decree in respect of such portions as did not relate to it. What the Subordinate Judge actually did was to pass an order on the petition, Exhibit D 1 "Decree in terms of the razinamah in so far as it is consistent with the plaint," and the decree, exhibit D, sets out that the Court "resolves to make a decree in accordance with its (the razinamah's) terms and so far as is consistent with the plaint and hereby directs that the plaintiffs and defendants do abide by the same. The terms of the razinamah are" (setting them out).

Now it is not clear what the Subordinate Judge meant by "consistent with the plaint." Strictly speaking it may be contended that the whole compromise is inconsistent with the plaint, as it rejects the exclusive title of the first plaintiff to the six villages on the basis of which the first and second plaintiffs sued. Obviously, however, the Subordinate Judge did not take this view or he would not have passed the decree at all. Although he has expressed himself badly, we do not think the Subordinate Judge intended to do more than to comply with the provisions of section 375 by passing a decree in accordance with the compromise in so far as it related to the suit, and that this must be taken to be the effect of his decree. On any other view it would be necessary to consider how far the present defendants and their father who got possession of one of the suit villages on the strength of this compromise are now at liberty to raise an objection of this kind.

It is then said to be *res judicata* that this portion of the compromise is not included in the decree by reason of the order of the succeeding Subordinate Judge on the execution petition exhibit H. Now it is clear that this Subordinate Judge treated the decree, exhibit D, as decreeing the compromise in so far as it related to the suit and in this, we think, he was right. He also held that the decree, exhibit D, did not award the remedy sought in the execution petition. Here again, we think, he was right, for the decree, exhibit D, can only be read as declaratory of the plaintiff's right to rent, and not as directing payment of it by

the decree as often as it fell due. The Subordinate Judge however went further and held that this part of the compromise did not relate to the suit and therefore no decree could be considered to have been passed with regard to it. We think he was wrong in holding that this part of the compromise did not relate to the suit for the reasons already given in an earlier part of the judgment, and that this was a mistake of law which, according to the decisions of this Court collected in *Mangalatham-mal* v. *Narayanswami Aiyar*(1), does not give rise to *res judicata* in a subsequent proceeding in which the operation of his order is not called in question.

The contention that this part of the compromise was not embodied in the decree appears to be material only in so far as it bears on the objections for want of registration. It is said that the effect of this part of the compromise is to create a new lease from the plaintiffs and their sister in favour of the defendants' father, and that such lease is bad for want of registration under section 17 of the Indian Registration Act. What the compromise does is to provide that the registered lease, exhibit B, shall be accepted by the present plaintiffs and that they shall be entitled each to one-fourth of the rent under it. Now we are not clear that we are bound to construe the compromise as creating a new lease so as to give an opportunity for the objection, but even if we are, we think the objection fails. In *Bindesri Naik* v. *Ganga Saran Sahu*(2) in the Privy Council, Lord Watson delivering their Lordships' judgment laid it down that the provisions of the Registration Act "do not apply to proper judicial proceedings whether consisting of pleadings filed by the parties or orders made by the Court." Applying this test it would appear to be immaterial whether this part of the compromise was embodied in the decree or not, as the compromise petition, Exhibit D-1, was a pleading properly filed by the parties, and that it may be sued on without registration. In a later case, *Pranal Anni* v. *Lakshmi Anni*(3), in which the same learned Lord again delivered their Lordships' judgment, the parties entered into a razinamah about the suit lands which was submitted to the Court and a decree passed in terms thereof. They at the same time entered

(1) (1897) I.L.R., 30 Mad., 461 at p. 463. (2) (1898) I.L.R., 20 All., 171.
(3) (1899) I.L.R., 22 Mad., 508, P.C.

into an agreement of union about certain lands excluded from the suit which was not submitted to the Court. Appended to the razinamah, however, was a note mentioning the agreement of union and a release which had been taken with regard to it. Their Lordships held that the terms of the agreement of union were related in the razinamah "by way of remark" and that the Subordinate Judge was not asked to consider or give effect to them and that they were not like the razinamah in so far as it was submitted to and acted upon judicially by the Judge, a step of judicial procedure not requiring registration. If, their Lordships went on to observe, the parties had settled the suit upon the terms that they were to take half shares not only of the suit lands but also of the lands excluded from the suit, "had informed the learned Judge that those were the terms of the compromise and had invited him by reason of such compromise to dispose of the conclusions of the suit, their Lordships see no reason to doubt that the order of the learned Judge, if it had referred to or narrated those terms of the compromise, would have been judicial evidence available to the appellant that the respondents had agreed to transfer to her the moiety of the land now in dispute." In our opinion this passage clearly means that the compromise could have been enforced, although not registered, even about the lands not included in the suit. The learned Judges who decided *Raghubans Mani Singh* v. *Mahabir Singh*(1), understood their Lordships' judgment in the same way. In *Birbhadra Rath* v. *Kalpataru Panda*(2) it was held that these decisions of their Lordships did not justify the view that petitions of compromise did not require registration in so far as they dealt with matters which were not the subject of the suit, but in the last-mentioned case it is expressly laid down that "a petition of compromise in so far as it relates to properties in suit does not require registration under section 17." The petition of compromise, exhibit D-1, undoubtedly relates to the properties in the suit and so in either view it does not require registration.

Mr. Sundara Ayyar, however, argues that in *Bindesri Naik* v. *Ganga Saran Sahu*(3), and *Muthu Vijaya Raghunatha Udayana Tevar* v. *Thandavaraya Thambiran*(4), their Lordships were not

(1) (1906) I.L.R., 28 All., 78.
(2) (1905) 1 C.L.J. 388, referred to in (1909) I.L.R., 36 Calc., 193 at p. 223.
(3) (1898) I.L.R., 20 All., 171. (4) (1899) I.L.R., 22 Mad., 214.

dealing with leases which are governed by clause (*d*) of sub-section 1 of section 17 but with instruments covered by clauses (*b*) and (*c*) as to which sub-section 2 creates various exemptions, amongst others "(i)—any decree or order of a Court or any award." We are not prepared to put any such restricted construction on the observations of their Lordships which mention pleadings as well as orders and decrees and appear to us to proceed rather upon the view that in the absence of clear and unambiguous words the legislature cannot be supposed to have intended to make the proceedings of Courts dependent for their efficacy and validity on registration by one of the parties. Taking decrees and orders generally to be outside the scope of sub-section 1 of section 3 of the Registration Act, we cannot infer that decrees and orders relating to leases are brought within it simply because certain other decrees and orders, viz., those relating to clauses (*b*) and (*c*) of sub-section 1 of section 17 are expressly excepted by sub-section 2 of that section. Sub-section 2 is in the nature of a proviso and in *West Derby Union* v. *Metropolitan Life Assurance Company*(1) Lords Watson and Herschell observe that provisos are often inserted unnecessarily excepting cases which would not otherwise fall within the enactment for the purpose of removing apprehensions, and that cases which are otherwise clearly outside the scope of an enactment cannot be brought within it by any inference founded on the terms of the proviso. Having regard to their Lordships' decisions we are of opinion that decrees and orders are clearly outside the scope of section 17 whether they relate to leases or not.

We think that the objection for want of registration under section 107 of the Transfer of Property Act fails similarly as that section does not apply to decrees and orders.

The next contention is that the defendants are not bound to pay because the plaintiffs and their sister have never put them in possession of the rents payable by the Sivaganga lessees in respect of the five villages which they are entitled to. Under the compromise the defendants as lessees are entitled to possession and profits on the one hand and bound to pay rent on the other and under section 108 (*b*) of the Transfer of Property Act a lessor is bound in the absence of a contract to the contrary at the lessee's request to put him in possession of what is leased which in this

(1) (1897) A.C., 647.

case includes the rent payable by the Sivaganga lessees. What then is the sort of possession of these rents which the plaintiffs are bound if requested to give the defendants? At common law for legal possession or seisin of rent, not only attornment by the tenant but also receipt of rent was necessary, Pollock and Wright on Possession, pages 36, 52. We have not been referred to nor have we succeeded in finding any English case where the point is expressly decided. In *Heelis* v. *Blain*(1) it was held that a conveyance operating under the Statute of Uses would of itself without more give "actual possession" of rent within the meaning of section 26 of 2 Will. IV, c. 45, but that a conveyance at common law would not of itself give such possession. What is required in this country in addition to the conveyance has been considered by this Court with reference to leases or izaras of villages or other parts of permanently-settled estates which are of common occurrence and it was held in *the Zamindar of Vizianagram* v. *Behara Suryanarayana Patrulu*(2) that "according to the common law of the land which especially prevails in zamindaris and similar estates the delivery of possession when the owner transfers the estate or a portion thereof by sale, gift, lease or otherwise is by the issue of orders or notices to the karnams or other village officers and also though not usually by a general proclamation addressed to the ryots or others in occupation giving notice of the transfer and requiring them to attorn and pay rents to the transferee", which as will be seen is very like what the defendants' father stipulated for in this case. The effect of this is that in this country attornment by the tenants liable to pay the rent and receipt of rent from them are not necessary to give the transferee possession of the rent. This must, however, we think, be limited to cases where the transferor himself has possession to give, for a transfer by a claimant out of possession even if followed by the usual notice could not be said to amount to a delivery of possession. Here it is to be gathered from exhibits A, B and C to which the defendants' father was a party that the Sivaganga lessees took a lease of the five villages from the present plaintiffs' mother and paid her rent in advance to the extent of Rs. 60,000. If so, the mother was in possession of the rent and her possession would

(1) 18 C.B.N.S., 90.

(2) (1902) L.L.R., 25 Mad., 587 at p. 592.

enure to the benefit of her heirs, the plaintiffs and their sister. Apart from the special contract therefore it would appear that all that the plaintiffs and their sister could be called upon to do to give possession of the rent in question to the defendants' father was to send notices to the Sivaganga lessees to pay it to him and this they have admittedly done.

The Subordinate Judge has gone further and found that by the terms of the compromise exhibit D I, read with exhibit B all that the plaintiffs' sister under exhibit B and all that she and the plaintiffs under exhibit D I were required to do was to send notices to the Sivaganga lessees and in this we fully agree with him. Exhibits A and B show that the plaintiffs' sister, a young gosha lady, was not in a position to bring suits herself financially or otherwise and that the defendants' father was to have sole conduct of the suit to be instituted against her sisters. During the suit he was to have the rent due from the Sivaganga lessees paid into Court, afterwards he was to get it collected, and at the expiration of their lease he was to recover the villages from them amicably or through Court. The defendants' father must have known all about these six villages before he advanced Rs. 30,000 to the plaintiffs' sister in October 1900 and he certainly had full notice of what could be urged in favour of the Zamindar in the written statement of the present plaintiffs in Original Suit No. 18 of 1901, exhibit N, and in connection with the unsuccessful attempt to make the minor Zamindar a party to that suit in August 1901, exhibit O. Yet in the terms of the compromise, exhibit D-1, he stipulates that the plaintiffs (here) shall refrain from interfering with the said villages during his lease, that he is to collect the rent from the Sivaganga lessees according to the terms of the lease, exhibit B, and that the plaintiffs and their sister are to send yadasts or notices to pay to the lessees. This it appears to us was all they were required to do to give possession and they have done it. With regard to the further contention that the plaintiffs agreed to forego their rent until the defendants succeeded in recovering it from the lessees we agree with the lower Court that no such agreement is proved and dismiss the appeals with costs. The memoranda of objections are dismissed but without costs.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Abdur Rahim.

1909. July 26.

NARASIMMA AMMAL (FIRST DEFENDANT), APPELLANT,

v.

SRINIVASARAGAVA AIYANGAR AND ANOTHER (PLAINTIFFS AND SECOND DEFENDANT), RESPONDENTS.*

Res judicata – Res judicata between co-defendants—Burden of proof.

Where an adjudication between co-defendants is necessary to give the appropriate relief to the plaintiff, such adjudication will be *res judicata* between the defendants as well as between the plaintiff and defendants. There must be a conflict of interest between the defendants, a necessity for a decision between them and a judgment defining the rights and obligations of the defendants *inter se*. *Ramchandra Narayan* v. *Narayan Mahadev*, [(1887) I.L.R., 11 Bom., 216 at 220)], referred to and followed.

The general rule is that a person who claims property through some other person must prove that such property vested in that other person. A person who alleges that property in the hands of a female was inherited from some person whose heir he claims to be, must prove that it belonged to that person. *Diwan Ran Bijai Bahadur Singh* v. *Indarpal Singh*, [(1899) 26 I.A., 226 at 228], referred to.

SECOND APPEAL against the decree of F. D. P. Oldfield, District Judge of Tanjore, in Appeal Suit No. 345 of 1906, presented against the decree of C. V. Visvanatha Sastri, District Munsif of Kumbakonam, in Original Suit No. 25 of 1905.

Claim for the recovery of Rs. 656-10-6 due on a registered hypothecation bond, dated 7th January 1890, executed by Kanakammal, the mother of the first defendant, in favour of plaintiff. The second defendant was made a party as he was a subsequent purchaser of a portion of the hypotheca.

It was alleged by plaintiff that the hypotheca belonged to Kanakammal and that Kanakammal executed a mortgage bond in favour of plaintiff.

Defendants pleaded that the hypotheca never belonged to Kanakammal; that it belonged to first defendant's father; that the mortgage bond was not executed for purposes binding upon first defendant. The question also arose whether on the following facts the question of ownership of the hypotheca was not barred by *res judicata*.

* Second Appeal No. 500 of 1907.

MUNRO AND ABDUR RAHIM, JJ.

NARASIMMA AMMAL v. SRINIVASA-RAGAVA AIYANGAR.

Original Suit No. 504 of 1898 was filed by one Lakshmana Chetti, against defendants for the recovery of money due on a mortgage bond, and the present plaintiff was made second defendant on the ground that he was a prior mortgagee. In that suit also the plea was that the hypotheca belonged to first defendant's father, and that the mortgage by Kanakammal was invalid. The Court gave a decree for plaintiff but the Appellate Court held that the hypotheca belonged to first defendant's father and dismissed the suit. The decree of the first Appellate Court was confirmed in second appeal. The present plaintiff was not a party to the appeal and second appeal.

The District Munsif held that there was no *res judicata*, but dismissed the suit on the ground that the plaintiff had not proved his case.

On appeal the District Judge held that the decision in the previous suit that the hypotheca belonged to first defendant's father operated as *res judicata*.

He accordingly decreed plaintiff's claim.

The first defendant appealed to the High Court.

The second and third grounds of appeal were—

The lower Appellate Court erred in holding that the decision of the District Munsif of Kumbakonam in Original Suit No. 504 of 1898 operated as *res judicata* in the present suit.

The plaintiff and the first defendant having been co-defendants in that suit and there having been no active controversy as between them in Original Suit No. 504 of 1898 the lower Appellate Court erred in holding that the judgment in that suit operated as *res judicata* in the present suit.

The Hon. The Advocate-General for appellant.

T. V. Seshagiri Ayyar and *R. Rungaswami Ayyangar* for third respondent.

JUDGMENT.—The rule as to *res judicata* between co-defendants is laid down thus in *Ramchandra Narayan* v. *Narayan Mahadev*(1) :—" Where an adjudication between the defendants is necessary to give the appropriate relief to the plantiff there must be such an adjudication—*Cottingham* v. *Earl of Shrewsbury*(2),—and in such a case the adjudication will be *res judicata* between the defendants as well as between the plaintiff and defendants. But

(1) (1887) I.L.R., 11 Bom., 216 at p. 220. (2) 3 Hare's Rep., 627.

MUNRO AND ABDUR RAHIM, JJ.

NARASIMMA AMMAL v. SRINIVASA-RAGAVA AIYANGAR.

for this effect to arise, there must be a conflict of interests amongst the defendants and a judgment defining the real rights and obligations of the defandants *interse*. Without necessity, the judgment will not be *res judicata* amongst the defendants." This rule was declared to be the correct rule in *Ahmad Ali* v. *Najabatkhan*(1), and there is nothing in the Madras cases cited *Venkayya* v. *Narasamma*(2), *Muhammad Kuni Rowthan* v. *Viswanathiyar*(3), *Somasundara Mudali* v. *Kolandaivelu Pillai*(4), *Kandiyil Cheriya Chandu* v. *The Zamorin of Calicut*(5), *Yusuf Sahib* v. *Durgi*(6), which conflicts with this rule. The necessity for an active controversy between the co-defendants is uniformly recognised. In the present case this rule is not satisfied. In the former suit (Orginal Suit No. 504 of 1898) the present plaintiff who was joined as second defendant because he had a prior mortgage is not shown to have done more than to put in a written statement to the effect that he had such prior mortgage and that a certain amount was due to him. No question as to the validity of the mortgage was raised or decided, nor was it necessary to decide any such question. We therefore hold that the first issue framed in the suit is not *res judicata*. We therefore reverse the decree of the District Judge and remand the appeal for disposal according to law. Costs will abide the result.

We may observe that the District Judge was in error in placing the burden of proof upon the plaintiff. Their Lordships of the Privy Council observe in *Diwan Ran Bijai Bahadur Singh* v. *Indarpal Singh*(7).

"They alleged that when a widow is found in possession of property of the acquisition of which no account is given, and it is shown that her husband died possessed of considerable property, then there is a presumption of law that the property found in the widow's possession was originally that of her husband. No authority was cited at the bar which supports this proposition, and their Lordships are not prepared to adopt it or to lay down anything inconsistent with the general rule that he who claims property through some other person must show the property to have been vested in that person."

(1) (1896) I.L.R., 18 All., 65.
(2) (1888) I.L.R., 11 Mad., 204.
(3) (1903) I.L.R., 26 Mad., 337.
(4) (1905) I.L.R., 28 Mad., 457.
(5) (1906) I.L.R., 29 Mad., 515.
(6) (1907) I.L.R., 30 Mad., 447.
(7) (1899) 26 I.A., 226 at p. 228.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Sankaran-Nair.

1909. July 23. August 11.

SUBBARAYA IYER AND OTHERS (DEFENDANTS), APPELLANTS,

v.

VAITHINATHA IYER AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Negotiable instrument, party to suit on—Limitation Act, s. 22—Amendment by adding party cannot relate back to date anterior to application to add party.

A suit on a negotiable instrument must be instituted in the name of the person who, on the face of the instrument, is entitled thereto or by a holder deriving title from him.

Where the suit is instituted in the name of a wrong person, the Court has power, under Order I, rule 10 (1), to amend the plaint by bringing the proper party as plaintiff. Such person cannot be brought on the record as from the day the suit was instituted. The amendment will relate back, at the most, to the date on which the application to be added as plaintiff was made and if such application was made after the right to sue was barred by limitation, such amendment should not be allowed.

In suits of this kind, a mistake to be corrected under Order I, rule 10 (1), must be corrected before the limitation period of the suit expires.

Seshamma v. *Chinnappa*, [(1897) I.L.R., 20 Mad., 467], referred to.

SECOND APPEAL against the decree of T. Gopalakrishna Pillai, Subordinate Judge of Salem, in Appeal Suit No. 142 of 1906, presented against the decree of S. Dcraiswami Aiyar, District Munsif of Salem, in Original Suit No. 160 of 1905.

The plaintiffs, by their mother and next friend, sought to recover from the defendants the sum of Rs. 629 being the balance of the principal and interest due on a promissory note which the first defendant and the late father of the second and third defendants executed to the plaintiffs' mother and next friend for Rs. 1,000 on the 12th June 1902.

The suit was instituted in the names of the plaintiffs on the allegation that the money due on the promissory note belonged to them, though the note itself was executed in the name of their mother Minakshi Ammal. It was said in the plaint that the plaint promissory note was executed for a balance due on a prior promissory note which the first defendant and the second and

* Second Appeal No. 603 of 1908.

third defendants' late father had executed in the name of the plaintiffs on the 21st June 1899.

The first defendant pleaded *inter alia* that the plaintiffs were not entitled to maintain the suit on the promissory note executed in the name of Minakshi Ammal.

After the case was closed, the plaintiffs applied to bring Minakshi Ammal on the record as plaintiff. The District Munsif rejected the application, but passed a decree for plaintiffs on the ground that the suit by the plaintiffs was maintainable.

His judgment was confirmed on appeal.

The defendants appealed to the High Court.

T. M. Krishnaswami Ayyar for *T. Subramania Ayyar* for appellants.

The Hon. The Advocate-General for respondents.

JUDGMENT (MILLER, J).—We are bound by the decisions of this Court to hold that the suit is not maintainable unless Minakshi Ammal is the plaintiff, and I cannot accede to the contentions of the Advocate-General that as the suit has been framed she is a plaintiff by implication, or that the statement in the plaint to the effect that the money belongs to the plaintiffs amounts to an assignment to the plaintiffs. I think therefore that the suit must be dismissed unless she can now be made a plaintiff. I have no doubt that this can be done under order I, rule 10 (1) (*vide Krishna Boi* v. *The Collector and Government Agent, Tanjore*(1)), and the only question is whether if it is done now the suit will not be barred by limitation.

We cannot bring her on the record now as from the date on which the suit was actually instituted: it is not very clear to me what was the effect of the order in *Seshamma* v. *Chennappa*(2), in the matter of dates, but clearly the learned Judges did not intend to make their amendment date back to the date on which the suit was originally instituted. Had they felt themselves able to do that no question of limitation could have arisen.

The utmost we could do on the authority of that case would be, it seems to me, to date the amendment as of the date on which the Court of First Instance ought to have made it and that could not be earlier than the date of application; and the suit, if instituted on that date, would have been already barred by limitation.

(1) (1907) I.L.R., 30 Mad., 419. (2) (1897) I.L.R., 20 Mad., 467.

The earliest date then on which Minakshi Ammal could appear as plaintiff is a date on which the suit if then instituted would be barred, and if the effect of the amendment bringing her on record is to bring on a new plaintiff within the meaning of section 22, Limitation Act, the bar will not be saved.

I agree with the observations of the learned Judges in *Fatmabai* v. *Pirbhai Virji*(1) (at page 584 of the report) to the effect that the language of section 22 of the Limitation Act precludes the view that a plaintiff added or substituted is not a new plaintiff if he is made a party merely for the purpose of more correctly representing the title originally asserted, and that *Subodini Debi* v. *Cumar Ganoda Kant Roy Bahadur*(2) cannot be regarded as an authority from which a general proposition ought to be deduced.

The effect of section 22 of the Limitation Act is that in a suit of the kind before us a mistake to be corrected under order I, rule 10 (1), must be corrected before the limitation period of the suit expires.

That this may work hardship in certain cases is recognised in *Fatmabai* v. *Pirbhai Virji*(1), and it is fairly arguable that it does so in the present case, but having given my best consideration to the subject I think the law requires us to hold that no amendment which we could now make would save the suit from the bar of limitation, and that we must consequently allow the appeal and dismiss the suit; but as the law as to the necessary parties to a suit on a negotiable promissory note had not been finally declared by this Court when the suit was instituted in 1905 I think we ought to dismiss it without costs.

SANKARAN-NAIR, J.—The plaintiffs are clearly not entitled to sue on the promissory note. Their application to substitute their mother as plaintiff was not made till after the case was argued and closed in the Court of First Instance, though the objection that the plaintiffs are not entitled to sue was raised in the written statement of the first defendant. I do not think therefore that their application ought to be allowed.

I agree therefore that the suit must be dismissed but in the circumstances without costs.

(1) (1897) I.L.R., 21 Bom., 580, at p. 584. (2) (1887) I.L.R., 14 Calc., 400.

APPELLATE CIVIL.

Before Sir R. S. Benson, Officiating Chief Justice, and Mr. Justice Munro.

1909. September 30.

KADIR IBRAHIM ROWTHER (PLAINTIFF), APPELLANT,

v.

MAHOMED RAHUMADULLA ROWTHER AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Muhammadan Law—Wakf—Right to recover money under a decree cannot be made the subject of Wakf.

Right to recover money under a decree cannot be made the subject of Wakf in the absence of a custom authorising such appropriation.

Kulsom Bibee v. *Gulam Hossein Cassim Ariff*, [(1905) 10 C.W.N., 449 at p. 494], referred to and followed.

Kaleeola Sahib v. *Nuseerudeen Sahib*, [(1895) I.L.R., 18 Mad., 201 at p. 209], referred to.

SECOND APPEAL against the decree of R. F. Austin, District Judge of Tinnevelly, in Appeal Suit No. 50 of 1906, presented against the decree of Munro French, Additional District Munsif of Tinnevelly, in Original Suit No. 167 of 1905 (Original Suit No. 404 of 1905 in the file of the District Munsif's Court, Tinnevelly).

The first defendant held a decree against the second defendant in Original Suit No. 258 of 1901 of the District Munsif's Court, Tinnevelly, for recovery of money on a mortgage. The first defendant on 29th September 1903 executed exhibit A assigning the decree for the endowment of a feeding charity at a mosque, to the plaintiff as manager. In 1905 the plaintiff applied to the Court on the strength of exhibit A for permission under section 232, Civil Procedure Code, to execute the decree in Original Suit No. 258 of 1901. The application was refused on 20th June 1905. It was opposed by first defendant who produced a deed (exhibit B), dated 21st November 1904, revoking the assignment A on the ground that the plaintiff had not taken steps to execute the decree and had not conducted the charity.

The present suit was filed for a declaration of the plaintiff's right to execute the decree as assignee and for other reliefs. The

* Second Appeal No. 1176 of 1906.

BENSON, C.J., AND MUNRO, J.

KADIR IBRAHIM ROWTHER v. MAHOMED RAHUMADULLA ROWTHER.

Court of First Instance granted the declaration. On appeal the District Court held the assignment under exhibit A to be invalid and dismissed the suit.

The plaintiff appealed to the High Court.

P. M. Sivangnana Mudaliar for appellant.

The Hon. The Advocate-General for first respondent.

JUDGMENT.—The question for decision in this second appeal is whether a right to recover a sum of money under a decree can be made the subject of wakf according to Muhammadan Law. We are of opinion that it cannot. Even if the proposed subject of the wakf be regarded as the money which may (problematically) be recovered under the decree, we think that the weight of authority and argument is opposed to the plaintiff's contention that the wakf is valid. The question has lately been discussed in a most elaborate judgment by Mr. Justice Woodroffe in the Calcutta High Court, and his conclusion is that "unless a moveable is accessory to land or allowed because of certain traditions concerning the Prophet and the sacred writings or there is a custom to make wakf of it, it cannot be lawfully appropriated." (*Kulsom Bibee* v. *Golam Hossein Cassim Ariff*(1)) and this decision has been followed by Mr. Justice Russell in the Bombay High Court (*Bai Fatmabai* v. *Gulam Husen*(2)).

No doubt the decision is opposed to some earlier decisions (*Abu Sayid Khan* v. *Bakar Ali*(3), *Sakina khanum* v. *Laddan Saheba*(4), *Banubi* v. *Narsingrao*(5)), but we think that good reasons are given for dissenting from them. The only decision of this Court which has been referred to in the argument before us is in accord with the view we have adopted (*Kaleeola Sahib* v. *Nuseerudeen Sahib*(6)).

In the present case no alleged custom has been relied upon. We must therefore hold that the wakf is invalid and dismiss the second appeal with costs.

(1) (1905) 10 C.W.N., 449 at p. 494.
(2) (1907) 9 B.L.R., 1337.
(3) (1902) I.L.R., 24 All., 190.
(4) (1905) 2 C.L.J., 218.
(5) (1907) I.L.R., 31 Bom., 250.
(6) (1895) I.L.R., 18 Mad., 201 at p. 209.

APPELLATE CIVIL.

Before Sir R. S. Benson, Officiating Chief Justice, and Mr. Justice Sankaran-Nair.

1909. September 15, 22.

A. L. A. R. ARUNACHELLAM CHETTIAR AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

THE MADRAS RAILWAY COMPANY (DEFENDANT), RESPONDENT.*

Carrier, liability of—Construction of contract—Consignor bound by ordinary train arrangements made by Company.

A consigned certain cotton by railway from *E* station to *K* station. Under the terms of the risk note signed by the consignor, the company was exempted from liability for any loss *before, during or after transit over the Railway*. Under the train arrangements made by the Railway Company, goods consigned from *E* to *K* were carried beyond *K* to *C*, and then back from *C* to *K*. The goods were damaged while at *C*. In a suit to recover compensation for the loss so caused:

Held, that the loss occurred during transit from *E* to *K* and that the company was protected by the terms of the risk note.

Every customer dealing with a company is bound not only by the ordinary route but also by the ordinary train arrangements according to which it professes to carry. *Tobin* v. *London & North-Western Railway Company*, (2 Ir. Rep. 22 at p. 35), referred to.

SECOND APPEAL against the decree of Mundappa Bangera, Subordinate Judge of South Malabar at Calicut in Appeal Suit No. 267 of 1906, presented against the decree of P. S. Sesha Iyer, Principal District Munsif of Calicut in Original Suit No. 618 of 1905.

The facts necessary for this report are set out in the judgment.

P. R. Sundara Ayyar for appellants.

D. M. C. Downing for respondent.

JUDGMENT.—In this case the defendants, the Madras Railway Company, contracted to carry a consignment of cotton for the plaintiffs from Erode station to Kallai station. The company carried the cotton in an iron covered goods wagon When the train reached Kallai station the wagon was not detached but was carried on a couple of miles to the next station (Calicut) where it was kept in the station yard during the night to be sent back to Kallai by another train in the morning. Early in the morning

* Second Appeal No. 1022 of 1906.

BENSON, C.J., AND SANKARAN-NAIR, J.

ARUNACHELLAM CHETTIAR v. THE MADRAS RAILWAY COMPANY.

smoke was seen to be issuing from the wagon and water had to be poured on it to quench the fire. When the cotton was delivered to the plaintiffs part of it was damaged by the fire and water. The plaintiff's suit was for the compensation for this damage.

The defendants alleged that they were protected by the terms of the risk note, exhibit I, which is signed by the plaintiff's consignor and formed part of the contract. The Courts below have found that there was no negligence on the part of the defendants The argument urged by the plaintiff's vakil before us is that the contract was to carry the goods from Erode to Kallai, and that as the defendants carried them further, viz., to Calicut, for their own convenience, that was done at their own risk, and they were not protected by the terms of the risk note. Both Courts have found that the cotton was taken by the usual route adopted and publicly notified (exhibit IV) by the defendants as that by which goods booked from Erode to Kallai are taken and that the defendants are protected by the terms of the risk note.

We think that the decision of the Courts below is right. In the risk note the plaintiffs' consignor says "I, the undersigned, do, in consideration of such lower charge, agree and undertake to hold the said railway administration and all other railway administrations working in connection therewith, and also all other transport agents or carriers employed by them, respectively, over whose railways or by or through whose transport agency or agencies the said goods or animals may be carried in *transit from Erode station to Kallai station* harmless and free from all responsibility for any loss, destruction or deterioration of, or damage to, the said consignment from any cause whatever *before, during and after transit over the said railway* or other railway lines working in connection therewith or by any other transport agency or agencies employed by them respectively for the carriage of the whole or any part of the said consignment." Under the risk note the defendants are protected from damages caused "before, during and after transit."

Having regard to the finding that the cotton was carried by the usual route adopted by the railway, we think that it must be held that the damage occurred "during" transit from Erode to Kallai within the meaning of the risk note. Even if it could be held that, as the damage occurred after the wagon first reached

BENSON, C.J., AND SANKARAN-NAIR, J.

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Kallai and had been carried beyond that station to Calicut, the damage did not occur "during" transit to Kallai, it would not be possible to hold that it did not in that view occur "after" transit to Kallai. The words "before during and after transit" seem to cover the whole period from the time the goods were delivered to the defendants at Erode up to the time they were re-delivered to the plaintiffs at Kallai.

The plaintiffs' vakil has relied on the case of *Sleat* v. *Fagg*(1) but we do not think that the case is on all fours with the present case.

With reference to the plaintiffs' plea that they were not aware of the Railway Company's arrangement that goods should be sent to Kallai *viâ* Calicut, and that it was an unreasonable arrangement imposing an extra risk on them against which the risk note would not protect the defendants, we may refer to the observations of Mr. Justice Gibson in the case of *Tobin* v. *London and North-Western Railway Company*(2) where it was held that "The consignor is bound to enquire as to trains and hour of arrival, and cannot, by omitting to do so, enhance the obligation of the carrier, or submit the reasonableness of their ordinary traffic arrangements to the review of a jury. Juries would, of course, take different views, according to the train service of their locality; and, if the management of goods traffic depended on their decision, it would become a chaos resulting in the ruin of the company under an avalanche of litigation. Whether he inquire or not, every customer dealing with a company is bound not only by the ordinary route (*Hales* v. *London North-Western Railway Company*(3)), but also by the ordinary train arrangements and hours of arrival according to which they profess to carry. This is distinctly laid down in the judgments in *Bolland's Case*(4); and my own decision in *M'Nally's Case*(5) is to the same effect." On the ground that the defendants are protected by the terms of the risk note, we dismiss the second appeal with costs.

Messrs. *David & Brightwell*, Attorneys for respondent.

(1) (1822) 24 Rev. Rep., 407.
(2) 2 Irish Rep. 22 at p. 35.
(3) 4 B. & S., 66.
(4) 15 Ir.C.L.R., 560.
(5) 26 Ir.L.T.R., 138.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Abdur Rahim.

1909. September 24. October 6. November 9.

GOPALAKRISHNA IYER (PLAINTIFF), APPELLANT,

v.

GOPALAKRISHNA IYER AND OTHERS (DEFENDANTS NOS. 1, 3 AND 6), RESPONDENTS.*

Transfer of Property Act, IV of 1882, ss. 130, 131, 134—Transfer of debt, notice of—Duty of debtor on receiving notice from transferee.

Where a creditor hypothecates a debt due to him, and authorises the person to whom the debt is hypothecated by power-of-attorney in writing to recover the debt from the debtor, the debt is absolutely transferred to the transferee under section 130 of the Transfer of Property Act.

Notice of the transfer is not necessary to perfect the title of the assignee but until the debtor receives notice of the assignment in accordance with law his dealings with the original creditor will be protected.

The notice of transfer need not necessarily be free from any condition or qualification. A debt was assigned absolutely, and the debtor received notice of assignment from the transferor, who at the same time requested the debtor to pay only if the liability forming the consideration for the transfer was not discharged. The debtor also received notice of the assignment from the transferee who claimed payment. The transferee did not represent that he had discharged the claim on account of which the transfer was made. The debtor after receiving the above notices refusing to recognise the assignment paid the amount to the transferor:

Held, that the payment was inoperative and that the transferee was entitled to recover from the debtor.

If the fact of the assignment or its validity is disputed, the only safe course for the debtor who has received notice of the assignment is not to pay either party but to ask them to interplead.

William Brandt's Sons & Co. v. *Dunlop Rubber Co.*, [(1905) A.C., 454], referred to.

SECOND APPEAL against the decree of W. W. Phillips, District Judge of Tinnevelly, in Appeal Suits Nos. 258 and 286 of 1905, presented against the decree of T. Sadasiva Iyer, Subordinate Judge of Tinnevelly, in Original Suit No. 4 of 1904.

The facts are fully stated in the judgment.

The Hon. The Advocate-General for appellant.

Nugent Grant for *T. Richmond* for third respondent.

K. N. Aiya for first and second respondents.

* Second Appeal No. 643 of 1906.

JUDGMENT (ABDUR RAHIM, J.).—This second appeal is preferred by the plaintiff in a suit which he instituted in the Tinnevelly Subordinate Judge's Court to recover Rs. 3,200 consisting of principal (Rs. 3,000) and interest (Rs. 200) from six defendants, of whom defendants Nos. 1, 3 and 6 are respondents before us, and the question with which we are concerned relates to their liability. The sum of Rs. 3,000 was due on account of advances made from time to time by the plaintiff to defendants Nos. 1 and 3 who, on the 19th November 1902, executed a hypothecation deed (exhibit A) in favour of the plaintiff, by which they hypothecated the money due to them both from the South Indian Railway Company, the sixth defendant in the case, on account of certain work done by them for the Railway Company in what is called the First Division and also the amount due to the first defendant alone from the same Railway Company for works done by him on the Second Division of the line. On the same date as the deed of hypothecation the first defendant executed a power-of-attorney (exhibit D) authorizing the plaintiff to receive from the Railway Company so much of the Rs. 9,400 due by them to the first defendant as could then be drawn and to give a proper discharge for the amount to the Company. The plaintiff out of the sum when drawn was to satisfy the debt due to himself from the first and the third defendants and pay over the balance to the first defendant. Notice of the assignment was duly given to Mr. Lindsay, an Executive Engineer of the Railway Company, but he refused to recognize the assignment at all. Further correspondence ensued with the result that the plaintiff placed the matter in the hands of his lawyers who very properly pointed out to Mr. Lindsay that the attitude he thought fit to take up on behalf of the Railway Company was absolutely indefensible and in defiance of the law. But Mr. Lindsay was not willing to acknowledge his mistake and pay to the plaintiff the amount which had become payable to the first defendant by the Railway Company. So what he did was to send for the plaintiff and the first defendant to his office where a bill for Rs. 4,902-3-6 for the first defendant's works was drawn up and signed by the first defendant and attested by the plaintiff and two cheques, one for Rs. 3,500 and the other for the balance, were made out in favour of the first defendant. The cheque for Rs. 3,500 was then, at the desire of Mr. Lindsay, endorsed and made over by the first defendant to the plaintiff. Directly the

plaintiff and first defendant went out of the Engineer's room, the endorsement on the cheque in favour of the plaintiff was scored out by the first defendant who then endorsed it to his own servant and this man cashed the cheque. The entire amount of the cheque less a small sum which was paid to the plaintiff on account of the interest which was due till then was received by defendants Nos. 1 and 3 who were in need of money for carrying out further works for the Railway Company. The power-of-attorney (exhibit D) executed by the first defendant was cancelled but not the hypothecation bond (exhibit A) which remained in possession of the plaintiff. All this happened on the 9th February 1903, and on the 1st May 1903 defendants Nos. 1 and 3 executed a power-of-attorney (exhibit E) in favour of the plaintiff authorizing him to receive from the Railway Company the sum of Rs. 3,000 which was still due to the plaintiff under exhibit A, out of the amount of the final bill which became due to them from the Railway Company for the works executed by them in connection with the First Division and which had been mortgaged to the plaintiff under exhibit A.

Here we may conveniently pause and deal with the contentions which as grounds of defence are common to the first and third defendants as well as the sixth defendant. The first contention is that by what happened on the 9th February 1903 in the room of Mr. Lindsay the hypothecation bond was discharged. It is absolutely clear from the facts just stated, and these facts are as found both by the Subordinate Judge and the District Judge, that so far as the parties to the bond were concerned, they never intended that the plaintiff should have the proceeds of the cheque or that the liability of defendants Nos. 1 and 3 under the bond should cease. The third defendant was not even present at the interview. What the learned District Judge however says is that payment by a cheque was treated both by the first defendant in whose favour it was drawn by the Railway Company as well as by the plaintiff as absolute payment in the same sense as if the payment was made in current coin of the realm. This has not been disputed by the learned Advocate-General who appeared for the appellant nor does he quarrel with the conclusion of the District Judge that the liability of the Railway Company for the amount due to the first defendant in respect of the Second Division works was extinguished by such payment. And here we take it—and it

has not been contended otherwise—that although the cheque was drawn by Mr. Lindsay in favour of the first defendant and made over by the former to the latter and not to the plaintiff to whom the amount due was assigned, yet since the first defendant, at the request of Mr. Lindsay, endorsed the cheque in favour of the plaintiff who took it, the plaintiff could not call upon the Railway Company to pay him over again the amount payable by the Company in respect of the Second Division works for which the cheque was given. This, not because the liability of the Railway Company in respect of that debt was satisfied by payment to the plaintiff who alone was entitled to it but because the plaintiff having permitted and been content that payment should be made to a third person, would be estopped from holding the Railway Company still liable for that amount. And apparently both the plaintiff and the first defendant taking this view of the transaction cancelled exhibit D, the power-of-attorney in respect of the money due for the Second Division work. But the lower Appellate Court goes further and finds evidently on the evidence of Mr. Lindsay that this gentleman representing the Railway Company intended that the hypothecation bond by which not only the amount payable to the first defendant for the Second Division works but also the money which was payable for the First Division works to the first and third defendants was mortgaged should be discharged. The Railway Company were not a party to the bond and no demand was made upon them and no payment was made by them with respect to the First Division works It is not easy therefore to conceive how any intention on the part of Mr. Lindsay could affect the operation of the bond in respect of what might be due to the first and third defendants for works that had not been paid for. Of course, it was open to the plaintiff and the first and third defendants to treat the bond as discharged, although the debt due by the latter to the former was not in fact satisfied but such agreement has not been found and is negatived by the proved facts of the case. The District Judge is therefore wrong in holding that the hypothecation bond is discharged. We also agree with the contention of the plaintiff that the power-of-attorney (exhibit E), dated the 1st May 1903, was in itself a valid assignment to the extent of Rs. 3,000 out of the amount payable by the Railway Company for the First Division

works. The answer given by the District Judge to that contention is that exhibit E was intended to be provisional in the sense that it was not to be acted upon unless it was approved by Mr. Lindsay. But that was never the case of the defendants with respect to exhibit E and the parties did not go to trial on such an issue. We therefore hold that it was not open to the District Judge in appeal to make out a new case on the point for the defendants. But before us, Mr. Grant who appeared for the Railway Company has argued that in the plaint the suit is based on the hypothecation bond alone and not on the power-of-attorney of the 1st May 1903. But the power-of-attorney is distinctly set out in the plaint and its legal effect was one of the points discussed in both the lower Courts. We think there is no force in this objection.

The only question which now remains for consideration is whether there was sufficient and valid notice of the assignment to the sixth defendant. This of course concerns only the sixth defendant. The facts in this connection are not in dispute. On the 1st May, the day exhibit E was executed, defendants Nos. 1 and 3 sent a letter (exhibit F2) to the Executive Engineer No. I Division informing him that they owed Rs. 3,000 to R. Gopalakrishnier, the present plaintiff, and had executed a power-of-attorney in his favour authorizing him to draw from the Railway Company Rs. 3,000 out of the amount due on their final bill and at the same time requested the Executive Engineer to pay this amount to the plaintiff when the bill would be ripe for payment in due course unless in the meantime they themselves had otherwise paid off the debt due by them to the plaintiff. On the 7th May, the plaintiff himself wrote a letter (exhibit F) to the Engineer saying that the defendants Nos. 1 and 3 owed him Rs. 3,000 for which they had executed in his favour a hypothecation bond under which the debt still due to them from the Railway Company was mortgaged to him and that they also executed a power-of-attorney entitling him to draw Rs. 3,000 from the Company and wound up with a request for payment. The plaintiff at the same time forwarded copies of the bond (exhibit A) and the power-of-attorney (exhibit E) to the Engineer. In this notice there was no qualifying clause as in the notice given by defendants Nos. 1 and 3, namely, that the payment of Rs. 3,000 was to be made by the Company if the debt due by the defendants Nos. 1 and 3 to the plaintiff had not already been discharged.

On the 11th May the Executive Engineer wrote (exhibit F4) to defendants Nos. 1 and 3 in reply to their letter exhibit F2. "I decline to have anything to do in their private transaction, nor do I recognise any power-holder. Payments will only be made to the contractors as per agreement," and on the 12th May he forwarded a copy of this reply to the plaintiff in answer to the latter's letter of the 7th May. Whatever the nature of the agreement mentioned in exhibit F4, if there was any such agreement no reliance was placed on it either in the lower Courts or before us. What has to be noted here is that the Railway Company on this as on the previous occasion simply refused in utter defiance of the law to recognise any assignment of the money due by them to the contractors and not that they thought there was any risk in paying the plaintiff because of the qualifying words mentioned above in the notice given by the contractors. On the 21st May the plaintiff sent another letter, exhibit F1, insisting that the Company could not disregard the assignment and that if they failed to pay him he would be obliged to seek redress in a Court of law. He received no reply to this; and on the 23rd October being informed that the defendants Nos. 1 and 3 had completed their works and that the bill was ready for payment he wrote again to the Engineer requesting him to pay the amount of Rs. 3,000 to himself and on no account to pay it to defendants Nos. 1 and 3. The Railway Company however gave no heed to these letters and soon afterwards paid Rs. 11,000 to defendants Nos. 1 and 3, the entire amount due for the work done on the First Division.

The District Judge holds that the notice, exhibit F2, given by defendants Nos. 1 and 3 was not in accordance with law being only a conditional notice and therefore the Railway Company were justified in paying them. He does not say that the transfer of the contractor's claim against the Company was not a valid and legal transfer, nor has any such contention been put forward before us. If there was a valid and effectual transfer then according to section 130 of the Transfer of Property Act, the rights of defendants Nos. 1 and 3 against the sixth defendant immediately vested in the plaintiff, who thus became entitled to enforce them whether notice of the transfer was given or not. The transferors, defendants Nos. 1 and 3, were no longer entitled to payment of the debt so transferred. But if the debtors—the

Railway Company—paid their original creditors without notice of assignment of the debt then the law would allow them to plead such payment in discharge of their liability although at the time of payment the right had vested in the assignee, the present plaintiff. Notice is not necessary to perfect the title of the assignee of a debt but until the debtor receives notice of the assignment in accordance with the law his dealings with the original creditor will be protected. Sections 130 and 131 of the Transfer of Property Act lay down that the notice shall be express and in writing—and so it is in this case—and signed by the transferor or the transferee. Here, before the Railway Company made any payment to defendants Nos. 1 and 3 they had received one such notice signed by defendants Nos. 1 and 3 (exhibit F2), copies of the bond, exhibit A and the power of attorney exhibit E, the originals of both of which were signed by defendants Nos. 1 and 3, and three letters written on three different dates by the plaintiff (exhibits F, F1, F3) notifying the assignment to the Company. The notice signed by the creditors mentioned that they had authorised the plaintiff by a power-of-attorney to draw the sum of Rs. 3,000 without any condition or qualification but the request to the Railway Company to pay the plaintiff is qualified by use of the words "in case our loan is not cleared till then." The Act does not say that the notice to be valid must be free from any condition or qualification but Mr. Grant relies upon the case of *Durham Brothers* v. *Robertson*(1), as laying down that the notice of assignment must not be conditional. But that case decides nothing as to the form of the notice and all that is decided there is that the assignment must be absolute and not by way of charge only as required by the Judicature Act. That the transfer of the debt by way of security as in this case is good under the Transfer of Property Act, has not been seriously questioned at the bar as it could hardly be in the face of section 134. Even in the sense of the English Law, the assignment under exhibits A and E would be an absolute assignment. What then is the duty of a debtor, the c
whom has been absolutely transferred to another person and who has received notice of such assignment from his creditor but has, at the same time, been requested by the latter to pay the transferee

(1) (1898) 1 Q.B., 765.

only if the liability which formed the consideration of the transfer has not already been discharged. The utmost that could be fairly claimed for a debtor in that position is that if his creditor after giving such notice represents to him that he had satisfied the claim of the transferee and the transferee himself takes no steps to realise the debt from the original debtor, the latter would be justified in paying the transferor, but the Railway Company in this case did not pay the contractors until long after they had received a number of notices of the assignment—and no irregularity is alleged in those notices—coupled with demand of payment from the plaintiff, nor is it suggested that they paid defendants Nos. 1 and 3 in *bonâ fide* reliance on any representation by the latter that they had paid off the debt due to the plaintiff and therefore the assignment ceased to be operative. The Railway Company paid the contractors and not the plaintiff because they would not recognise the assignment to the plaintiff at all. The Transfer of Property Act does not lay down what the debtor is to do when the fact of the assignment or its validity and operation is in dispute; but there can be no doubt that in such a case if he has received a duly signed notice of the alleged assignment, the only safe course for him is not to pay either of the claimants but to ask them to interplead. If he pays one of them he does so at his peril and he will be obliged to pay over again to the right person if the persons to whom he paid had no title. (See *William Brandt's Sons & Co.* v. *Dunlop Rubber Company*(1).) Even if the notice, exhibit F2, was not a valid notice the Railway Company had as we have pointed out perfectly good notice from the plaintiff before they paid the defendants Nos. 1 and 3. Under section 131 the transferee can sign the notice if the transferor refuses to do so, but it was never alleged that circumstances did not exist which justified the plaintiff in giving the notice and the Act does not require that these circumstances should be mentioned in the transferee's notice. And it would hardly be reasonable to say that if the transferor refused to give a proper notice but gave a notice which was invalid in law, the transferee could not give notice of the assignment so as to prevent the original debtor from defeating the assignment. We hold that the liability of the sixth

(1) (1905) A.C., 454.

defendant to the plaintiff was not discharged by payment to defendants Nos. 1 and 3.

The appeal must therefore be allowed, the decree of the District Judge reversed and that of the Subordinate Judge restored with costs in this Court and the lower Appellate Court. The memorandum of objections is dismissed with costs.

MUNRO, J.—I agree.

Messrs. *David & Brightwell*, Attorneys for third respondent.

APPELLATE CIVIL.

Before Sir R. S. Benson, Officiating Chief Justice, and Mr. Justice Sankaran-Nair.

SUNDARA BAI SAHIBA (PLAINTIFF), APPELLANT IN ORIGINAL SIDE APPEALS NOS. 82 AND 85 OF 1906,

v.

TIRUMAL RAO SAHIB AND ANOTHER (DEFENDANTS), RESPONDENTS IN THE ABOVE.*

1909. August 24, 25.

Jurisdiction—Letters Patent, cl. 12—Suit for land—Suit in which decree is asked for operating directly on land, is a suit for land.

A suit which prays for any relief with reference to any specific immoveable property is a suit for land within the meaning of clause 12 of the Letters Patent. Where in a suit for maintenance the plaintiff prays that the amount may be charged, not on the ancestral property generally, but on specific land, the suit is a suit for such land within the meaning of clause 12 of the Letters Patent.

APPEAL from the decree of Boddam, J., dated the 28th day of November 1906, in the exercise of the ordinary original civil jurisdiction of the Court, made in Civil Suit No. 164 of 1905.

The facts are stated fully in the judgment.

L. A. Govindaraghava Ayyar and *G. Krishnaswami Ayyar* for appellant.

The Hon. Mr. *V. Krishnaswami Ayyar* for respondents.

In Appeal No. 82 of 1906.

JUDGMENT.—The plaintiff a widow, sues the defendants her sons, for maintenance. She prays that her maintenance may be

* Original Side Appeals Nos. 82 and 85 of 1906.

charged on certain immoveable property situated within the local limits of the original jurisdiction of the High Court.

Her suit is dismissed on the ground that the High Court has no jurisdiction to entertain the suit.

The question is whether the suit is 'for land' within clause 12 of the Letters Patent. It is contended that suits for the recovery of possession alone fall within the clause.

The High Court of Calcutta has held that suits to establish title to land, suits for foreclosures, sale, redemption and suits for specific performance of contract for sale of land, are suits for land, and in a judgment in which the question was fully considered, Moore, J., held that a suit for sale is a 'suit for land,' following certain Calcutta decisions. See *Nalum Lakshmikantham* v. *Krishnaswamy Mudaliar*(1) and the Calcutta cases referred to therein; also, *The Delhi & London Bank* v. *Wordie*(2), *Kellie* v. *Fraser*(3), *Sreenath Roy* v. *Cally Doss Ghose*(4), *Land Mortgage Bank* v. *Sudurudeen Ahmed*(5).

In Bombay in the cases reported in *Venkoba Kásár* v. *Rambhaji valad Arjun*(6), *His Highness Shrimant Maharaj Yashvantray Holkar* v. *Dadabhai Cursetji Ashburner*(7), the Judges took the contrary view, but in *Sorabji* v. *Rattonji*(8), Strachey, J., expressed his opinion that in the absence of authority upon the point he should have had great difficulty in holding that a suit for foreclosure is not a 'suit for land.' The authority of these decisions is considerably shaken if they are not overruled by the later decision in *Vaghoji* v. *Camaji*(9).

The decisions of the Calcutta High Court are based on the ground that any suit in which a decree is asked for operating directly on the land is a suit for land. This is in accordance with the principle, that all questions relating to land should ordinarily be decided by the Court, within the limits of whose jurisdiction it lies. We are, therefore, inclined to hold that a suit which prays for any relief with reference to any specific immoveable property is a suit for land.

(1) (1904) I.L.R., 27 Mad., 157 at p. 161. (2) (1876) I.L.R., 1 Calc., 249.
(3) (1877) I.L.R., 2 Calc., 445. (4) (1880) I.L.R., 5 Calc., 82.
(5) (1892) I.L.R., 19 Calc., 358 at p. 361 (note). (6) (1872) 9 B.H.C.R., 12.
(7) (1890) I.L.R., 14 Bom., 353.
(8) (1898) I.L.R., 22 Bom., 701 at p. 704. (9) (1905) I.L.R., 29 Bom., 249.

The plaintiff's right of maintenance is not merely a personal obligation. It is a real right but it is not a charge or any other proprietary right until it is referred to specific property by contract or decree.

Where, therefore, in a suit for maintenance the plaintiff only prays for a decree charging her maintenance on ancestral property without specifying any particular portion of that property, the suit may not be a suit for land as she does not claim any relief against any specified property. But where she claims to have her maintenance made a charge on specified immoveable property, we are of opinion that she prays for a decree to operate directly on the land. The decree to be passed if she succeeds is a decree against that property. If the defendant fails to pay her decree debt, it may be sold, if the decree is so framed, for the purpose of discharging the same.

We are therefore of opinion that the suit is 'for land.'

The only question that remains for consideration is the rate of maintenance. There is evidence that during her husband's lifetime the plaintiff was living apart and under exhibit C she was to get for her maintenance a sum of Rs. 50 (fifty) a month. Since then she has become a widow. The sum of Rs. 250 (two hundred and fifty) which the father jagirdar paid to the family has been reduced to Rs. 160 (one hundred and sixty) and there has been litigation in which the members of the family were involved. Taking these circumstances and the state of the family into consideration, we think that maintenance may be awarded at the rate of Rs. 40 (forty) a month. The plaintiff is also entitled to arrears of maintenance for 3 (three) years prior to date of suit at that rate. The maintenance accruing due from this date will be payable on or before the 10th of every month.

We therefore pass a decree for maintenance at the above rate and direct that such maintenance as well as arrears be made a charge as prayed for on the property specified in the plaint. The arrears decreed will be paid in three equal instalments, the first instalment to be paid on or before the 15th November next and the other instalments at intervals of four months from that date. We further direct that on default the said property may be sold in execution to discharge the amount due. Both parties will pay and receive proportionate costs throughout.

BENSON, C.J., AND SANKARAN-NAIR, J.

SUNDARA RAI SAHIBA v. TIRUMAL RAO SAHIB.

In Appeal No. 85 *of* 1906.

At this stage, it is unnecessary to make the purchaser who is bound by the decree in the suit or appeal a party. The appeal is therefore dismissed.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Abdur Rahim.

1909. July 26. August, 6, 16. September 28.

THE OFFICIAL ASSIGNEE OF MADRAS AND AS SUCH THE ASSIGNEE OF THE PROPERTY AND CREDITS OF ARBUTHNOT & COMPANY, INSOLVENT DEBTORS (APPELLANT),

v.

L. D. RAMACHANDRA IYER (RESPONDENT).*

Indian Insolvency Act, 11 & 12 *Vict., cap.* 21, *s.* 73—*'Person aggrieved,' who is—Official Assignee, right of, to appeal as person aggrieved—Fiduciary relationship—Effect of demand by creditor in creating fiduciary relationship between him and debtor.*

A 'person aggrieved,' within the meaning of section 73 of the Indian Insolvency Act, is a person against whom a decision has been pronounced which has wrongly refused him something which he had a right to demand.

Where a debtor, whose claim to be paid in full was rejected by the Official Assignee, moved the Insolvency Court making the Official Assignee a party and obtained an order directing payment in full, the Official Assignee is a 'person aggrieved' within the meaning of section 73 of the Act and is entitled to appeal against such order.

Ex parte Sidebottam in re Sidebottam, [(1880) 14 Ch.D., 458 at p. 465], referred to.

In re Lamb; ex parte Board of Trade, [(1894) 2 Q.B.D., 805], referred to.

The Official Assignee, in refusing the creditor's claim, does not act judicially and the notice of motion to Court cannot be considered as an appeal against a judicial or quasi-judicial proceeding of the Assignee.

Where a person pays money into a Bank without giving any directions, the money becomes the property of the Bank and the relation between the Bank and the person paying is that of debtor and creditor.

Per MUNRO, J.—Where the person paying money without any directions makes a proper demand for payment after the money has become payable, the debtor is bound to remit at once such money to the creditor; and the debtor thereafter holds such money in a fiduciary capacity, just as if the creditor had received payment and deposited it with directions to remit.

Per ABDUR RAHIM, J.—It is not competent to a creditor by making a demand upon his debtor, to convert the latter into a trustee in respect of the amount

* Original Side Appeal No. 27 of 1908.

MUNRO AND ABDUR RAHIM, JJ.

OFFICIAL ASSIGNEE OF MADRAS v. RAMACHANDRA IYER.

due. Such a change in the relationship can be brought about only by the debtor agreeing to accept the altered position and by his doing something towards effectuating the trust.

APPEAL from the order and judgment of Sir Arnold White, C.J. in the exercise of the jurisdiction of this Court for the relief of insolvent-debtors at Madras in Petition No. 181 of 1906.

The facts are fully stated in the judgment.

D. M. C. Downing for appellant.

K. Ramanath Shenai for respondent.

JUDGMENT.—This is an appeal by the Official Assignee of Madras and as such the Assignee of the property and credits of Arbuthnot & Co., "Insolvent Debtors" against the order of the Insolvency Commissioner passed in Petition No. 181 of 1906. The preliminary objection is taken that the Official Assignee is not entitled to appeal. The respondent holds a fixed deposit receipt from Arbuthnot & Co. The amount with interest fell due on the 9th October 1906. The respondent applied to the Official Assignee for payment of the amount due to him in full on the ground that he had demanded payment from Arbuthnot & Co. on the 18th October 1906 and before that firm suspended payment. The Official Assignee refused to pay. The respondent thereupon gave a notice of motion to the Official Assignee stating that he intended to move the Court for an order that the amount due under the deposit receipt might be paid to him out of the assets of the insolvent in the hands of the Official Assignee. The Insolvency Commissioner after hearing the Official Assignee passed an order as prayed for by the respondent. It is against this order that the Official Assignee appeals.

Under section 73 of the Indian Insolvency Act, 1848, "any person who shall think himself aggrieved" by an order of the Court may appeal. It does not, we think, follow from this that any person can claim a hearing by merely stating that he thinks himself aggrieved. Unless it appears that he is actually "aggrieved," in the proper meaning of that expression, he cannot maintain an appeal. Thus in *Ex parte Ditton*; *In re Woods*(1) it was held that a person who alleged himself to be a creditor but had

(1) (1879) 11 Ch.D., 56.

not tendered any proof of debt, was not a "person aggrieved" by the order to which he objected and was not entitled to appeal against it. Under section 71 of the English Bankruptcy Act of 1869 and section 104 of the Act of 1883 "any person aggrieved" may appeal. The words used in the Indian Statute do not seem to mean anything different. In *Ex parte Sidebotham, In re Sidebotham*(1) James, L.J., said:—"'A person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something." In *Ex parte Official Receiver*; *In re Reed, Bowen & Co.*(2) the question arose whether the Official Receiver was a "person aggrieved" by an order adjourning an application of his under rule 191 of the Bankruptcy rules, 1886, for an immediate adjudication of bankruptcy against a debtor. Lord Esher, M.R., observed, at page 177: "Therefore, he as it seems to me, is made a party to an application against the debtor for a judicial decision upon matters of fact which may be in contest, and I cannot doubt that he is bound to maintain the application by producing evidence and by arguing upon the effect of that evidence. Therefore he is placed in the position of a party to a litigation before a judicial tribunal." His Lordship then proceeded to consider whether Official Receiver was a "person aggrieved" by the decision and so entitled to appeal, and after pointing out that James, L.J., in *Ex parte Sidebotham, In re Sidebotham*(1) when saying a "person aggrieved" must be a man who has suffered a legal grievance, did not say a pecuniary grievance, a grievance to his property or to his person, explained the definition of the term given by James, L.J., in *Ex parte Sidebotham, In re Sidebotham*(1), as meaning among other things that "a person aggrieved" must be a man against whom a decision has been pronounced which has wrongfully refused him something which he had a right to demand. Finally he said:—"When you see that the Official Receiver is by rule 191 a person who is to make and to support this application and who is bound to prove the grounds, affirmative and negative, on which the application ought to be granted, if he says that the facts have been wrongly decided against him, or that, the facts being decided in his favour, the Court has come to

(1) (1880) 14 Ch.D., 458 at p. 465. (2) (1887) 19 Q.B.D., 174.

a wrong conclusion in refusing the application, it seems to me that he is, within the definitions given in *Ex parte Sidebotham*(1) 'a person aggrieved'". In *In re Lamb, Ex parte Board of Trade*(2), the question arose whether the Board of Trade was "aggrieved" by a decision that an objection taken by them to the appointment of a trustee of the property of a bankrupt was invalid. It was held that they were "aggrieved". Lord Esher, M.R., at page 812 referred to *Ex parte Official Receiver, In re Reed, Bowen & Co.*(3) quoted above as determining "that any person who makes an application to a Court for a decision, or any person who is brought before a Court to submit to a decision, is, if the decision goes against him, thereby a person "aggrieved" by that decision. He then proceeded to say:—"Here the creditors summoned the Board of Trade before the Judge to support the validity of their objection, and the Board went before the Judge. The Board and the creditors were heard, and the Judge had to give his determination. That determination being against the Board upon the matter which was brought before the Court, they are 'aggrieved' by it if it is wrong. They are therefore persons aggrieved and are entitled to appeal to this Court."

In the light of these rulings we have no hesitation in holding that the Official Assignee is a "person aggrieved" by the order now appealed against. He was brought before the Court to submit to a decision that he was bound to pay a certain sum to the respondent and the decision was against him. An attempt was made to distinguish *In re Lamb*; *Ex parte Board of Trade*(2) on the ground that Lord Esher, M.R., remarked that if the Board of Trade could not appeal, there could be no appellant. It is pointed out that, in the present case, even if the Official Assignee did not appeal, any creditor might appeal. Again *Ex parte Official Receiver, In re Reed, Bowen & Co.*(3) was sought to be distinguished on the ground that the application was made there by the Official Receiver, prior to adjudication and that the application having been refused, the Official Receiver was the natural person to appeal. The definitions of "person aggrieved" were however arrived at quite independently of the special circumstances of these cases and are of general application.

(1) (1880) 14 Ch.D., 458 at p. 465. (2) (1894) 2 Q.B.D., 805.
(3) (1887) (19) Q.B.D., 174.

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It is suggested that the notice of motion was in substance an appeal against the decision of the Official Assignee refusing to pay the sum demanded, that that decision was passed by the Official Assignee in a *quasi judicial* capacity, and that he cannot be considered a party to an appeal against his own order. If the respondent's application had been an application under rule 50 of the Insolvency Rules, 1905, there might have been some force in the contention that the decision complained of was passed in a *quasi judicial* capacity. But the application is not under that rule. The respondent asked the Official Assignee to pay him something. The Official Assignee refused, and cannot be said in so refusing to have been acting in any sense judicially. Neither the notice of motion nor the affidavit of the respondent treats the refusal of the Official Assignee as a judicial order and asks to have it reversed.

There has been considerable discussion as to the exact position of the Official Assignee. But it is unnecessary to enter into that question, seeing that we are satisfied that in the present case the Official Assignee is a "person aggrieved" and therefore entitled to maintain the appeal. The preliminary objection is therefore overruled.

JUDGMENTS (MUNRO, J).—As to the facts there is no dispute. The respondent is the holder of a fixed deposit receipt for Rs. 1,890 for one year from Messrs. Arbuthnot & Co., dated 9th October 1905. The amount of the deposit with interest having fallen due on the 9th October 1906, the respondent wrote to Messrs. Arbuthnot & Co., on the 18th October 1906, enclosing the deposit receipt duly signed and requesting them to send him the amount due. This letter reached Messrs. Arbuthnot & Co., on the 19th or 20th October at the latest. On the 22nd October Messrs. Arbuthnot & Co. suspended payment. On these facts the learned Commissioner found that Messrs. Arbuthnot & Co., having received a demand for payment before suspension, held the money in a fiduciary capacity. He therefore directed the Official Assignee to pay the respondent the whole amount due under the deposit receipt out of the assets of the insolvents, Messrs. Arbuthnot & Co., in his hands.

The contention in appeal is that the fact that demand was made did not in any way alter the relationship between the parties which continued to be merely that of debtor and creditor. The

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law relating to banker and customer has recently been considered in *Official Assignee of Madras* v. *Smith*(1) so far as is necessary for the present case, the law as there laid down may be stated thus. When a person pays money into a bank, then, if nothing further appears, the money becomes the money of the banker, who is entitled to mix it with his other money and use it as his own, but is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it. In such a case the relationship between the banker and the person paying the money is that of ordinary debtor and creditor. The person paying the money may, however, at the time of payment, give directions to the banker which put the relationship upon a different footing and give it a fiduciary character. When this is the case the money does not become the money of the banker. He is not entitled to mix it with his own money and use it, and if he does so and afterwards fails, the unspent balance in his hands must be taken to include the money which it was his duty to keep separate and not to use rather than the money which he had the right to dispose of. It is on this principle that money held by a banker in a fiduciary capacity, may, if he fails, be recovered in full out of the general assets.

In the present case the money was paid into the bank on the understanding that it should bear interest at 5 per cent. per annum for one year from the date of being paid in and that, at the expiry of the one year, interest should cease unless the deposit was renewed, and that no portion of the money could be drawn without the production of the deposit receipt. There was nothing to prevent the operation of the rule that the money when paid became the property of the banker. Messrs. Arbuthnot & Co. became therefore merely debtors to the respondent, bound after the expiry of the year to repay on demand, accompanied by production of the deposit receipt, the amount of the deposit with interest. Demand by letter was duly made; but Messrs. Arbuthnot & Co. did not remit on the day the demand was received. Two or three days later, they suspended payment without having remitted the money. What we have to determine in this case is whether the demand altered the relationship of debtor and creditor which previously existed between Messrs. Arbuthnot & Co. and

(1) (1909) I.L.R., 32 Mad., 68.

the respondent in respect of the money due under the deposit receipt into one of a fiduciary character.

Now we have seen that a person at the time of paying money into a bank may give directions which cause the banker to hold the money in a fiduciary capacity. If the money has been paid in without such directions is there anything to prevent directions being given by the customer at a subsequent time with the same result? I think not. The customer, in the case supposed is, if the money was paid into his current account, entitled to go to the Banker at any time and demand repayment of his money and the Banker is at once bound to repay. The customer having received his money may at once hand it back to the Banker with directions such as cause the Banker, if he accepts the money, in future to hold the money in a fiduciary capacity. But it would be absurd to say that it is necessary for the customer to go through the process of actually receiving his money across the counter and handing it back. It is manifestly sufficient if he gives his directions. On receipt of those directions the Banker, if he retains the money, is bound to act at once upon them, and thereafter to deal with the money as if it had actually been repaid to the customer and again paid in with the directions and it need hardly be said that it is not necessary for the customer to give his directions in person. If the money was paid into a fixed deposit account, the same rule would on the same line of reasoning apply after the expiry of the period of the deposit.

From the above it is clear that when Messrs. Arbuthnot & Co., on the 19th or 20th October received the respondent's demand for repayment it was their duty to remit the money at once. After this demand they held the money in the same way as if on the day the demand was made the respondent had received the money, and had then handed it back and asked them to hold the money for him in trust pending remittance to him at a future date.

We have not been referred to any cases in which the effect of demand as between Banker and customer has been considered. There is another class of cases, however, in which a principle similar to that I have followed has been laid down. See for instance *Ex parte Ward, In re Couston*(1), where it was held that

(1) (1872) L.R., 8 Ch. App., 144

certain goods did not pass to the trustee in liquidation in as much as prior to the bankruptcy the owner had demanded possession from the bankrupt.

I therefore agree with the learned Commissioner that after demand Messrs. Arbuthnot & Co. held the money of the respondent in a fiduciary capacity and I would dismiss his appeal with taxed costs to be paid out of the estate.

The appeal is dismissed accordingly.

ABDUR RAHIM, J.— These appeals (Original Suit Appeals Nos. 26, 27, 29, 30, 46, 50, 53, 54, 56, 67, and 68 of 1908) are preferred by the Official Assignee of Madras and the question to be determined upon the facts of each case is whether the learned Commissioner in Insolvency was right in saying that Arbuthnot & Co. at the time of their insolvency held the respective sums of money ordered by him to be paid to the several petitioners, in a fiduciary capacity or as mere Bankers. In none of the cases are the facts in dispute and the decision turns upon the right application of the law to the admitted facts. Before I deal with each case separately it will be more convenient to state generally the law which governs such questions and I should like to observe that the principles and methods according to which Arbuthnot & Co. carried on their Banking business were so far as they bear upon the present question much the same as those of other Bankers in this country and in England. Arbuthnot & Co. not only received their customers money in current or deposit account, but also acted as agents and bailees not only for their customers as the term is ordinarily understood but also for persons who had no account with them. On moneys received in deposit they paid a certain rate of interest and for acting as agents or bailees they generally charged commission.

Now the following propositions may be taken to be well established by English cases. Ordinarily money paid into a Bank on current or deposit account is no longer the customer's money but the Banker's. The Banker can deal with it in any way he chooses, his only obligation being to repay a similar amount. He is further bound to honour the cheques of those customers who have a current account with him, and as to fixed deposits the Banker according to the practice in this country is to repay the amount at the expiry of the stipulated period. The Banker is a debtor of his customer in respect of such moneys and does not hold them as

trustee or in any fiduciary capacity. In the event of the Banker's bankruptcy the customer like any other creditor has a right of proof against the general assets of the Bank and no more. See *Foley* v. *Hill*(1). It is otherwise however when a Banker receives money in trust or as agent for an especial purpose as he often does. He cannot use money so received as his own without being guilty of breach of trust. His duty is to keep it separate and not to mix it with his own money. And if he mixes it with his own funds or purchases any property with it, a Court of Equity will not allow it to be said "the identical coins which the Banker received in a fiduciary character are no longer traceable and must therefore be taken to form part of the general assets of the Banker." The doctrine of following trust property is no longer confined to properties which are capable of being traced in specie although it might have been so in the olden days. The modern developments of equity enables the Court to follow trust-money in all its transmutations and to seize upon the fund or property into which it is traced for the purpose of making good thereout the trust funds (see *In re Hallett's Estate*, *In re Knatchbull* v. *Hallett*(2) and *Frith* v. *Cartland*(3)). The inviolability of trust-money is carried still further. If a person holding money in trust or quasi trust mixes it with his own money and then draws out a portion of the blended fund for his own use, he will be held to have drawn his own money and no portion of the trust money. Similarly if he spends part of the mixed fund and buys property with the rest he shall be deemed to have expended his own money and invested the trust money. The reason underlying the rule is thus forcibly expressed by James, L.J., in *Ex parte Kelly & Co.*(4): "No doubt if a trustee commits a breach of trust by stealing or otherwise misappropriating the trust moneys, he becomes a debtor to his *cestui que* trust in respect of the money which he has thus improperly taken, and if he becomes a debtor in that way he remains only a debtor, and the *cestui que* trust only a creditor, unless he can 'ear mark' the money which the trustee has misappropriated. But I do not think it is for a Court of Law to compel a man to be a thief, or to hold that he intended to be or that he did become a thief, and

(1) 2 H.L.C., 28.
(2) (1879) 13 Ch.D., 696.
(3) 34 L.J.Ch. 301.
(4) (1879) 11 Ch.D., 306 at p. 311.

therefore a debtor in respect of the money stolen by him, when he had no such intention." It is only when trust property is shown to be destroyed by misappropriation or otherwise and only to the extent that it is destroyed that the Court of Equity will deem trust property to be lost. But as Bramwell, L.J., says in *Ex parte Kelly & Co.*(1): "I cannot think the law is that the money cannot be followed and traced where there was what may be called a technical or formal breach of trust in not ear marking the fund."

Again it was at one time thought that the rule regarding following trust property whether it be specific property or money applied only to cases where there has been a trust in the ordinary acceptance of the word as is quasi-trust and was not to be extended to property held in any other fiduciary capacity such as by an agent or a bailee. But since the judgment of Jessel, M.R., in *In re Hallett's Estate*(2) that notion has been exploded and it is now settled law that the equitable doctrine as to following property belonging to one person in the hands of another applies in all its refinements not only to the ordinary cases of trust but of quasi-trust such as when money or other form of property is placed in the hands of an agent or a factor for an especial purpose. *Gibert* v. *Gonard*(3), North, J., at page 440 states the rule thus: "It is very well-known law that if one person makes a payment to another for a certain purpose, and that person takes the money knowing that it is for that purpose he must apply it to the purpose for which it was given. He may decline to take it if he likes; but if he chooses to accept the money tendered for a particular purpose, it is his duty, and there is a legal obligation on him to apply it for that purpose." Thus far the law is well established and I shall now consider the questions as they arise in each case.

Appeal No. 27.—In this case L. D. Ramachendra Aiyar had a fixed deposit of Rs. 1,890 for one year with Arbuthnot & Co., and the amount fell due on the 9th October 1906. By a letter, dated the 18th October 1906, Ramachandra Aiyar demanded payment of the sum and I assume that Arbuthnot & Co. received this letter on the 20th October. On the 22nd October Arbuthnot & Co. suspended payment. The argument urged before us on behalf of Ramachandra Aiyar which apparently found favour with the learned

(1) (1879) 11 Ch.D., 306 at p. 311.
(2) (1879) 13 Ch.D., 696.
(3) 54 L.J.Ch., 439.

Commissioner is that from the moment the letter reached Arbuthnot & Co., the latter must be taken to have held the Rs. 1,890 as trustees or quasi-trustees for Ramachandra Aiyar because upon the demand being made Arbuthnot & Co. were bound to hand over the money to their customer. We have not been referred to any authority in support of this proposition which upon a little reflection would appear to be wholly untenable. The contention really resolves itself into this, that a creditor is competent simply by making a demand for his debt to turn his debtor into a trustee with respect to the amount of the debt without the debtor having even at any time accepted such a position. This, if allowed, would go far to obliterate all distinction between a debt and property held in trust and if that be the necessary result of such an argument it at once shows the utter unsoundness of it. Here undisputedly Arbuthnot & Co. were mere debtors of Ramachandra Aiyar in respect of the amount in deposit account and on expiry of the fixed period they became liable to repay the debt and there is nothing to show that they ever assumed any fiduciary position towards Ramachandra Aiyar. The relationship of debtor and creditor must be taken to continue until it is terminated by payment or it may be that if Arbuthnot & Co. at any time agreed at the request of Ramachandra Aiyar to hold the amount in trust for him or to apply it in a particular manner as his agents and did something towards effectuating the trust or applying it for the specified purpose a new and different kind of relationship would be established between the parties in substitution of the old. But here there is no pretence of such a change of relationship having been effected unless it be by the mere fact of demand being made for repayment which to my mind cannot possibly have that effect. And I think it would be quite absurd to say as suggested that on the demand for payment being made Arbuthnot & Co. became agents of Ramachandra Aiyar for the purpose of paying back the amount to him. The cases cited at the bar and to which I have already referred only lay down that if money gets into the hands of a Banker impressed with a trust or for some specific purpose it can be followed even if blended with other moneys. Before the rule as to following can be applied you must therefore first of all find that the money in question was held in some kind of fiduciary character and where that is wanting the rule cannot apply. I may mention that especial reliance has been placed on behalf of the respondent on *Ex parte Ward, In re Coustan*(1). But that case has no bearing on the present question. There the point for decision was whether certain goods were within the order and disposition of the bankrupt with the consent of the true owner of the goods and it was held that, the owner having in sufficient time before bankruptcy asked the bankrupt to forward the goods to him furnishing the bankrupt at the same time with a cheque for cost of carriage and clearance from the warehouse, the consent of the owner had been determined by the demand for possession. With every deference therefore I am of opinion that the order of the learned Chief Justice sitting as Commissioner in Insolvency is based on a misapprehension of the law and I would allow the appeal and dismiss with costs the claim of Ramachandra Aiyar to be paid in priority to the other creditors of Arbuthnot & Co.

Messrs. *King & Josselyn*, attorneys for appellant.

C. Vijiaragavalu Naidu, attorney for respondent.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Abdur Rahim.

THE OFFICIAL ASSIGNEE OF MADRAS AND AS SUCH THE ASSIGNEE OF THE PROPERTY AND CREDITS OF ARBUTHNOT & COMPANY, INSOLVENT DEBTORS (RESPONDENT), APPELLANT,

v.

A. E. A. LUPPRIAN (PETITIONER), RESPONDENT.*

1909. August 16. September 28.

Fiduciary relationship—Direction by creditor to debtor—How far such direction can create fiduciary relationship between creditor and debtor.

A customer who had certain amount standing to his credit in a Bank, gave directions to the Bank to utilise the money for a certain purpose and the officers of the Bank, when the customer called at the Bank, informed him that his instructions would be carried out in due course. The Bank became insolvent before the directions were so carried out. On a motion by the creditor to have his amount paid in full:

Held, per MUNRO, J., that, by virtue of the direction by the customer, the Bank held the money for a specific purpose and that a fiduciary relationship was established between the customer and the Bank. The customer was therefore entitled to be paid his money in full.

(1) (1872) L.R., 8 Ch. App., 144.

* Original Side Appeal No. 50 of 1908.

Per ABDUR RAHIM, J.—The direction by the customer did not alter the relation of creditor and debtor between the customer and the Bank into a fiduciary relationship. Such relationship could not be created unless the debtor by some unequivocal act, shows that he had changed his position into that of a bailee. The mere promise to carry out the customer's directions, without doing anything to appropriate the money, is not sufficient. The customer was only entitled to prove for his debt.

APPEAL from the order and judgment of Sir Arnold White, Chief Justice, in the exercise of the jurisdiction of this Court for the relief of Insolvent debtors at Madras in Petition No. 181 of 1906.

The facts for the purpose of this case are sufficiently stated in the judgment.

D. M. C. Downing for appellant.

K. Ramanath Shenai for respondent.

JUDGMENTS (MUNRO, J.)—This is an appeal by the Official Assignee against an order of the learned Chief Justice sitting as Commissioner in insolvency.

The facts are not in dispute. The respondent had, on the 5th August 1906, Rs. 600, standing to the credit of his current account with Arbuthnot & Co. On the above date he wrote to Arbuthnot & Co., and requested them to buy on his behalf a Government promissory note for Rs. 1,000 when the amount of his current account reached that sum. On the 30th September 1906, he again wrote and requested Arbuthnot & Co., to buy the promissory note as there was then Rs. 1,000 to his credit. He received no reply up to 10th October. He then called at the bank and was told by two officers of the bank that his instructions would be carried out in due course. The promissory note had not, however, been purchased when Arbuthnot & Co. suspended payment on the 22nd October 1906, though it could have been bought for Rs. 1,000 between the 30th September and the 22nd October. On these facts the learned Commissioner held that Arbuthnot & Co. held the sum of Rs. 1,000 in a fiduciary capacity, and directed the Official Assignee to pay the whole amount to the respondent.

As pointed out in my judgment in *Official Assignee of Madras* v. *Ramachendra Aiyar*(1), it was competent for the respondent to give such directions with regard to the money standing to the

(1) (1910) I.L.R., 33 Mad., 134.

credit of his current account as would thereafter cause Messrs. Arbuthnot & Co. to hold the money in a fiduciary capacity. The effect of his order to them to buy was the same as if he had attended in person at the bank, drawn his money, as he was entitled to do at any time, and then placed it in the hands of Messrs. Arbuthnot & Co. for the specific purpose of buying the promissory note. In the face of the respondent's specific directions Messrs. Arbuthnot & Co. were not entitled to use the money as their own but clearly held it in a fiduciary capacity. For the appellant, *In re Barned's Banking Company (Limited), (Massey's Case)*(1) is relied upon. There one Massey paid into a bank a certain sum with instructions to remit it to another firm. Next day the bank stopped payment without having made the remittance. It was held that Massey had only the right to prove with the general creditors, as the bank stopped payment before taking any steps to apply the money as directed. I am, with great respect, unable to see how this circumstance could affect the character of the money in the hands of the bank. It was money which the bank was clearly not entitled to use as its own. Heber Hart in his 'Law of Banking', second edition, page 146, makes the comment in a foot-note that the decision seems of doubtful authority and we have not been referred to any case in which it has been followed. In *King* v. *Hutton*(2) it was pointed out that where a stock-broker receives from his client a sum of money for the purchase of stock, he has only a special property in the money so handed to him for a specific purpose, and if he became bankrupt while the stock was unpurchased the money would not go into the general account in the bankruptcy. The same principle would, I think, apply when money is handed to a banker for the specific purpose of purchasing securities, and as has been shown, that is in effect the position in the present case. In *Prince* v. *Oriental Bank Corporation*(3) it was observed that the decision in *De Bernales* v. *Fuller*(4) might be supported on the ground that money had been paid in specifically for the payment of the particular bill and had been accepted by the bankers for that purpose, and that they made themselves, by so accepting the money, agents to hold it for the plaintiffs. Again in *Vaughan* v.

(1) (1870) (39) J.Ch., 635.
(2) (1900) 2 Q.B., 504.
(3) (1878) L.R., 3 App. Cases, 325 at p. 334.
(4) (1810) 14 East, 590.

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Halliday(1) mention is made of the rule of law that, if a remittance is sent for a specific purpose, the person who receives the money must either apply it for the purpose for which it is sent or else return it. I think the order of the learned Commissioner is right and would dismiss the appeal with taxed costs to be paid out of the estate.

The appeal is dismissed accordingly.

ABDUR RAHIM, J.—One Lupprian who has a current account with Arbuthnot & Co. had to his credit on the 5th August 1906 Rs. 600 and on that date he wrote to Arbuthnot & Co., requesting them to buy for him a Government promissory note for Rs. 1,000 when the balance to his credit reached the sum of Rs. 1,000. On the 30th September the amount to his credit then being Rs. 1,000, Lupprian informed the bankers of the fact and asked them to buy a Government promissory note for the amount. On the 10th October he not having received any reply to his letter interviewed some of the officers at the bank who told him that no reply was necessary as his instructions would be carried out in due course. But in fact Arbuthnot & Co. never bought any promissory note before they stopped payment.

I think the reasoning which I have applied to in *Official Assignee of Madras* v. *Ramachandra Aiyar*(2) also applies to these facts. The only difference between the two cases is that in the former the customer asked the bankers to pay the money to himself while in the latter he asked them to invest the amount due from them in Government promissory notes. Having regard to the usual course of business of bankers, I shall take it that Arbuthnot & Co. were under an obligation to buy the Government promissory note for Lupprian just as they were in the other case to repay to Ramachandra Iyer the amount due to him. And it may be that their failure to invest the money as directed would entitle Lupprian to recover damages for breach of that contract. But the question here is did the direction given by Lupprian to his bankers to buy Government promissory notes followed by a promise on their part to carry out the directions have the effect of making them bailees or trustees with respect to the amount in question? Such a case does not fall within the rule established

(1) (1874) L.R., 9 Ch. App., 561 at p. 568.
(2) (1910) I.L.R., 33 Mad., 134.

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by *In re Hallett's Estate*(1), *Burdick* v. *Garrick*(2) and *Gibert* v. *Gonard*(3) and similar cases, nor in my opinion does it come within the meaning of that rule. As I have said, before you can make the rule applicable you must first of all find an entrustment or bailment. But it is argued that there is nothing to prevent a debtor consenting to hold the amount due from him as agent or bailee for the purpose of applying it in the manner designated by the creditor, for instance, in this case, it is said, it would be unreasonable to insist that Lupprian should have gone to the counter of Arbuthnot & Co. and received the Rs. 1,000 due to him and then and there handed over the amount again to them for buying Government promissory notes. I think there is force in this argument in so far that the law would not insist upon a mere superfluous formality if there is evidence of some unequivocal act on the part of the debtor, showing that he had changed his position into that of a bailee with respect to the money due from him. Obviously a mere promise to carry out the directions of the customer so long as he does nothing towards appropriating the money to any specific purpose will not suffice, for, such a promise can have no higher legal effect, so far as the present question is concerned, than a promise to pay the debt. Something has to be done which would enable the Court to say that a particular sum is held by the banker as trustee or agent for some specific purpose and which he is not therefore entitled to use but which he is bound to keep apart from his own money. It may not be necessary to separate the amount physically by tying it up in a bag or otherwise and the law would, I apprehend, regard it as a sufficient act of separation or appropriation if, for instance, an entry to that effect were made in the bankers' books of accounts. Here nothing was done by Arbuthnot & Co. towards appropriating the Rs. 1,000 to the purpose of buying any Government promissory notes and the matter rested in a mere promise when they became bankrupts. In taking this view of the law I am not going so far as *In re Barned's Banking Company (Ltd.) Massey's Case*(4) in which it was held that when money is received by a banker to be applied in a specific manner and that banker stops payment before taking any steps towards applying it for that

(1) (1879) 13 Ch.D., 696.
(2) (1870) 5 Ch.App., 233.
(3) (54) L.J.Ch., 439.
(4) (1870) 39 L.J.Ch., 635.

purpose the payer cannot recover the money paid and I shall have something more to say hereafter regarding that case. But I am distinctly of opinion that to hold that Arbuthnot & Co. ever assumed any fiduciary character in respect of the money sought to be recovered would be going much further than what these authorities warrant or the principles of equity would justify.

I hold therefore that Lupprian has only a right of proof as a creditor of Arbuthnot & Co. and the appeal ought to be allowed with costs.

Messrs. *King & Josselyn*—attorneys for appellant.

Messrs. *Grant & Greatorex*—attorneys for respondent.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Abdur Rahim.

1909. August 17. September 28.

THE OFFICIAL ASSIGNEE OF MADRAS AND AS SUCH THE ASSIGNEE OF ARBUTHNOT & Co. AND SIR GEORGE GOUGH ARBUTHNOT AND JOHN MONTGOMORY YOUNG, PARTNERS IN THE SAID FIRM OF ARBUTHNOT & Co., INSOLVENTS (RESPONDENTS), APPELLANTS,

v.

THE ORIENTAL GOVERNMENT SECURITY LIFE ASSURANCE COMPANY, LIMITED (PETITIONERS), RESPONDENTS.*

Fiduciary relationship—When banker holds money as agent—Banker holding money as agent not a debtor.

O, who owed certain money to *M.C.*, sent a cheque to Bank *A* for the amount, asking *A* to place the amount to the credit of *M.C.*, who at the time had no account with *A*. *M.C.* was informed by *A* that the amount was placed to her credit. *M.C.*, on the 5th October, asked *A* to send her the amount and *A* sent *M.C.*, a form of receipt to be signed by her. *M.C.* signed the receipt and sent it to *A*, who received it before the 20th when *A* suspended payment. *A* applied to the Court for the relief of insolvent debtors and the estate of *A* was vested in the Official Assignee. On a motion by *M.C.* claiming payment:

* Original Side Appeal No. 56 of 1908.

Held, that the relationship of debtor and creditor did not exist between *A* and *M.C.* and that the former held the money as agent of the latter when payment was suspended.

Per MUNRO, J.—As the receipt and demand for payment reached *A* before payment was suspended, the result was the same as if *M.C.* attended in person and demanded payment. On *A's* failure to remit the money, which it was *A's* duty to do, *A* held the money in a fiduciary capacity.

Per ABDUR RAHIM, J.—As *A* received the money for a particular purpose and, as there was no account between *A* and *M. C.*, *A* had no right to appropriate the money and did not purport to do so.

Even supposing the case were otherwise, the subsequent communication by *A* to *M. C.* that he held the money for *M. C.* in accordance with the instructions received was an act of appropriation, sufficient to show *A's* consent to hold the money in a fiduciary capacity.

In re Hallett's Estate [(1879) 13 Ch.D., 696], referred to.

APPEAL from the order and judgment, dated 21st September 1908, of Sir Arnold White, Chief Justice, in the exercise of the jurisdiction of this Court for the relief of insolvent debtors, in Petition No. 181 of 1906.

The facts for the purpose of this case are sufficiently set out in the judgment.

D. M. C. Downing for appellants.

K. Ramanath Shenai for respondents.

JUDGMENT (MUNRO, J.).—This is an appeal by the Official Assignee from an order of the learned Chief Justice sitting as Commissioner in Insolvency. The material facts are not in dispute and may be briefly stated. A sum of Rs. 970 was due to one Mariam Chandy by the Oriental Government Life Assurance Company, Limited, the respondents; Mariam Chandy asked the respondents to remit the money direct to her by a cheque drawn on Arbuthnot & Co. By an oversight the respondents sent to Arbuthnot & Co. a cheque for Rs. 970 drawn on the National Bank of India, and asked them to place the amount to the credit of Mariam Chandy. The latter had at the time no account with Arbuthnot & Co. Arbuthnot & Co. informed Mariam Chandy that the amount was at her credit. She then on the 5th October 1906 asked Arbuthnot & Co. to remit the money. Arbuthnot & Co. sent her a form of receipt for signature. This receipt she duly signed and returned and the receipt reached Arbuthnot & Co. before they suspended payment. The respondents took from Mariam Chandy an assignment of her rights against Arbuthnot & Co.

On these facts the learned Commissioner held that from the 5th October 1906. Arbuthnot & Co. held the money as Mariam Chandy's agent to remit the money and that they did not hold it as her bankers. He therefore directed the Official Assignee to pay the whole amount to the respondents.

I think the order of the learned Commissioner is right. As the receipt and demand for payment reached Arbuthnot & Co. before they suspended payment, the result was the same as if Mariam Chandy had attended in person at the bank, handed over the receipt and asked for payment. In that case Arbuthnot & Co. would have been bound to pay her at once. But as she did not attend in person it was their duty to remit the money at once as requested, and failing to do so they thereafter held the money in a fiduciary capacity—*vide* my judgments in *Official Assignee of Madras* v. *Ramachandra Aiyar*(1), *Official Assignee of Madras* v. *Lupprian*(2). I would therefore dismiss the appeal with taxed costs to be paid out of the estate.

The appeal is dismissed accordingly.

ABDUR RAHIM, J.—The facts of this case to my mind come within the rule of *In re Hallett's Estate*(3). What happened was that the Oriental Life Assurance Company which owed Rs. 970 to one Mariam Chandy sent on the 20th September 1906 to Arbuthnot & Co. a cheque for that amount drawn on the National Bank of India in favour of Arbuthnot & Co. requesting the latter to place the sum at the credit of Mariam Chandy, at the same time informing Mariam Chandy of the fact. On the 24th September Arbuthnot & Co. wrote to Mariam Chandy advising her of the receipt of the remittance and that it would be placed to her credit in due course. On the 5th October Mariam Chandy asked Arbuthnot & Co. to remit the amount to her suggesting to them several modes of transmission. In reply Arbuthnot & Co. on the 9th October wrote to her that they held the money in her account and enclosed a form of a receipt for her signature informing her that they would remit the amount by postal money order less $\frac{1}{4}$ per cent. commission on receipts and $\frac{1}{2}$ per cent. on payments. Mariam Chandy, it appears, took objection to the amount charged for commission which she considered to be excessive, but, as she was

(1) (1910) I.L.R., 33 Mad., 134. (2) (1910) I.L.R., 33 Mad., 145.
(3) (1879) 13 Ch.D., 696.

willing to leave this matter to Arbuthnot & Co.'s sense of justice, she sent them on the 17th October the receipt form duly filled up and signed requesting them to remit the money in the manner mentioned in their letter of the 9th October. The money was not, however, remitted before Arbuthnot & Co. stopped payment. Mariam Chandy subsequently assigned her claim to the Oriental Life Assurance Company. It should be borne in mind that neither the Oriental Life Assurance Company nor Mariam Chandy had an account with Arbuthnot & Co. at the time of the above transaction.

On these facts it seems to me that Arbuthnot & Co. received the money from the Oriental Life Assurance Company for the purpose of paying the amount to Mariam Chandy. Arbuthnot & Co. were not entitled therefore to appropiate the money to their own use nor did they purport to do so and the fact that they charged commission for their services strengthens this inference. Nor can it be said that they had any authority afterwards from Mariam Chandy to treat the money as their own and the correspondence clearly shows that they held the money to the use of Mariam Chandy. The learned Counsel for the Official Assignee, however, relies upon Lord Romilly M.R.'s ruling in *In re Barned's Banking Company (Ltd.) Massey's Case*(1). Even if that decision lays down the law correctly, I think that, when Arbuthnot & Co. wrote to Mariam Chandy that they held the money on her account in accordance with the instructions which they had received, that was sufficient as an act of appropriation to bring the case within that rule. But it must be borne in mind that *Massey's Case* was decided before the case of *In re Hallett's Estate*(2) in which the equitable rule as to following trust money was for the first time clearly recognised in all its modern developments and it seems to me, as remarked in Mr. Heber Hart's 'Law of Banking' (see p. 146 foot-note) that the decision in *Massey's Case* must be held to be of very doubtful authority at the present day. I think the words of Mellish, L.J., in *Vaughan* v. *Halliday*(3), "Then the rule of law is applicable, that if a remittance is sent for a particular purpose, whether it be a remittance by bill or a remittance in money, the person who receives the remittance must,

(1) (1870) (39) L.J.Ch., 635. (2) (1879) 13 Ch.D., 696.
(3) (1874) 9 Ch., App., 561 at p. 568.

either apply it for the purpose for which it was sent, or else return it" and of North, J., to the same effect in *Gibert* v. *Gonard*(1) correctly express the equitable rule as now enforced in England and the rule being founded on broad considerations of justice should be followed by this Court. For these reasons I hold that the learned Commissioner's order is right in this case and would dismiss the appeal with costs.

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

Messrs. *Short & Bewes*—attorneys for respondent.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Abdur Rahim.

1909. August 17. September 28.

THE OFFICIAL ASSIGNEE OF MADRAS AND AS SUCH THE ASSIGNEE OF THE ESTATE AND EFFECTS OF MESSRS. ARBUTHNOT & Co. (RESPONDENT),

v.

KRISHNASWAMI NAIDU AND OTHERS (PETITIONERS), RESPONDENTS.*

Trustee, powers of investment of—Investment by trustees, who are members of a firm, in the firm under the direction of cestui que trust*—Firm does not hold the money in a fiduciary capacity—Indian Trusts Act, s.* 51.

Where the settlor appoints the members of a banking firm as trustees and directs them to invest the trust funds with the firm in deposit account without any directions which would constitute the firm a trustee, such funds are, when invested, held by the firm as its own property and the relation between the firm on the one hand and the trustees and settlor on the other is merely that of debtor and creditor. On the bankruptcy of the firm such amount cannot be recovered in full, but can only be proved as a debt.

The doctrine embodied in section 51 of the Trusts Act that a trustee cannot use trust funds for his own profit does not apply where the settlor directs such use.

In re Beale Ex-parte Corbridge, [(1876) 4 Ch.D., 246)], referred to.

APPEAL from the order and judgment of Sir Arnold White, Chief Justice, in the exercise of the jurisdiction of this Court for the relief of insolvent debtors at Madras in Petition No. 181 of 1906.

The facts for the purpose of this case are set out in the judgment.

(1) 54 L.J.Ch., 439. * Original Side Appeal No. 54 of 1908.

D. M. C. Downing for appellant.

C. F. Napier for first respondent.

The Hon. Mr. *V. Krishnaswami Ayyar* and *I. V. Ramanuja Rau* for second and third respondents.

JUDGMENT (MUNRO, J.).—This is an appeal by the Official Assignee from an order of the learned Chief Justice sitting as Commissioner in Insolvency.

On the 2nd June 1892, the ex-Raja of Venkatagiri executed a deed of trust with a view to making provisions for his daughters. The trustees appointed were the five persons who were at the time carrying on business under the style or firm of Arbuthnot & Co. The deed provided that the terms "trustees or trustee" should be taken to include not only the then members of the firm of Arbuthnot & Co., but also the members or member for the time being constituting the firm of Arbuthnot & Co. The deed, however, went on to say that if a trustee died, or left British India permanently or ceased to be a member of the firm of Arbuthnot & Co. or desired to be discharged, or refused or became incapable to act, then the settlor, or after his death, the surviving trustees, or continuing trustees, in which class retiring trustees are included, might appoint a new trustee in place of the trustee who had died, etc. It is thus clear that, although the settlor was desirous that the trustees should, if possible, be the persons who were for the time being the members of the firm of Arbuthnot & Co., it was recognised that it might not always be possible to secure this, and that eventually all the trustees might be persons in no way connected with Arbuthnot & Co. The deed further recited that the settlor had paid to the five persons named as trustees the sum of Rs. 62,957-8-6 to be held by them in trust for certain purposes, and directed that the trustees should invest the amount in their names in deposit with the firm of Arbuthnot & Co. bearing interest at the rate of 5 per cent. per annum and in no other manner.

Arbuthnot & Co. suspended payment on the 22nd October 1906. At the date of the insolvency only two persons constituted the firm and they were two of the five persons named as trustees in the deed. In March 1907, these two persons appointed three other persons as trustees in their place, in accordance with the powers given by the deed. The new trustees applied for payment in full of the trust-money out of the assets of the insolvents

and the learned Commissioner granted their application. He was of opinion "that the members of the firm at the date of the insolvency must be fixed with knowledge of the fact that the monies held by them in deposit account were monies which they as individuals held in trust." He further observed "In law a firm is not recognised as distinct from the members comprising it. On the facts I am not prepared to hold that the firm as a separate legal entity held the money as bankers for the trustees."

Now, I think it is clear from the terms of the trust-deed that the settlor regarded the body of trustees and the banking firm of Arbuthnot & Co. as two distinct and separate entities. At first no doubt the persons named as trustees were the then members of the firm. But the deed contemplated the possibility that at any moment all the members of the firm might cease to be trustees and appoint persons entirely unconnected with the firm as trustees in their place, an event which has actually happened, and this possibility itself made it necessary to distinguish between the body of trustees and the members of the firm. The distinction is emphasized by the fact that the settlor thought it necessary to direct the trustees to invest the trust-money paid to them with the firm of Arbuthnot & Co. The settlor clearly regarded his payment to the trustees and their investment with Arbuthnot & Co. as two distinct transactions just as much as if he had directed the investment to be made with a bank with which the trustees were in no way connected. It seems to me, therefore, that the simplest way to arrive at a correct conclusion is to regard the case from what was clearly the settlor's point of view. I will therefore for the present deal with the case on the assumption that the trustees were unconnected with Arbuthnot & Co. The trustees were directed by the deed to invest the money entrusted to them in a particular way. They did so, and when they had done so their only liability under the trust deed was to renew the deposit from time to time and apply the interest as directed. If the investment turned out badly and the money invested was lost owing to the failure of the bank, the money could not be recovered from the trustees. The only fund from which it could be recovered in whole or in part would be the assets of the insolvent bank. We have then to consider what claim the trustees would have upon those assets in respect of the

trust-money. Now all we have in this case is that the money was deposited with the bank at interest. The settlor did not stipulate that the trustees when investing the money should give any direction which would have the effect of causing the bank to hold the money as trustees or in any fiduciary capacity. It follows that the money became the money of the bank which it was entitled to use as its own, that the relationship between the bank and the trustees was merely that of debtor and creditor, and that on the failure of the bank the trustees would rank with the general body of creditors and be entitled to no preference—*vide Official Assignee of Madras* v. *Smith*(1) and my judgment in *Official Assignee of Madras* v. *Ramachandra Aiyar*(2). The matter is made still clearer by the fact that the bank was to pay interest at 5 per cent. per annum on the money deposited. This it would certainly never have agreed to do unless it was to be allowed to use the money and make as much profit as it could. But if the bank held the money as trust-money, it could not have lawfully used the money for its own benefit. Section 51 of the Indian Trusts Act prohibits a trustee from dealing with the trust property for his own profit, and it is pointed out in *Official Assignee of Madras* v. *Smith*(1) on the authority of two English cases, that if a banker were a trustee, he could not use the trust property as his own without a breach of trust, and that it is an indelible principle of trust property that a trustee can never make use of it for his own benefit. On the assumption I have made therefore the application must fail. But the facts that the trustees at the time of the insolvency were the persons who were at the time partners in Arbuthnot & Co. can make no difference in principle. When, as trustees under the deed, they, as directed, invested the money in their own firm, their liability in their capacity as trustees appointed by the deed was reduced in the same manner as if they had not been members of the firm. When the money was invested with them as bankers, the same result must, there being no reason to the contrary, have followed as would have followed had the money been invested with another bank with which they had no connection. I therefore, with great respect, am clearly of opinion that the order of the learned Commissioner is wrong. I would set aside his order and dismiss the application with taxed costs throughout.

(1) (1909) I.L.R., 32 Mad., 68. (2) (1910) I.L.R., 33 Mad., 134.

The appeal is allowed accordingly.

ABDUR RAHIM, J.—I agree with my learned brother that the order of the learned Commissioner in Insolvency is wrong; but, I think, I ought to state my reasons for so holding. The simple question is whether a sum of money invested in deposit account with the banking firm of Arbuthnot & Co. by the express direction of the settlor as contained in the deed of settlement itself can be recovered or whether the trustees of the settlement have only a right of proof against the general assets of the bank like any other creditors. It seems to me all the subtle discussion as to whether Arbuthnot & Co. as a banking firm should be treated as a distinct legal entity from the partners of that bank who were appointed first trustees of the settlement is altogether beside the question in the present enquiry. Such discussion may be relevant when the question is whether a trading firm is to be fixed with notice of a trust as, for instance, when one member of a firm who is a trustee of a settlement has contrary to, or in breach of, the terms of the trust used trust-money in the business of the firm. Here there is no dispute as to the knowledge of Arbuthnot & Co. that the Rs. 62,957 was trust-money, but does such knowledge of Arbuthnot & Co. make any difference in determining the question whether the money formed part of the general assets of the bank, when the settlor himself directed the money to be invested in deposit account with Arbuthnot & Co.'s bank, the bank agreeing to pay 5 per cent. on the amount as interest? It seems to me, with the utmost deference, that the learned Commissioner in thinking that it does, has failed altogether to give effect to the directions of the settlor. The effect of those directions clearly is that Arbuthnot & Co. who, I shall take it were also trustees, were authorized to use the money as their own and to that extent they became debtors to the beneficiaries or the trustees whoever they may be at the time. If Arbuthnot & Co. were not so authorized, the Official Assignee would have been liable to make good the amount as I have already pointed out in my judgments *in the previous cases*. Mr. Napier, who appeared to support the learned Commissioner's order, has dwelt a great deal on the general duties of trustees as to investing trust-monies, and so forth; but the obvious answer to all such arguments is that the first and foremost duty of a trustee is to carry out the directions of the creator of the trust. If Arbuthnot & Co. in this case did not obey the instructions of the settlor, they would be guilty of breach of trust and would have to make good any loss that might accrue to the trust from such derilection. If, therefore, the settlor chose to make it a term of his settlement that the money should be lent to the trustees themselves hoping to get a profitable return, then it is the misfortune of the beneficiaries if the trustees become bankrupts and they must be content to rank as ordinary creditors. I think the words of Bacon, C.J., *in re Beale Ex-parte Corbridge*(1) where he says "No proof can be admitted in respect of a trust which is inconsistent with the application of the money which the lender has pointed out" are applicable to the present case. This appeal should therefore be allowed and the application of B. Krishnaswami Naidu and others dimissed with costs.

Messrs. *Short & Bewes*—attorneys for appellant.

APPELLATE CIVIL.

Before Sir R. S. Benson, Officiating Chief Justice, and Mr. Justice Sankaran-Nair.

GANAPATHY MOODELLY AND OTHERS (DEFENDANTS), APPELLANTS,

v.

MUNISAWMI MOODELLY (PLAINTIFF), RESPONDENT.*

1909. August 27. September 2

Contract Act IX of 1872, s. 25, cl. (3)—Not necessary that the agreement should in terms refer to the barred debt.

A promissory note purported to be executed for cash received, but the real consideration was proved to be a debt, the recovery of which was barred by the Statute of Limitations:

Held, that the promissory note was a contract enforceable under section 25, clause (3) of the Indian Contract Act.

A party to a contract may prove that the actual consideration was something different from that recited in the document and effect must be given to the real consideration. A contract falling within section 25, clause (3) of the Indian Contract Act is no exception to this rule. The agreement will be enforced if the real consideration is shown to be a barred debt, though no reference is made in the document to such debt.

(1) (1876) 4 Ch.D., 246. * City Civil Court Appeal No. 2 of 1907.

BENSON, C.J., AND SANKARAN-NAIR, J.

GANAPATHY MOODELLY v. MUNISAWMI MOODELLY.

Appa Rao v. *Suryaprakasa Rao*, [(1900) I.L.R., 23 Mad., 94], considered.
Vasudeva v. *Narasimma*, [(1882) I.L.R., 5 Mad., 6 at p. 8], referred to.
Kumara v. *Srinivasa*, [(1888) I.L.R., 11 Mad., 213 at 215], referred to.

APPEAL against the decree of C. V. Kumaraswami Sastriar, City Civil Judge at Madras, in Original Suit No. 69 of 1906.

The facts for the purpose of this case are fully set out in the judgment.

T. M. Krishnaswami Ayya for *G. Krishnaswami Ayyar* and *S. Venugopal Chetti* for appellants.

E. V. R. Sarma for respondent.

JUDGMENT.—The suit is brought to recover the amount due, Rs. 582, on two promissory notes executed by the defendant's father and in default of payment for the sale of certain properties, the title-deeds whereof were deposited with the plaintiff as security by way of equitable mortgage.

The execution of the promissory notes is not denied and the finding of the City Civil Judge that the discharge alleged, has not been proved, is not disputed before us.

We agree with the City Civil Judge that the title-deeds were deposited with the plaintiff as security. They are produced by the plaintiff. The defendant's explanation that he got them by fraud and in collusion with Varadaraja Mudaliar is not supported by reliable evidence. No weight can be attached to the statement of Varadaraja Mudaliar that D^1 and D^2 were never given to him.

It was then argued before us that as exhibit A, dated the 1st December 1904, is admitted to be a renewal of a prior promissory note, dated the 1st January 1889, it is not enforceable as the debt had become barred before it was renewed and there is no reference in exhibit A to a barred debt or no promise to pay the debt to bring it within the terms of clause (3), section 25 of the Contract Act.

Exhibit A runs thus: "On demand I promise to pay to O. Munisawmy Mudaliar or order the sum of Rupees (325) three hundred and twenty-five only with interest at 12 per cent. per annum for value received in cash."

The City Civil Judge held that the debt was not barred as the whole interest due under the earlier promissory note and a portion of the principal has been discharged at the time of exhibit A. But there is no evidence that any amount at any time before the expiry of the period of limitation was paid for interest as such. Nor does the part payment of the principal appear in the

BENSON, C.J., AND SANKARAN-NAIR, J.

GANAPATHY MOODELLY v. MUNISAWMI MOODELLY.

hand-writing of the debtor as required by section 20 of the Limitation Act. We must, therefore, hold that the debt under the promissory note of 1899 was barred in 1904 at the time of exhibit A.

It is then argued as there is no reference in exhibit A to that debt there is no promise to pay a barred 'debt' under clause (3), section 25 of the Contract Act, and therefore there is no consideration. There is clearly a reference to a debt contracted by receipt of cash, though it is not stated when it was received. It is no doubt true that in *Appa Rao* v. *Suryaprakasa Rao*(1), the learned Judges, while deciding that it is unnecessary that a document should refer to the fact that the debt is no longer recoverable owing to the law of limitation, say that the debt itself which is in fact barred must be referred to therein. But these observations were unnecessary for the decision.

It has been decided by the Madras High Court and also by the other High Courts that a party to a contract may prove that the actual consideration was something different to that recited in the document itself, and effect must be given to the real consideration (*Vasudeva* v. *Narasamma*(2) and *Kumara* v. *Srinivasa*(3)).

These decisions proceed on the view that the recitals are not in themselves conclusive and do not therefore preclude the Courts from ascertaining and giving effect to the intention of the parties.

Section 25 of the Contract Act provides that an agreement made without consideration is void unless it is a promise to pay a debt of which the creditor might have enforced payment but for the law of limitation.

The section indicates what must be deemed to take the place of "consideration" in an ordinary contract. Full effect is given to the words of the section by taking it to mean that when a man promises to pay what in fact is proved to be a debt which is barred, that agreement will be enforced. This is consistent with the decisions that hold that consideration may be proved when not recited in the document or a different consideration may be proved from that recited therein. To hold otherwise would be to confine the parties to the recitals in the instrument in cases that are

(1) (1900) I.L.R., 23 Mad., 94. (2) (1882) I.L.R., 5 Mad., 6 at p. 8.
(3) (1888) I.L.R., 11 Mad., 213 at p. 215.

BENSON, C.J., AND SANKARAN-NAIR, J.

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governed by section 25. We see no warrant in that section for doing so.

We hold accordingly that the agreement is a contract under section 25, clause (3), and dismiss the appeal with costs.

The plaintiff's vakil's fee not included in the decree of the lower Court, viz., Rs. 29-1-6 will be inserted in the decree. The memo. of objections is allowed without costs.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Miller.

1909. August 25. September 1.

MOYIL KOTTA KUNCHUNNI NAIR AND OTHERS (PLAINTIFFS Nos. 2 TO 4), APPELLANTS,

v.

SUBRAMANIAN PATTAR AND OTHERS (DEFENDANTS), RESPONDENTS.*

Principal and agent—Agent with irrevocable authority may be removed for misconduct—Suit, abatement of.

In every contract of service there is an implied condition that if the services be not faithfully performed, the employer is entitled to put an end to the contract; and an irrevocable contract of agency is no exception to this rule.

An agent appointed under an irrevocable contract of agency may be removed if he is guilty of misconduct in the performance of his duties.

The above principle will apply whether the person employed be a servant or agent or a person occupying a fiduciary position. A suit brought against such an agent for his removal and for recovering damages for his misconduct does not abate with the death of such agent.

APPEAL against the decree of S. Raghunathiya, Subordinate Judge of South Malabar at Palghat, in Original Suit No. 31 of 1904.

The first defendant (since deceased) was appointed by the plaintiffs and others under a karar to manage their landed properties for a fixed term of eighteen years, in consideration of the first defendant undertaking to pay off plaintiffs' debts and making them an advance of money. The deed provided that the first defendant should recoup himself such amounts with interest out of the moneys collected by him. The plaintiffs brought a suit to remove the first defendant on the ground that they had revoked

* Appeal No. 211 of 1905.

WALLIS AND MILLER, JJ.

KUNCHUNNI NAIR v. SUBRAMANIAN PATTAR.

his agency. Their suit was dismissed, the High Court holding that the agency was coupled with an interest and was irrevocable. The plaintiffs have brought the present suit to have the first defendant removed on the ground that he was unfaithful in the discharge of his duties and to recover from him sums alleged to have been misappropriated by him.

The Subordinate Judge dismissed the suit on the ground that the question of the plaintiffs' right to remove the first defendant was *res judicata*.

Plaintiffs appealed to the High Court.

K. P. Govinda Menon for appellants.

P. R. Sundara Ayyar and *C. V. Anantakrishna Ayyar* for second respondent.

JUDGMENT.—The Subordinate Judge has dismissed the suit owing, it would seem, to a misapprehension of the true import of the expression "irrevocable." In the former suit the plaintiffs claimed the right to revoke the authority given to the first defendant, and based their suit altogether upon this right. This Court held that they had no such right and dismissed the plaintiffs' appeal expressly upon that ground. In the present proceedings the claim is not based solely upon a right to revoke the authority: the plaintiffs ask the Court to dismiss the first defendant for misconduct and to take an account of what is due from the defendants and decree payment thereof together with damages for loss occasioned by the first defendant's misfeasance.

The first dependant has died since the suit was dismissed and we have only to decide whether the plaintiffs had when the suit was instituted a good cause of action and what is the effect, if any, of the first defendant's death pending the appeal.

The plaintiffs' right to dismiss the first defendant or to ask the Court to do so for them depends on the existence of a right to put an end to the contract, and in considering the question we must assume that the allegations of misconduct set out in the plaint are true. If they are true it cannot be disputed that the first defendant has been unfaithful and dishonest in the execution of the duty which he undertook. Now in every contract of service there is an implied condition that if the services be not faithfully rendered the employer is entitled to put an end to the contract—*vide* observations of Bowen, L.J., in *Boston Deep Sea Fishing*

WALLIS AND MILLER, JJ.

KUNCHUNNI NAIR v. SUBRAMANIAN PATTAR.

and Ice Co. v. *Ansell*(1) quoted with approval by Cozens-Hardy, M.R., in *General Billposting Co.* v. *Atkinson*(2). The first defendant was not, no doubt, an ordinary servant bound to obey the orders and instructions of the first plaintiff in all that he did: he was employed as managing agent with wide powers of action on his own initiative; but he was bound to act in all matters left to his discretion in good faith and to the best of his judgment solely for the benefit of his principal (*vide* "Bowstead on Agency," 4th edition, p. 117).

His right to retain his position under the contract was dependent on his performing faithfully the duties which he undertook.

It would be manifestly unjust to require the plaintiffs as the Subordinate Judge's decision would require them to continue for eighteen years to employ an agent to rob them, with no remedy except from time to time to claim damages for some misconduct and nothing in the law of contract nor in the agreement in this case compels us to work this injustice.

Whether the first defendant is rightly regarded as a servant or as an agent or as holding a fiduciary position resembling in respect of its duties the position of a trustee (*Cf. Burdick* v. *Garrick*(3)) his right to retain his position depends on the faithful performance of the duties attached to it.

The suit therefore was good when instituted: Mr. Sundara Ayyar invites us to decide that it has abated with the death of the first defendant but the principle on which he relies is not applicable to a case like the present.

The decree of the Subordinate Judge must be reversed and the suit remanded for disposal on the other issues.

If as we have been informed a suit by the first defendant's representatives has been instituted claiming relief against the plaintiffs after taking an account under the same agreement, the Subordinate Judge will have to apply the provisions of section 10 of the Civil Procedure Code, or if they are not applicable to arrange by adjournment or otherwise that it may not be necessary to try both suits separately and concurrently.

Costs abide the event.

(1) (1888) 39 Ch.D., 339 at p. 365.
(2) (1908) 1 Ch., 537.
(3) (1870) L.R., 5 Ch., 233.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Miller.

1909. September 14.

SAMUDRALA VARAHA NARASIMHA CHARLU AND OTHERS (DEFENDANTS NOS. 1 TO 3), APPELLANTS,

v.

SAMUDRALA VENKATA SINGARAMMA BEING A MINOR BY HER MOTHER AND NEXT FRIEND LAKSHMI NARASAMMA AND OTHERS (PLAINTIFF AND DEFENDANTS NOS. 13 AND 14), RESPONDENTS.*

Hindu Law, Mitakshara—Reunited family, succession in, governed by law of survivorship.

Succession in a reunited family governed by Mitakshara Law is by survivorship.

This mode of succession is not confined to the members who actually reunited and the son of a reunited member born after the reunion is reunited and takes by survivorship.

Krishtraya v. *Venkatramayya*, [Appeal No. 170 of 1901 (unreported)], followed.

Ramasamy v. *Venketasan*, [(1893) I.L.R., 16 Mad., 440], distinguished.

APPEAL against the decree and judgment of D. Raghavendra Row, Temporary Subordinate Judge of Vizagapatam, in Original Suit No. 15 of 1906.

The first defendant and plaintiff's father-in-law *R* were brothers. They divided the family property in 1865 and became reunited in 1884. In 1895 *R* died and his son, the plaintiff's husband, lived with his uncle the first defendant and died issueless in 1904. The plaintiff alleging that she had succeeded to her husband's share, brought this suit for partition. The lower Court passed a decree in favour of the plaintiff.

Defendants appealed.

The Hon. Mr. *V. Krishnaswami Ayyar* for appellants.

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

JUDGMENT.—In *Krishtraya* v. *Venkatramayya*(1) three learned Judges of this Court Subramania Ayyar, Benson and Bhashyam Ayyangar, JJ., decided that succession in a reunited family governed by Mitakshara Law is by survivorship, and that the son of a reunited member of the family is "reunited": they say that

* Appeal No. 194 of 1907.
(1) Appeal No. 170 of 1901 (unreported)

the contrary contention is not supported by any text of Hindu Law and is not in accord with the principles of the Mitakshara Law.

This decision, if we follow it, is sufficient to dispose of the present case: we have here a contest as to the succession to the son of a reunited member of a family: the widow claiming on the one hand and on the other the brother of her husband's father, reunion having been effected between the brothers before the birth of the deceased.

If the decision of *Krishtraya* v. *Venkatramayya*(1) is to be followed, the widow's claim cannot be supported and the appeal must be allowed, and we are asked to decline to follow that decision and to hold that in a reunited family there is no survivorship and that no one can be "reunited" who was not one of those who actually divided and again joined together.

The able argument which we have heard on behalf of the respondent has shown in a clear light the difficulties surrounding the question of succession in a reunited family, but has not convinced us that we ought to decline to follow a decision of three Judges of this Court, two of them Hindus and Brahmans. It was argued that in the case of *Ramasami* v. *Venkatesam*(2) the learned Judges declined to apply the law of survivorship, but we do not think that that is so. The principle which they applied is not very clear from the report, but as we understand the decision, they regarded the succession of the uterine brothers not reunited as an exception engrafted on the ordinary rule that a surviving reunited parcener takes the property of one deceased while in reunion with him; and for this view authority may be found in the Mitakshara: Chapter II, Section IX, 5. Stokes' 'Hindu Law Books'—*vide* also Sarvadhikaris Hindu Law (edition of 1882), at page 953.

There is no reported decision of any of the High Courts in India or of the Privy Council which takes the view for which Mr. Sundara Aiyar contends, while there are dicta in some cases which may be said to support the opposite conclusion (*vide Prankishen Paul Chowdry* v. *Mothooramohan Paul Chowdry*(3) and *Jasoda Koer* v. *Sheo Pershad Singh*(4)).

(1) Appeal No. 170 of 1901 (unreported).
(2) (1893) I.L.R., 16 Mad., 440. (3) (1865) 10 M.I.A., 403 at p. 406.
(4) (1890) I.L.R., 17 Calc., 33 at p. 35.

We are accordingly not prepared to dissent from the decision of *Krishtraya* v. *Venkatramayya*(1) and we allow the appeal and dismiss the suit with costs throughout.

APPELLATE CIVIL.

Before Sir Ralph Sillary Benson, Officiating Chief Justice, and Mr. Justice Sankaran-Nair.

GODA COOPOORAMIER (PLAINTIFF), APPELLANT,

v.

SOONDARAMMALL (DEFENDANT), RESPONDENT.*

1909. September 1, 21.

Civil Procedure Code Act XIV of 1882, ss. 366, 371 and Act V of 1908, order XXII, Rules 2, 9—Judgment passed after death of party not absolute nullity—Such judgment not liable to collateral attack but must be set aside only by proper proceedings and unless so set aside bars a fresh suit.

A decree was passed in favour of a deceased plaintiff on the day of his death, which occurred before the case was taken up for disposal and heard. In a suit brought by the representative of the plaintiff on the same cause of action and for the same relief, it was urged that the decree so passed was a nullity and that the subsequent suit was maintainable:

Held, that the suit was barred. It is only when the representative of a deceased plaintiff fails to apply within the time allowed by law that a suit abates under order XXII, rule 2 of Act V of 1908 or that the Court could have passed an order under Section 366 of Act XIV of 1882 that the suit shall abate. A decree passed after death is not therefore an absolute nullity.

The intention of the Legislature in enacting section 371 of Act XIV of 1882 and order XXII rule 9 of Act V of 1908 is clearly that where a suit has abated, no fresh suit shall be brought on the same cause of action, and that any remedy which the representative of a deceased plaintiff may have is by application to the Court in which the suit was pending.

APPEAL against the decree of C. V. Kumaraswami Sastri, City Civil Judge, Madras, in Original Suit No. 132 of 1907. The facts of this case are sufficiently set out in the judgment.

T. Ethiraja Mudaliar for appellant.

T. Rangachariar and *T. Varadappa Nayakar* for respondents.

JUDGMENT.—A decree was passed by the High Court on the 8th September 1891 in favour of the plaintiff in Civil Suit No.

(1) Appeal No. 170 of 1901 (unreported).
* City Civil Court Appeal No. 2 of 1908.

186 of 1891, one Ramakkamall against Appukutti Chetti, the defendant in that suit. The present plaintiff, the representative of Ramakkamall now sues the defendant, the widow of Appukutti Chetti, on the same cause of action, for the same relief, that was therein granted. The plaintiff alleged and proved in the lower Court that Ramakkamall, the plaintiff died in the morning of the 8th September 1891 and the suit was taken up, heard and disposed of the same day after her death. He alleges that the decree is therefore a nullity and not a bar to this suit. The finding that the plaintiff in the prior suit died before the hearing is not contested before us. The question for decision is whether the suit is maintainable or not. Under the English Common Law the death of a plaintiff or a defendant causes an action to abate. After the death of either of them, therefore, no judgment can be passed, and no execution can issue. Where, however, the death of the party occurred after the hearing of the case, then in the Courts of Common Law the judgment was entered as of the date when the judgment was reserved on the principle that a party ought not to be prejudiced by the delay arising from the act of the Court. Similarly where a judgment was signed at 11 A.M., the usual hour, and the defendant died at 9-30 the same morning the judgment was held regular on the principle that judicial proceedings are to be considered as taking place at the earliest period of the day on which they are held. *Wright* v. *Mills*(1). In Bombay it has been held that this procedure ought to be followed and that a decree speaks from the day the judgment was reserved and binds all parties then before the Court and the representatives of those dying in the interim (see *Narna* v. *Anant*(2) and *Ramacharya* v. *Anantacharya*(3)), and the entry of the date of delivery was only treated as an irregularity. Sections 202 and 205 of the Code of Civil Procedure (Act XIV of 1882) seem to be opposed to this view. But Act V of 1908 properly enacts that the judgment is to bear the date of delivery but effect is to be given to it as if it had been pronounced before the death took place (order XXII, rule 6).

The Code of Civil Procedure provides that "the death of a plaintiff or defendant shall not cause the suit to abate if the right

(1) 4 H. & N., 488. (2) (1895) I.L.R., 19 Bom., 807.
(3) (1897) I.L.R., 21 Bom., 314.

to sue survives," and it is only when the representative of a deceased plaintiff fails to apply within the time allowed by law that the suit abates under order XXII, rule 2 of Act V of 1908 or that the Court could have passed an order under section 366 of Act XIV of 1882 that the suit shall abate. The decisions of the English Courts which proceed on the ground that the suit has abated do not therefore apply in all cases in India.

In America, "the great preponderance of authority is to the effect that, where the Court has acquired jurisdiction of the subject matter and the persons during the lifetime of a party, a judgment rendered against him after his death is, although erroneous and liable to be set aside, not void nor open to collateral attack." "Black on Judgments", section 200, page 294. And the case of a judgment for a deceased plaintiff, it is said, "cannot be distinguished in principle from that of a defendant dying while the action is pending, where, as already shown (section 200) the great preponderance of authority sustains the rule that the judgment is at least impervious to collateral attack and must be vacated or reversed by proper proceedings." Section 204, page 300. To hold that the representative of a party is bound by the decision passed after the death of the party would probably lead to fraud. It would also be opposed to the well-established principle that a judgment should not be passed against a person without hearing him or giving him an opportunity to be heard. In the cases of *Imdad Ali* v. *Jagan Lal*(1) and *Janardhan* v. *Ramchandra*(2), relied upon by the appellant, decrees were passed against a person after his death. But the case of the representative of a plaintiff suing on the same cause of action after having obtained a decree stands on a different footing. After the abatement of a suit, it is not open to his representative to bring a fresh suit on the same cause of action. Section 371 of Act XIV of 1882 and order XXII, rule 9 of Act V of 1908. His only remedy under the same provision of law is to apply for an order to set aside the abatement and the abatement shall be set aside only if it is proved that he was prevented by any sufficient cause from continuing the suit. The intention of the Legislature is clear that no fresh suit on the same cause of action is to be permitted, and that any remedy which the representative of a deceased plaintiff may have is by application to the Court in which

(1) (1895) I.L.R., 17 All., 478. (2) (1902) I.L.R., 26 Bom., 317.

BENSON, C.J., AND SANKARAN-NAIR, J.

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the suit was pending. This is consistent with the American authorities holding that the validity of such a decree is impervious to collateral attack. We are also of opinion that a decree passed in favour of a deceased plaintiff is only voidable at his instance and not void at any rate when the record does not show the fact and time of death. A revivor at the instance of the plaintiff's representative would ordinarily result only in a needless repetition of the proceedings with the same result. It might be harassing to the defendant. This conclusion is consistent with the principle that a party should not be allowed to contend that a solemn judgment passed by a competent Court to which his predecessor in title was a party is a nullity and does not bind his estate. Any other view may lead to injustice as it would enable a plaintiff long after the date of the decree and after it was barred by limitation in the case before us the suit was filed about 16 years after the first decree—to come to Court and give evidence about an event which, in practice, it would be difficult for the defendant in many cases to meet. We are, therefore, inclined to adopt the view stated to be generally adopted in the United States of America. The provisions of the Indian Codes seem to be in harmony with it; and we are not deterred from adopting it by considerations arising from the theory of the abatement of suit by death of a party which influenced the English decisions and we have seen that the English Judges attempted to mitigate the severity of this rule in various ways.

The suit is, therefore, not maintainable and we dismiss the appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Abdur Rahim

SRIMAN MADHABUSHI ACHAMMA AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

GOPISETTI NARAYANASAWMY NAIDU AND OTHERS (DEFENDANTS NOS. 1, 3, 4, 5 TO 7, 9, 10 AND SECOND DEFENDANT'S REPRESENTATIVE), RESPONDENTS.*

1909. September 17.

Limitation Act XV of 1877, sch. II, arts. 120, 131—Right of tenant to sue in respect of excess collections arises on every occasion when excess collection is made—Art. 120 and not art. 131 of sch. II of the Limitation Act applies to such suits.

A landlord had been collecting excess rents from his tenant from 1872. In respect of the excess collection made in October 1898 the tenant brought a suit in December 1909 for a declaration that the landlord was not entitled to collect such excess:

Held, that the right to sue for such declaration arose on each occasion the excess was collected; that the period of limitation was six years from the date of collection under article 120 of schedule II of the Limitation Act, and that article 131 of the schedule did not apply to such suits.

SECOND APPEAL against the decree of M. D. Bell, District Judge of Kistna, in Appeal Suit No. 451 of 1905, presented against the decree of T. Varada Rao, Additional Subordinate Judge of Gódávari at Rajahmundry, in Original Suit No. 56 of 1901.

The facts are sufficiently stated in the judgment of the lower Appellate Court which is as follows:—

Plaintiffs who are Agraharamdars of Gopavaram sue for an injunction to restrain the Zamindar by whose predecessors agraharam was granted from collecting in the way of quit-rent a sum in excess of that fixed by the permanent settlement.

The first point taken in appeal is that the suit is barred by time and I think that this contention must prevail. The right which the plaintiffs now seek to establish was denied so far back as 1872. In a suit brought in 1876 the Zamindars established their right to collect quit-rent at the rate at which the plaintiffs now seek to restrain them from collecting. It was conceded in the lower Court that the parties to that litigation were the same

* Second Appeal No. 1016 of 1906.

MUNRO AND ABDUR RAHIM, JJ.

SRIMAN MADHABUSHI ACHAMMA v. GOPISETTI NARAYANA-SAWMY NAIDU.

as now. It is argued that the right of a tenant to sue for a declaration that he is entitled to an abatement of rent recurs every year that the landlord demands a higher rent (XII Madras Law Journal, Part IV, page 126). This ruling however applies to a case in which the right claimed had never been denied. It is quite a different matter when, as in the present case, the right claimed has been specifically denied. There is no question that the right now claimed by the plaintiff was denied in 1872 (See exhibit IV). I am of opinion that the ruling in XVI Madras, page 294, applies to the present case and that the suit is barred by article 131 of the Limitation Act. The appeal is allowed and the suit dismissed with costs throughout.

Plaintiffs appealed.

The Hon. the Advocate-General for appellants.

S. V. Padmanabhachariar for *P. R. Sundara Ayyar* and *C. R. Tiruvenkatachariar* for first and ninth respondents.

JUDGMENT.—The plaintiffs stated in their plaint that their cause of action arose on the 3rd October 1898 when the first defendant illegally levied Rs. 165-14-0 and they brought their suit in December 1901 for a declaration that the Zamindar of Nidadavolu had no right to levy from them any sum in excess of the sum of Rs. 549 per annum by way of quit-rent. We are clearly of opinion that article 131 of schedule II to the Indian Limitation Act does not apply to a suit like the present. The suit cannot be said to be a suit to establish a periodically recurring right. The article applicable is article 120. Under that article limitation runs from the time when the right to sue accrues. As was held in *Gopaladasu Garu* v. *Perraju*(1) the plaintiff's right to sue for a declaration arises on each occasion when the Zamindar collects or demands the enhanced rent. Each exaction is, if illegal, a separate injury and gives rise to a new cause of action. This suit was brought within six years of the 3rd October 1898 and is not barred. We therefore reverse the decree of the District Judge and remand the appeal for disposal according to law. Costs will abide the result.

(1) (1902) 12 M.L.J., 126.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Abdur Rahim.

KRISHNA AIYAR (PLAINTIFF), APPELLANT,

1909. August 27. September 3, 15.

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL REPRESENTED BY THE COLLECTOR OF TINNEVELLY (DEFENDANT), RESPONDENT.*

Burden of proof—Evidence of possession necessary to prove title against Government—Nattam poramboke, classification as, effect of.

Where in a suit for declaration of title against Government, the plaintiff proves possession for a period of more than 12 years, the Government must prove that it has a subsisting title. When the Government fails to prove such title or possession within 60 years, the plaintiff is entitled to a declaration of title and not merely to a declaration that he is lawfully in possession of such land.

The classification of land as nattam poramboke is no legal evidence of title in the Government. At the most, it is evidence only of an assertion of title.

Kattai Mahomed Meera Mohideen v. *Secretary of State for India*, [(1903) 13 M.L.J., 269], explained.

Ganga Ram Chinna Patel v. *Secretary of State for India*, [(1896) I.L.R., 20 Bom., 798], distinguished.

Hanmantarav v. *Secretary of State for India*, [(1901) I.L.R., 25 Bom., 287], distinguished.

SECOND APPEAL presented against the decree of T. V. Anantan Nayar, Subordinate Judge at Tinnevelly, in Appeal Suit No. 267 of 1905, presented against the decree of T. Munro French, Additional District Munsif of Tinnevelly, in Original Suit No. 132 of 1904.

This suit was brought by the plaintiff against the defendant (the Secretary of State for India in Council), for a declaration of plaintiff's absolute title to the plaint properties and for the recovery of Rs. 15 collected from the plaintiff on account of prohibitory assessment.

There were three items of properties in the plaint schedule. The plaintiff's case was that items 1 and 3 belong to him by right

* Second Appeal No. 576 of 1906.

of purchase, and item 2 by ancestral right, that he and his predecessors-in-title had been in possession and enjoyment of these items for many years as absolute owners, that the defendant, by levying penal assessment upon those lands in faslis 1310 to 1312, had questioned the plaintiff's absolute right of ownership in respect of them, and that the plaintiff was consequently entitled to get a declaration of his title to the properties against the defendant.

The defendant contended *inter alia* that the plaint lands formed part of survey Nos. 364, 365 and I 366 registered in the Settlement Register as nattam poramboke, that according to the description set out in the settlement register survey Nos. 364 and 365 (plaint sites 1 and 2) were nattam sites which could not be occupied without the permission of the defendant and that plaintiff's occupation of the same was unauthorized, the Court of First Instance found that though the plaintiff and his predecessors had been in possession of the plaint sites Nos. 1 and 2 for 30 and 40 years respectively, such possession did not extend to 60 years, and was ineffectual to create in favour of the plaintiff a title by prescription as against the Government. It further held that the plaintiff's claim of absolute right of ownership in regard to the plaint items 1 and 2 was barred by limitation in view of the fact that these items were treated as nattam poramboke in the settlement register so far back as 30 years ago. On the findings aforesaid the lower Court dismissed the suit as regards items 1 and 2.

The plaintiff appealed against the decree of the lower Court in so far as it disallowed the declaration of title as regards items 1 and 2.

The lower Appellate Court confirmed the decree of the Court of First Instance. Plaintiff appealed to the High Court.

M. B. Doraiswami Ayyangar for *A. K. Sundaram Ayyar* for appellant.

The Government Pleader for respondent.

JUDGMENT.—It is found that the plaintiff has proved possession of item 1 in himself and his vendor for 30 years and of item 2 in himself for 40 years. The defendant, who is the Secretary of State for India in Council, has failed to establish his title to the land, or any possession within 60 years before suit. The only

circumstance put forward to show a title in the defendant is the fact that at the settlement in 1874 the Revenue authorities classed the items as nattam poramboke. This at the utmost was an assertion of title, and is not by itself sufficient to prove the title of the defendant. The judgment of this Court in *Kattai Mahomed Meera Mohideen* v. *The Secretary of State for India in Council*(1) has been entirely misunderstood by the Subordinate Judge. That judgment does not lay down that the mere classification by Government of the lands as nattam poramboke has any legal effect whatever, except in so far as it may be regarded as an assertion of title. It may be regarded as settled law that in circumstances like the present the possession of the plaintiff throws upon the defendant the burden of proving that he has a subsisting title—*vide The Secretary of State for India* v. *Kota Bapanamma Garu*(2), *Muthayya Chetti* v. *The Secretary of State for India*(3), *Ganga Ram* v. *The Secretary of State for India*(4) and *Hanmantrav* v. *The Secretary of State for India*(5) and this he has failed to do. The plaintiff is clearly entitled to some relief. It is contended that the only declaration that the plaintiff can, in the circumstances of this case, have, is that he is lawfully entitled to possession of the land. It is pointed out that this is the declaration that was given in *Ganga Ram* v. *The Secretary of State for India*(4) and *Hanmantrav* v. *The Secretary of State for India*(5). In the former case the plaintiff had only proved possession for 10 years which was insufficient to give him a title against any one who might be the true owner, and on the ground that he had not proved his title a declaration of title was refused. The declaration that he was lawfully entitled to possession was given because there was, as there is in the present case, a prayer in the plaint for any other relief to which the plaintiff might be entitled and because the facts brought the case within the ruling of their Lordships of the Privy Council in *Ismail Arift* v. *Mahomed Ghous*(6). In that case the possession proved was for less than 12 years and apparently on that ground the words "lawfully entitled to possession" were substituted for the words "sole and absolute

(1) (1903) (13) M.L.J., 269.
(2) (1896) I.L.R., 19 Mad., 165.
(3) (1899) I.L.R., 22 Mad., 100.
(4) (1896) I.L.R., 20 Bom., 798.
(5) (1901) I.L.R., 25 Bom., 287.
(6) (1893) I.L.R., 20 Calc., 884.

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owner" which appeared in the decree of the High Court. In *Hanmantrav* v. *The Secretary of State for India*(1) also the plaintiff's possession only extended to 10 years. In the present case the plaintiff's own possession of item 1 extends to 20 years, and of item 2 to 40 years, and such length of possession is sufficient to make out a title against any one including the Secretary of State, the latter having failed to prove a title or possession within 60 years. It is not contended that in order to prove his title against the Secretary of State the plaintiff is bound to prove 60 years' possession, and such a contention would be untenable—*vide The Secretary of State for India* v. *Kota Bapanammagaru*(2) and *Haidar Khan* v. *The Secretary of State for India*(3). The plaintiff will therefore have the declaration prayed for as to items 1 and 2 with costs throughout, and the decree of the lower Courts will be modified accordingly.

(1) (1901) I.L.R., 25 Bom., 287. (2) (1896) I.L.R., 19 Mad., 165.
(3) (1909) I.L.R., 36 Calc., 1.

PRIVY COUNCIL.

PARTHASARATHI APPA ROW (PLAINTIFF),

v.

CHEVANDRA VENKATA NARASAYYA (DEFENDANT) AND OTHER APPEALS CONSOLIDATED.

P.C.* 1910. March 10. April 27.

[On appeal from the High Court of Judicature at Madras.]

Rent Recovery Act (Madras Act VIII of 1865), s. 9—Tender of Pattas on produce sharing system—Allegation by tenants that money system prevailed—Prevalence of money rent for series of years—Alleged express contract to make prevailing rate permanent—Implied contract presumption of—Evidence in considering usage prevailing—Remand of cases for determination of proper rate when no contract exists.

The appellant, a zamindar, brought suits against the respondents, the tenants in a village on his estate, under section 9 of the Madras Rent Recovery Act (Madras Act VIII of 1865) to enforce of pattas tendered by him, and the execution of corresponding muchilkas. The pattas tendered were under the asara, or produce sharing system, which the respondents denied was in force in their village, money rates, as they alleged, being the proper form of rent. It appeared that in 1299 (1889) different rates of rent prevailed in the village, some being higher than Rs. 5, and others lower; that in that year a uniform rate of Rs. 5 per acre was introduced by mutual agreement between the appellant and respondents, and leases were exchanged on that basis for a term of 5 years. The respondents alleged that the appellant at that time expressly agreed that the rate of Rs. 5 should be permanent. The High Court did not uphold the express agreement, but found there was an implied contract to be inferred from the fact that rents at the same rate were paid and received for four years after the expiration of the term fixed by the leases of 1299 the presumption being that such rate of rent should continue the same in perpetuity:

Held, by the Judicial Committee that there was, alongside of the express contract embodied in the leases exchanged between the parties, no proof of any such collateral implied agreement relating to fixity of rent. Any understanding of the kind was denied by the appellant, and no credible explanation was given by the respondents why, if it existed, such an important arrangement was not reduced to writing.

Whilst agreeing with the High Court that it was not open to Courts to imply, from the mere circumstance that the rent had been paid in money for a series of years, an agreement to pay money rent, their Lordships saw no reason why the fact that money rent had prevailed in a particular locality for a considerable number of years might not form an element in the consideration of usage.

* *Present*: Lord MACNAGHTEN, Lord COLLINS, Sir ARTHUR WILSON and Mr. AMEER ALI.

PARTHA-SARATHI APPA ROW v. CHEVANDRA VENKATA NARASAYYA.

The real question between the parties not having been decided, namely, whether the pattas tendered by the appellant were such as he was entitled to impose on the respondents, a question which, it having been found that there was no express or implied contract, must be decided in accordance with the rules contained in clause (iii) of section 11 of Act VIII of 1865 which dealt with the mode of determining the rate when no contract exists, their Lordships remanded the cases to the proper Court in India to determine under those provisions the *rates* the appellant was entitled to receive.

CONSOLIDATED appeals from decrees (26th September 1904 and 19th January 1905) of the High Court at Madras in second appeals arising out of certain suits under the Madras Rent Recovery Act (VIII of 1865), section 9.

The suits were instituted by the zamindar, the appellant, against the respondents, who were tenants in the village of Chevandra on his estate, and the object of the suits was to obtain decrees directing the tenants respectively to accept pattas which he had tendered for the current agricultural year, and to execute on their part corresponding muchalkas. The pattas tendered required the tenants respectively to deliver to the zamindar by way of rent a specific share of certain crops grown on irrigated land comprised in their holdings, and to pay rent at the rate of Rs. 2-12-0 per acre for land on which "dry" crops were raised.

Up to the fasli year 1266 (1856) the tenants in the village of Chevandra collectively delivered to the zamindar by way of rent a fixed share of the produce of the land in grain under a system known as *asara*. In that year the mode of sharing the produce was changed and under a three-year lease described therein as a *veesabadi* cowle the tenants collectively paid rent in cash and in fasli 1270 (1860) that arrangement was renewed for five years at enhanced rates of rent. Subsequently, and (except in faslis 1285 and 1286) up to fasli 1299 (1889) the tenants held under separate leases and paid rent in cash in respect of the different parts of their holdings at various rates which were altered from time to time. In faslis 1285 and 1286 (1875 and 1876) the *asara* system was again followed. In fasli 1299 (1889) the zamindar visited the village and discussed the matter with the tenants, and offered them pattas for five years, the rate of rent in most of them being Rs. 5 per acre; these pattas were accepted and corresponding muchalkas were executed by the tenants. On the expiration of the five years the same terms were again offered, the tenants accepted

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them, and they were in force until 1900. A dispute then arose, and on 22nd June 1900 the appellant tendered to the tenants pattas for the next fasli, stipulating (except as to land under certain named crops) for rent in kind, being a share of produce according to the original *asara* system. The tenants refused to accept those pattas and to execute corresponding muchalkas. Thereupon the suits under the Rent Recovery Act, section 9, were instituted on 15th August 1900. Of these suits two Summary suits Nos. 437 and 558 were dealt with together throughout and gave rise to two of the present appeals.

The defendants denied that the *asara* system was according to custom and in paragraphs 4 and 7 of their written statement asserted as follows:—

"4. Up to fasli 1277, joint money-rents system continued to be in force; in fasli 1278, individual money-rents were arranged, and in fasli 1280, *taram* cists (classification cists) were charged. According to these *Taram* (classification) rates, cists were paid from fasli 1281 to fasli 1298. Afterwards, in fasli 1299, as the plaintiff came to the village of Chevandra, stayed there for one month, sent for and told the defendant and the other ryots of the village that the extent of lands bearing lower rates was very large and that the extent of lands bearing higher rates was very small and that same uniform rate for all the lands should be arranged permanently; all the ryots approved of it, and an arrangement was entered into between both parties to the effect that a uniform rate at Rs. 5 per acre should be permanently paid in respect of all kinds of lands in the holding of individuals.

"7. Moreover, the *veesabadi* system has been in force for a long time continuously up to date, whereby cists continue to be paid in the form of money. Therefore, the intention and understanding of the parties is to pay the cists only in the form of money; besides, it is an implied contract. Nor does the custom of paying grain rents prevail in the village. It is not disclosed in the plaint that such custom exists. For these reasons also, plaintiff has no right to give up the *mamool veesabadi* rates and to ask for grain rents."

Of the issues raised the only two now material 3 and 6 are set out in the judgment of the Judicial Committee; and the way in which the suits were dealt with in the various courts are also there sufficiently stated.

The High Court (SUBRAMANIA AYYAR and BODDAM, JJ.) on second appeal held that there was an implied contract between the plaintiff and the defendants respectively under which the defendants were entitled to occupy their holdings in perpetuity at the rent reserved in the leases granted to them by the plaintiff in fasli 1299 (1889); and that the pattas tendered should be so modified as to give effect to that contract, and accordingly the decrees were passed against which two of the present appeals were preferred.

During the pendency of the above suits, namely on 20th August 1902, the plaintiff tendered to the defendants pattas in the same form as before for a subsequent year and the defendants refused to execute corresponding muchilkas. The plaintiff thereupon filed the two other suits (Summary suits Nos. 18 and 113 of 1902) now on appeal. The Deputy Collector dismissed the suits on the ground that money being the proper form of rent, and the pattas tendered being not for a money rent, section 9 of the Rent Recovery Act was not applicable. Appeals to the District Court were dismissed on the same ground. On second appeals the High Court (Sir C. A. WHITE, C.J., and SUBRAMANIA AYYAR, J.) passed decree in the same terms as in the previous cases, and two of these Consolidated Appeals have been preferred against these decrees.

On these appeals which were heard ex parte.

DeGruyther, K. C., and *Kenworthy Brown* for the appellant contended that the High Court had wrongly decided that there was an implied contract in 1889 between the appellant and respondents, that the rate of rent then agreed to should be permanent. There was no evidence in law to support such a finding as that the rate of rent could not be varied at the expiry of the periods for which the leases were given. Payment of rent at a uniform rate for a certain number of years under express contracts limited to those years was no evidence in law of an implied contract that rent should be paid at that rate for ever. The High Court moreover had no jurisdiction under section 584 of the Civil Procedure Code (1882) relating to second appeals, to direct a new trial of a question of fact (on the question of implied contract) which had already been determined by the District Court in accordance with law. Reference was made to the Madras Rent Recovery Act (VIII of 1865), sections 3, 7, 9 and 11, clause (iii);

Evidence Act (I of 1872), section 91; and Wilson's 'Glossary,' page 241, as to the definition of "Jirayati Hakku" as "Occupancy rights."

27th April 1910.—The judgment of their Lordships was delivered by Mr. Ameer Ali.

These are Consolidated Appeals from certain decrees of the High Court of Madras made on the 26th of September 1904 and 19th of January 1905, respectively.

The suits, which gave rise to the appeals, were, along with a number of others, instituted by the appellant Zamindar on the 15th of August 1900 against his tenants of the village of Chevandra, in the Madras Presidency, under section 9 of the Madras Rent Recovery Act (VIII of 1865) to enforce the acceptance of pattas tendered by him and the execution of muchilkas corresponding thereto.

Although this litigation has passed through several Courts in India, the matter in controversy lies within a small compass.

Act VIII of 1865 requires landholders specified in section 3, to which category the plaintiff belongs, to enter into written engagements with their tenants; and no suit or legal proceeding to enforce the terms of a tenancy is sustainable unless pattas and muchilkas have been exchanged or "unless it is proved that the party attempting to enforce the contract had tendered such a patta or muchilka as the other party was bound to accept" (section 7). In case of a refusal to accept a patta such as the landholder is entitled to impose, he can proceed under section 9 by a summary suit before the Collector to enforce its acceptance.

Section 11, which lays down the rules to be observed in the decision of suits involving disputes regarding rates, is important.

It declares that—

"(i) All contracts for rent, express or implied, shall be "enforced.

"(ii) In Districts or villages which have been surveyed by "the British Government previous to 1st January 1859, and "in which a money assessment has been fixed on the fields, such "assessment is to be considered the proper rent when no contract "for rent, express or implied, exists.

"(iii) When no express or implied contract has been made "between the landholder and the tenant, and when no money

"assessment has been so fixed on the fields, the rates of rent shall "be determined according to local usage, and when such usage "is not clearly ascertainable, then according to the rates estab- "lished or paid for neighbouring lands of similar description and "quality. Provided that if either party be dissatisfied with the "rates so determined, he may claim that the rent be discharged "in kind according to 'the warum,' that is, according to the "established rate of the village for dividing the crop between "the Government or the landlord and the cultivator. When 'the "warum' cannot be ascertained, such rates shall be decreed as may "appear just to the Collector after ascertaining if any increase "in the value of the produce or in the productive power of the "land has taken place otherwise than by the agency or at the "expense of the ryot."

The rest of the section is not material to the present cases.

The pattas tendered by the appellant required the tenants respectively to deliver to him by way of rent a specific share of certain crops grown on what are called "wet" or irrigated lands comprised in their holdings and certain money-rent for land on which "dry crops" were raised—his case being that the asara or sharing system was the mamool or customary mode of payment in the village of Chevandra, and that the tenants had refused to accept the asara pattas for fasli 1309; hence the suits.

The tenants denied that the asara system was in force in their village, and alleged *inter alia* that money rates had prevailed there for a considerable number of years "continuously up to date," and were the proper rates; and that by a specific arrangement entered into in fasli 1299 (1889) an uniform rate of Rs. 5 per acre had been settled in perpetuity for the lands held by them respectively. They also took exceptions to the "rules, conditions, and items" in the asara pattas as being improper and illegal.

The two material issues framed by the First Court are (3) and (6), which are as follows:—

"3. Whether the system of payments of rental in money, "or whether the system of payment of rent in grain is the proper "cist of payment?

"6. Whether there was a special contract in fasli 1299 "between the parties as to the rates and what were the terms "of the contract and whether such contract is still binding?".

At the trial before the Deputy Collector it was admitted that money-rents at varying rates had been in force in the village since fasli 1266 (1856), with the exception of two years (faslis 1285 and 1286 = 1865 and 1876), when rent in kind was paid under circumstances regarding which the parties are not agreed; that in fasli 1299 an arrangement was come to by which the varying money-rates prevailing in Chevandra were replaced by an uniform rate of Rs. 5 per acre, and pattas and muchilkas were exchanged on that basis for a term of five years, and that the same arrangement continued for the next four years; that in fasli 1309 the plaintiff, wishing to revert to the asara system, tendered to the tenants asara pattas, which they refused to accept on the grounds already stated.

On the third issue, viz., "Whether money-rent or rent in kind was the proper cist of payment," the Deputy Collector, principally on the fact that the veesabadi or cash system (as opposed to the asara) had prevailed in the village, with a short break, over more than forty years, held that payment in money was "the proper form of payment of rent."

On the question whether the rate of Rs. 5 was in 1889 fixed in perpetuity, he found, for reasons set out in his judgment, "that there was a special contract between the parties to pay and receive at the rate of Rs. 5 an acre as an unchanging rent." He accordingly directed that the pattas tendered by the plaintiff should be modified in conformity with his finding and that the defendants should execute muchilkas in accordance therewith.

On appeal by the plaintiff, the Acting District Judge agreed with the First Court that "money-rents alone were the proper mode of payment." With regard to the question whether the rates settled in 1889 were permanent, he held that the tenants had not succeeded in establishing their allegation. And he added: "The defendants, having failed to prove the express contract that Rs. 5 was agreed upon as the permanent rate, cannot be allowed to put forward the plea of an implied contract to the same effect. Having found that there has been a contract that the rent has to be paid in money, but that there has been none as to how much it is to be, I hold that under section 11, clause (iii) of the Rent Recovery Act, the plaintiff is entitled to be paid rent according to the established warum of the village."

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In this view, the District Judge remanded the cases to the First Court for the purpose of finding the proper warum rates. In his judgment on remand the Deputy Collector stated that he had already found on the evidence the warum rates in force in the village when the asara last prevailed there; but as the asara system ceased many years ago, the warum rates recognised then could not be considered the proper warum rates for the present time.

On the return of the above finding the cases came before another District Judge, who was of opinion that, as money-rent had been found to be the proper form of payment, and no attempt had been made before him to disturb that finding, the tender of warum pattas was wrong, and that the suits should be dismissed on that ground.

On second appeal by the plaintiff, the learned Judges of the High Court appear to have dealt with the judgments of the lower Appellate Court both before and after the remand. In the first place, they hold that, "even if it be found that the proper rates were only money rates," the tender of a warum patta was no objection to a suit being sustained under the Rent Recovery Act. Dealing with the judgment of the first District Judge, they were of opinion that it was not open to the Courts "to imply from the mere circumstance that the rent had been paid in money for a series of years, but at varying rates, an agreement to pay money-rent."

On the question of an implied contract to pay a fixed rent of Rs. 5 per acre, they considered the District Judge's finding to be unwarranted by law, and they set it aside and remanded the cases for a fresh finding, with the following observations:—

"The question for determination was having regard to what transpired in fasli 1299, when the uniform rent of Rs. 5 in respect of the whole of the lands in the village was agreed to instead of the different rates for different lands that obtained before and having regard to the fact that from that time for nine years continuously that rate was paid, whether that rate should be taken as impliedly assented to as the rate to be paid in future, and this was a question to be determined upon the evidence adduced and to which reference is made at length under the issue of express contract in the Judge's judgment. There was no question of presumption, and the circumstance that prior to fasli 1299 rent was

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paid at fluctuating rates and sometimes in kind and sometimes in money was quite immaterial with reference to the determination of the said question of implied contract. As to the third and last ground stated by the Judge 'again the defendants having failed to prove the express contract that Rs. 5 was agreed upon as the permanent rate cannot be allowed to put forward the plea of an implied contract to the same effect' it is difficult to understand why defendants were so precluded. These being all the reasons given for holding that there was no implied contract, the finding must be treated as unwarranted by law."

The matter on remand came before a third District Judge, who found in favour of the implied contract.

On the return of the cases to the High Court, the second appeals came on for final hearing on the 26th September 1904, when the learned Judges accepted the last finding of the lower Appellate Court as meaning that the rates settled in 1299 were intended to be permanent. They accordingly reversed the decrees of the Courts below, and directed that the terms of the pattas tendered by the plaintiff should be in conformity with the terms of the pattas of 1299, subject to certain corrections they had already pointed out in their previous judgment.

Other suits, under section 9, brought by the plaintiff in 1902, have been disposed of by the High Court in accordance with the above decision; and these consolidated appeals have been preferred by the plaintiff to His Majesty in Council against the several decrees of the High Court.

As the respondents do not appear, the case have been heard *ex parte*, and it has hence been necessary to refer at some length to the history of the litigation and the contentions of the parties.

It is clear that in 1299 different rates of rent prevailed in the village of Chevandra; some were higher than Rs. 5, others lower: in that year an uniform rate of Rs. 5 per acre was introduced by mutual agreement between the landlord and tenants, and leases were exchanged on that basis for a term of five years. The defendants allege that the plaintiff at that time expressly agreed the rate of Rs. 5 should be permanent. The Courts in India have disbelieved the story of an express agreement to that effect. An implied contract, however, has been inferred from the fact that rents at the same rate were paid and received for four years after the expiration of the term fixed by the leases of 1299. This

circumstance is regarded as explainable only on the hypothesis of an understanding that the rate of Rs. 5 should continue for ever, and as rendering probable the existence of an implied contract.

Their Lordships are unable to concur in that view or to hold that alongside of the express contract embodied in the leases exchanged between the parties there was a collateral implied agreement relating to fixity of rent. The plaintiff denies any understanding of the kind alleged by the defendants; their explanation as to the reason why such an important arrangement was not reduced into writing or incorporated in the pattas and muchilkas of 1299 is that the plaintiff told them that perpetual leases would require to be stamped; and they therefore rested content with his verbal assurance. The Courts in India do not appear to have placed reliance on this statement, nor are their Lordships prepared to accept it.

However much they regret this protracted litigation, they do not find themselves in a position to decide the cases finally. The theory of an implied contract on which the High Court has rested its decrees is, in their Lordships' judgment, untenable; there is thus no decision on the real question between the parties, viz., whether the pattas of fasli 1309 are such as the plaintiff is entitled to impose on the tenants. Section 11 of Act VIII of 1865 lays down the rules for deciding disputes as to rates of rent Clause (iii) deals with the mode of determining the rate when no contract exists. It being found that there is no express or implied contract, the question must be decided in accordance with the rules contained in clause (iii).

Their Lordships are disposed to agree with the High Court in the view that it is not open to Courts to imply from the mere circumstance that the rent has been paid in money for a series of years an agreement to pay money-rent. But they see no reason why the fact that money-rent has prevailed in a particular locality for a considerable number of years may not form an element in the consideration of the question of usage.

On the whole their Lordships are of opinion that the judgments and decrees of the High Court should be set aside and the cases sent back in order that they may be remitted to the proper Court to determine in accordance with the provisions of clause (iii), section 11 of the Rent Recovery Act, the rates the plaintiff is

entitled to receive, and their Lordships will humbly advise His Majesty accordingly.

In the circumstances their Lordships think the appellant should bear his costs of these appeals; the costs in the Lower Courts will be in the discretion of the High Court.

Appeals allowed.

Solicitor for the appellant: *Douglas Grant.*

J. V. W.

APPELLATE CIVIL.

Before Sir Ralphi Sillery Benson, Officiating Chief Justice, and Mr. Justice Sankaran-Nair.

DESOO VENKATESA PERUMAL CHETTY (TRANSFEREE—PLAINTIFF), APPELLANT,

v.

SRINIVASA RANGA ROW AND THE OFFICIAL ASSIGNEE OF MADRAS, RESPONDENTS.*

1909. September 28. October 6.

Limitation Act XV of 1877, schedule II, art. 180—'Revival' of decree, what is—Civil Procedure Code, XIV of 1882, s. 248, notice under—No revival where notice not issued.

Where on an application for execution of a decree more than one year old, order for execution was issued without the notice to the judgment-debtor required by section 248 of the Civil Procedure Code of 1882, such order for execution does not 'revive' the judgment within the meaning of article 180 of schedule II of the Limitation Act of 1877. It is only where such notice has been issued that the judgment or decree is 'revived'.

ORIGINAL side appeal against the judgment and order of Wallis, J., dated 22nd December 1908 in Civil Suit No. 151 of 1893.

A decree was passed in favour of the plaintiff on 30th January 1894 in Original Suit No. 151 of 1893 in the High Court. The decree was transferred for execution to the District Court of North Arcot in January 1896. An application for execution was made on 15th February 1896 to the District Court and an order for attachment was made on 19th March 1896 without notice to the defendant. The decree was assigned to the appellant on 27th January 1908, who applied to the High Court for execution.

* Original Side Appeal No. 5 of 1909.

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The following order was made by Wallis, J.

An application for the transmission of a decree is not an application for execution and notice under section 248 is not necessary (22 Cal., 921). The petitioners do not show that the order for transmission of 27th January 1896, was not made on notice to the defendant, and as such notice was not necessary, it cannot be presumed to have been given. The decree-holder applied for execution to the District Court of North Arcot on 15th February 1896 and an order for attachment was made on 19th March 1896 as the decree was more than a year old under section 248, Civil Procedure Code, this order ought to have been made on notice, but the petition on which the order of attachment is endorsed contains no order for notice such as would usually be found there if notice had been ordered and it may well be that the District Judge considered notice unnecessary. It is for the decree-holder to prove notice and I am not satisfied that he has proved notice or that on the evidence in this case notice ought to be presumed especially where there is a denial on the other side that notice was served. To constitute reviver under article 180 there must be an order for execution on notice, and as notice is not proved, the petition must be dismissed with costs.

Against this order the transferee-plaintiff appealed.

K. Srinivasa Ayyangar and *C. Venkatasubbaramiah* for appellant.

P. V. Ramachandra Raju for respondent.

JUDGMENT.—The decree-holder applied for execution on the 15th February 1896 of his decree which was more than a year old. It was necessary to issue notice under section 248, Civil Procedure Code of 1882. We have now ascertained that no notice was issued and an order for attachment was made on the 19th March 1896. The present application for the transmission of the decree for execution after substituting the appellant's name as transferee on record was made within twelve years from the date of the order. The question whether the application is barred depends upon the meaning to be given to the word "revived" in article 180, schedule II of the Limitation Act. In all the cases cited an order to issue execution *after* notice to the judgment-debtor has been held to revive a judgment or decree. But we have not been referred to any case in which an order alone without any notice has been held to have that effect. The appellant's pleader

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argues that the absence of notice under section 248 of the Code of Civil Procedure of 1882 has been held to be only an irregularity and though it may be open to the judgment-debtor to set aside the order passed without notice in an appropriate proceeding it is not open to him to treat it as a nullity till set aside—see *Malkarjun* v. *Narhari*(1). This may be so. But the question that we have to consider is what is the meaning of the term "revived," and when the cases show that it has long been understood to mean an order after notice we do not think we shall be warranted in giving that term a wider meaning. We must therefore uphold the order of the learned Judge and hold there was no revivor.

It was then argued that as there is an application now pending to execute the decree, the question of limitation does not arise. This question was not raised before the learned Judge, probably for the reason that the present application was to transmit the decree for execution and not to continue any execution proceeding already pending. The appellant must be left to make a fresh application on that basis and cannot be allowed to raise that question at this stage on this application.

The appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Miller.

1909. October 6, 18, 19, 28.

NARAYANASWAMI NAIDU GARU, RECEIVER, NIDADAVOLE ESTATE (PLAINTIFF), APPELLANT IN APPEAL SUIT NOS. 191 AND 192 OF 1907,

v.

SREE RAJAH VELLANKI SREENIVASA JAGGANNADHA RAO BAHADUR, ZAMINDAR GARU (DEFENDANT), RESPONDENT IN BOTH.*

Land-revenue Assessment Act (Madras), Act I of 1876—Party driven to sue for separate registration not entitled to damages for refusal to register—Action for money had and received—Request, when implied.

The alienee of a portion of an estate, who is driven to a civil suit to enforce separate registry, under Act I of 1876, all the parties to the alienation not

(1) (1901) I.L.R., 25 Bom., 337.

* Appeals Nos. 191 and 192 of 1907.

consenting to the transfer, is entitled to recover only the costs of such suit and not any further damages.

In an action to recover money paid by plaintiff for the defendant at his request, a request will generally be implied where the defendant has notice of the payment being made for him and does not dissent.

Where the circumstances show that the owner of property which is saved by another party knew that the other party was laying out his money in the expectation of being repaid, the inference of an understanding between the parties, amounting in law to an implied contract will unhesitatingly be drawn.

Falcke v. *Scottish Imperial Insurance Company*, [(1887) 34 Ch.D., 249], referred to.

Where a portion of an estate is alienated and the vendor and vendee agree that the vendee should pay the vendor a certain amount as the vendee's share of peshkash on the portion alienated, which amount is in excess of the amount ascertained on separate registry to be due on such portion, the vendor is *interested* in paying the peshkash, as he makes a profit in doing so and he can recover the amount so paid.

APPEALS against the decrees of N. Lakshmana Rao, Subordinate Judge of Kistna at Ellore, in Original Suit Nos. 8 and 31 of 1905 respectively.

The facts for the purpose of this case are stated in the judgment.

C. R. Tiruvenkatachariar for appellant.

N. Subba Rao for respondent.

JUDGMENT.—In these cases the suit village was bequeathed by the late Zamindar to his two brothers-in-law Jagannadha, the defendant's predecessor, and another. The Zamindar's widows bought out the other and put Jagannadha in possession of the whole village under exhibit C, dated the 22nd January 1869, under which Rs. 3,200 was treated as the peshkash payable on the village and Jagannadha was required to remit that sum annually together with the water-cess and road-cess to the zamindari, which remained liable to Government as there had been no separate registration of the village. Jagannadha was ousted from possession by the Rajah's surviving widow in 1886. He brought a suit and eventually recovered possession in accordance with the judgment of the Privy Council in December 1898. In March 1899 he applied for separate registry, but owing to the opposition of the Zamindarini, he was obliged to file a suit, Original Suit No. 19 of 1901, for a declaration of his right to separate registry, and obtained a decree in the District Court on the 9th October 1901,

which was confirmed by the High Court on the 20th July 1906. These two suits are brought by the Receiver of the Nidadavole Estate to recover peshkash, water-cess and local board-cess paid to Government by the estate in respect of the defendant's village, the first Suit No. 8 of 1905 for faslis 1309, 1310 and 1311 and the second Suit No. 31 of 1905 for fasli 1312, 1313 and 1314. It is not disputed that the plaintiff was bound to pay the peshkash and local-cess on the village for faslis 1309, 1310 and 1311 when the estate had not yet been separately registered in the defendant's name, but it is contended that the case as to water-cess is on a different footing. Under Act VII of 1865 the water-cess is charged on the land and Government is entitled to levy it from the landholder both under the original Act and the Act as amended in 1900. Exhibit D shows that Government required the plaintiff to collect and pay the water-cess on the zamindari, including this village, and exhibit XX, dated the 25th July 1899, that this arrangement was to continue unchanged, and it is not suggested that there has been any subsequent change. The plaintiff's claim to recover the water-cess therefore stands on the same footing as the claim to recover peshkash and local-cess. We think the Subordinate Judge was wrong in reading exhibit XX as an intimation by Government that it looked to the defendant rather than to the receiver for payment of the water-cess. Exhibit XX simply says the existing arrangement is to continue pending the orders of the Board, and admittedly Government collected the water-cess for all these faslis from the plaintiff and not from the defendant.

As to the amount of peshkash recoverable from the defendant, Jagannadha, who was in possession from 1869 to 1886 in accordance with exhibit C, paid Rs. 3,200 which has been held to have been fixed provisionally pending separate registry of the village. As, after the defendant had been put in possession in 1899, the plaintiff wrongfully resisted separate registration, the Subordinate Judge has not awarded Rs. 3,200 a fasli but only Rs. 2,045½ the peshkash for the village as finally apportioned. We agree with the Subordinate Judge and think that in the circumstances the plaintiff is only entitled to recover the peshkash which was actually found payable by the village. The Subordinate Judge however has deducted Rs. 3,239-3-7 from the peshkash for these three faslis, being the amount by which the defendant's collections for these

faslis fell short of the full kist, on the ground that the shortage was due to the action of the plaintiff in wrongly resisting separate registration. It is explained for the defendant that in accordance with certain decisions of this Court he was not entitled to take proceedings under the Rent Recovery Act until he was separately registered and that the shortage was due to this cause. Various objections are taken by the appellant. It is denied that the shortage was due to this cause, and it is pointed out that from 1869 to 1886 Jagannadha was able to collect the kist without being registered proprietor. It is also said that some of the arrears for these faslis have been collected after suit. As for the decisions, it is pointed out that there were other decisions of this Court the other way and that these latter decisions have now prevailed. It is we think unnecessary to go into these contentions because the defendant's claim on this head fails on a larger ground. He recovered possession of the village under the judgment of the Privy Council, exhibit I. Wanting separate registration as well he was obliged to apply for it under Act I of 1876. Under that Act unless all parties to the alienation concur the claimant is driven to a suit. There is no provision in the Act that any party wrongly withholding his assent is to be liable for any loss which the claimant may incur in consequence of his refusal to consent. The result of his refusal is that he is made one of the defendants in the suit, and if unsuccessful has to pay the plaintiff's costs, as happened in the present case. The plaintiff was fully entitled if so advised to oppose the defendant's claim to separate registration at the risk, of course, of having to pay costs if he failed in his grounds of opposition, and we have not been referred to any principle or authority under which he can be made liable for more. The allowance of Rs. 3,239-3-7 made to the defendant on this head for faslis 1309, 1310 and 1311 must be disallowed. With regard to issue No. 5 there appears to be some confusion in the Subordinate Judge's judgment as regards a sum of Rs. 190-1-8 paid by the defendant in August 1901 under exhibit J for local-cess due for fasli 1308. The Subordinate Judge finds that the amount was payable by the defendant for cess in that fasli, but has apparently overlooked the fact that this suit does not relate to fasli 1308 but to faslis 1309, 1310 and 1311. Consequently the defendant has wrongly been credited with this sum in the present suit, and the credit must be disallowed.

The Subordinate Judge has also credited the defendant in this suit with a sum of Rs. 5,138-12-7 paid under exhibit XXIII on the 11th August 1905, three years after the institution of this suit, but, as will appear, this sum cannot be considered as having been paid in respect of these faslis, and must be credited in the second suit.

The next suit filed on the 11th September 1905 is to recover peshkash, water-cess and local-cess for faslis 1312, 1313 and 1314. The defendant denied liability and pleaded that in any case he was entitled to credit in the suit for the sum of Rs. 5,138-12-7 paid by him to the plaintiff on the 11th August 1905 less than a month before the institution of the suit. The Subordinate Judge has found that the plaintiff is not entitled to recover anything in this suit and has given the defendant credit for this sum in the previous suit, on the ground that the village was separately registered on the 17th January 1903 in his name, and that the plaintiff is not entitled to recover any payments made by him subsequently to that date in respect of the plaint village. The fact that the defendant was held entitled to separate registration by the High Court on appeal between the settlement of issues and the hearing of this suit was not enough to decide the fourth issue. "Whether the defendant must make any payments to the plaintiff for the suit Faslis? If so, what is the sum payable?" We think the issue raised and was intended to raise the question whether in the circumstances of the case the defendant was bound to repay the plaintiff the sums which the plaintiff had paid Government in respect of the village or rather the balance, for it is alleged in the plaint and not denied in the written statement that before suit the defendant had paid the plaintiff over Rs. 5,000 in respect of these faslis, and obviously in repayment of what the plaintiff had paid Government. Now looking at the conduct of the parties, we think it raises the inference that the plaintiff went on paying the peshkash to Government by consent of all parties pending the decision of his appeal as to whether it was payable by the defendant direct or by the plaintiff out of a sum of Rs. 3,200 paid him by the defendant, and that as will be seen later in law it was paid at the defendant's request. At the time the apportionment was commenced in March 1903 fasli 1312 was nearly over and the plaintiff must have paid most of the peshkash for the year. It is not suggested that the defendant made any effort to

ascertain what balance was due by him or gave any notice to the Revenue authorities of his desire to pay direct to them or that they made any demand on him for these faslis or reduced their demand on the plaintiff. It is quite clear that he left the plaintiff to save the village by paying the peshkash and cesses while he enjoyed the rents and profits of the village. It is also clear that he acquiesced in the action of the plaintiff which was so greatly to his advantage and admitted his liability to repay the plaintiff whatever might prove to be due after the question of separate registry and of the amount of peshkash payable on the village which was also under appeal had been finally settled. It is alleged in the plaint in this suit that the plaintiff several times asked the defendant for the amounts sued for, and this is not denied in the written statement, nor is it anywhere suggested that the defendant ever denied his liability to repay until after the filing of the suit. In June-July 1904 when the first suit as regards faslis 1309, 1310 and 1311 was pending, the defendant, who had filed his written statement in November 1902, tendered Rs. 2,000 to the plaintiff, see exhibits XXI and XXII. There is nothing to suggest that this tender was in reduction of the claim for faslis 1309, 1310 and 1311 as to which a suit was pending. If so, it would have been paid into Court. In exhibit XXI, Rs. 2,000 are spoken of as collections. The plaintiff insisted that this should be paid without prejudice and nothing more was done then, but in August 1905 after another fasli had elapsed a payment of Rs. 5,138-12-7 was made through one Basivi Reddi who appears to have been consulted by the defendant at the suggestion of his brother-in-law, the minor Rajah of Pittapur, no doubt with a view of avoiding further litigation. The letter which he brought from the defendant's agent, exhibit XXIII, says he would pay the peshkash, etc., payable on the village to the plaintiff on condition of settling accounts subject to Court decisions. These decisions did not mean future suits which it was the object to avoid but the pending litigation as to whether the plaintiff was to have separate registration or to pay Rs. 3,200 to the plaintiff, and if the former, what was to be the amount of the separate peshkash. This letter bears an endorsement of payment by the plaintiff's accountant, stating that the Rs. 5,138-12-7 had been paid for fasli 1312, and the defendant has not produced the receipt given to Basivi Reddi to show that this is incorrect. Not satisfied with

this payment the plaintiff filed the present suit next month, and only then did the defendant repudiate liability whilst at the same time pleading that the payment of Rs. 5,138 must go in reduction of the claim. Less than this would be sufficient to enable the plaintiff to maintain this suit as one for money paid by the plaintiff for the defendant at his request. "A request will generally be implied where the defendant has notice of the payment being made for him, and does not dissent," Bullen and Leake's 'Precedents of Pleadings,' 3rd edition, page 42, citing *Paynter* v. *Williams*(1) and *Alexander* v. *Vane*(2). The learned editors of the 6th edition at page 254 say "sometimes" instead of "generally," but the alteration does not affect the present case. In *Falcke* v. *Scottish Imperial Insurance Company*(3), Bowen, L.J., says at page 249, "The inference of an understanding between the parties—which you may translate into other language by calling it an implied contract is an inference which will unhesitatingly be drawn in cases where the circumstances plainly lead to the conclusion that the owner of the saved property knew that the other party was laying out his money in the expectation of being repaid." The law is certainly no narrower in India, *Nobin Krishna Bose* v. *Mon Mohun Bose*(4), *Damodara Mudaliar* v. *Secretary of State for India*(5), *Jarao Kumari* v. *Basanta Kumar Roy*(6), cases under section 70 of the Indian Contract Act. In the present case it must be borne in mind that the amounts sued for were payable out of the defendant's pocket in any event and that the only question was whether he was to pay the apportioned peshkash to Government direct, or was to pay the plaintiff a larger sum out of which the latter was to pay the peshkash.

Further the plaintiff was undoubtedly interested in the payment of peshkash on the village as he was claiming Rs. 3,200 annually out of the village subject to the payment of peshkash by him, which as is proved would have meant a profit of Rs. 1,000 a year. The decision of the Privy Council in *Abdul Wahib Khan* v. *Shaluka Bibi*(7) though the facts are not precisely similar, is against putting obstacles in the way of a litigant seeking to recover money paid pending litigation for the preservation of the property

(1) 1 C. & M., 810.
(2) 1 M. & W., 511.
(3) (1887) 34 Ch.D., 234 at p. 249.
(4) (1881) I.L.R., 7 Calc., 573.
(5) (1895) I.L.R., 18 Mad., 88.
(6) (1905) I.L.R., 32 Calc., 374.
(7) (1894) I.L.R., 21 Calc., 496.

WALLIS AND MILLER, JJ.

NARAYANASWAMI NAIDU v. SREE RAJAH VELLANKI SREENIVASA JAGGANNADHA RAO.

and properly payable by the successful party. Lastly as the defendant was bound either to pay the peshkash on the village himself or to put the plaintiff in funds to pay it and the plaintiff was interested in paying it in view of his claim in the pending litigation it may well be argued that the case comes within section 69 of the Indian Contract Act as well. In this case also the water and local cesses stand on the same footing as the peshkash. In the result the decrees of the lower Court must be reversed and there must be judgment for the plaintiff in both suits in accordance with this judgment with interest at 6 per cent. from the date of plaint and costs in both suits. Interest will be allowed at 6 per cent.

APPELLATE CIVIL.

Before Mr. Justice Munro, Mr. Justice Abdur Rahim and Mr. Justice Bakewell.

1909. October 28. November 4.

KOTI VENKATA RAMIAH (APPELLANT), APPELLANT,

v.

THE OFFICIAL ASSIGNEE OF MADRAS (RESPONDENT), RESPONDENT.*

Currency notes, delivery of halves of—Such delivery does not pass the property in the notes—Creditor receiving halves of notes from debtor not entitled to insist on delivery of the other halves.

The delivery by a debtor of halves of currency notes to his creditor with the intention of paying off the debt by remitting the other halves, does not pass the property in the notes to the creditor so as to enable him to claim delivery of the other halves.

Smith v. *Mundy*, (29 L.J.Q.B., 172), followed.

The debtor does not by simply sending the first halves, without anything more, become a trustee or bailee in respect of the other halves of the notes.

Per ABDUR RAHIM, J.—Section 92 of the Indian Contract Act does not apply to money or currency notes, although the definition of goods in section 76 of the Contract Act is wide enough to cover coins and currency notes.

Per BAKEWELL, J.—The delivery of the half notes to the creditor was only one step towards or preparatory to the actual delivery of the notes and indicates only an intention to transfer and does not constitute a delivery of the notes.

APPEAL under section 15 of the Letters Patent against the judgment and decree of Sir Arnold White, Chief Justice, in Original Side Appeal No. 26 of 1907.

* Letters Patent Appeal No. 100 of 1908.

MUNRO, ABDUR RAHIM AND BAKEWELL, JJ.

KOTI VENKATA RAMIAH v. OFFICIAL ASSIGNEE OF MADRAS.

The facts of the case are sufficiently stated in the judgments of the learned Judges.

On the Official Assignee refusing to deliver the second halves of the currency notes, the appellant moved the High Court for an order directing the Official Assignee to hand over the second halves. The Learned Commissioner in insolvency dismissed the application.

On appeal, the following judgments were delivered by Sir Arnold White, C.J., and Miller, J.:—

(SIR ARNOLD WHITE, C.J.)—The learned Commissioner dealt with this case on the footing that Mr. Barru Narasimha Rao to whom the half notes were sent, was the agent of Mr. Ramaniah Pantulu who had the money in question in deposit with Messrs. Arbuthnot & Co. and who claims to be paid the amount in full. The actual terms of the letter of August 8th, 1906, are not before us, but it was not seriously contended on behalf of the appellant that the money was to be received by Mr. Narasimha Rao in any other capacity than that of Mr. Ramaniah Pantulu's agent, and on his behalf. The case may therefore be considered as if the half notes had been sent by Messrs. Arbuthnot & Co. direct to the customer.

The learned Commissioner in dealing with the case, held on the authority of *Smith* v. *Mundy*(1) that the property in the half notes had not passed, and (2) that no question of appropriation or trust arose.

As regards the question whether the sending of the half notes operated as payment of the debt due by Messrs. Arbuthnot & Co. to the customer, I think it is clear that the case is concluded by *Smith* v. *Mundy*(1). I agree with the learned Commissioner that the facts that in *Smith* v. *Mundy*(1) the party who sent the notes was not the debtor, and that his payment was a voluntary payment, make no difference.

The question whether there had been any trust created or appropriation made was not discussed by the learned Commissioner, but he states in his judgment that no question of appropriation or of trust arose.

In the course of the argument I was disposed to think that there had been an appropriation of a specific amount to the

(1) 29 L.J.Q.B., 172.

payment of this particular debt. On further consideration I have come to the conclusion that this is not so. There was no direction by the customer to appropriate. The only reason for sending the half notes, so far as appears from the evidence, was that it suited the convenience of the Bank and of the customer that the money should be transmitted in the form of two sets of half notes.

Mr. Narasimha Rao who acknowledged the receipt of the half notes on behalf of the customer, and asked that the other halves should be sent had no occasion to consider any question of appropriation. What he wanted was payment, and what he assented to was payment in the form adopted by the Bank.

I do not think the principle of the decision in *Farley* v. *Turner*(1), where there was an express direction to appropriate a specific sum to a specific purpose, has any application to the facts of this case.

Then, can it be said that there was an appropriation of the notes themselves in the sense that the property in the notes passed to the customer? The Bank in sending the half notes no doubt ear-marked and set aside specific notes to satisfy this particular debt. In a sense they appropriated the notes to the payment of this debt and by sending the half notes they communicated this appropriation to the customer, but this appropriation did not, in my opinion, operate so as to pass the property in the notes to the customer. The setting aside of the notes and sending of the half notes indicated an intention to pass the property, but not an intention to pass the property *eo instanti* by the sending of the half notes. As in *Wilson and others* v. *Balfour*(2), it seems to me there was no "virtual transfer".

I think the learned Commissioner was right, and I would dismiss the appeal.

MILLER, J.—From *Smith* v. *Mundy*(3), it seems to me we get this only, the property in a promissory-note payable to bearer passes by delivery, and the delivery of half the notes is not such a delivery as will pass the property.

But if it was the intention of the debtor in sending the half notes to set apart for the creditor specific notes and to pay by

(1) 26 L.J., Ch., 710. (2) 2 Camp, 579.
(3) 29 L.J.Q.B., 172

means of them and if this intention was communicated to the creditor, then it seems to me we have a specific appropriation upon which the creditor can rely against the Official Assignee. I do not think there is any doubt about this, but I may refer to the case of *Wilson* v. *Balfour*(1), to which the learned Chief Justice has referred, and *Ranken* v. *Alfaro*(2), as authorities from which the proposition can be deduced. No question of fraudulent preference is raised in this case, and the only difficulty is to decide upon the intention as evidenced by the circumstances and the acts of the parties. No doubt, Messrs. Arbuthnot & Co. intended primarily to pay the debt, but they must have also intended to pay it by means of those particular currency notes and that the creditor should be satisfied from the receipt of the half notes that his claim would be paid by the transmission of the other halves. They had undertaken to pay him on the 16th of October, and they commenced to meet their undertaking on that date by giving him the half notes. It must have been present to their minds and intended by them that he should accept the receipt of the first halves as sufficient security for the payment of his claim, till the other halves could reach him. It seems to me that that being so they made representations amounting to a 'pledge' that they would remit the second halves of the particular notes of which the creditor held the first halves.

And that will give the creditor a right in equity to call for delivery of the notes, or of course payment in lieu thereof. Messrs. Arbuthnot & Co. could not in my view of their acts, have recalled the half notes sent to the plaintiff unless by redeeming them by payment of the debt, or by substituting for them some other security equally satisfactory to the creditor.

I would allow the appeal.

THE CHIEF JUSTICE.—The result is the appeal is dismissed with costs.

Against the judgment and decree of the Hon'ble the Chief Justice, an appeal was filed under clause 15 of the Letters Patent.

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

C. E. Odgers for respondent.

JUDGMENTS (MUNRO, J.)—The facts upon which this case has to be decided are those set out in the appellant's affidavit which is

(1) 2 Camp, 579. (2) (1877) 5 Ch.D., 786.

not contradicted. It appears therefrom that the appellant had a fixed deposit with Arbuthnot & Co. that, on the 8th October 1906, he asked Arbuthnot & Co. by letter to send the amount due under the deposit to one Narasimha Rao, that, on the 16th October, Arbuthnot & Co. replied that the deposit would mature on the 16th October and that on that date they would deal with the amount due in accordance with the appellant's instructions of the 8th October, that, on the 16th October, Arbuthnot & Co. sent to Narasimha Rao a money order for Rs. 4-7-0, and the first halves of currency notes for the balance of Rs. 4,930, that on receiving the halves Narasimha Rao on the 20th October acknowledged receipt to Arbuthnot & Co., and asked them to send the second halves, that Arbuthnot & Co. became insolvent and the second halves were not sent and that the Official Assignee refused to hand over the second halves to the appellant. The appellant moved the High Court for an order directing the Official Assignee to hand over the second halves of the currency notes. The learned Commissioner in Insolvency dismissed the application, and the appeal against his order was dismissed though Miller, J., was of opinion that the appeal ought to be allowed.

Now from the above statement of the facts and from the nature of the claim it is manifest that we are not concerned either with the circumstance that Arbuthnot & Co. became insolvent after sending the half notes or with any question as to what the position would be if the appellant were claiming payment of his debt in full in preference to the ordinary creditors of the firm. There is nothing to distinguish the present case from the ordinary case where a debtor wishing to pay his debt takes a step towards that end by sending to his creditor the half of a currency note, intending at the time to forward the second half in due course, but eventually failing to do so, and the short question is whether the creditor in such a case can insist upon the delivery to him of the second half of the note. In *Smith* v. *Mundy*(1), the facts were these—One Williams owed a debt to Mundy. Smith who had arranged to enter into partnership with Williams sent the first halves of two Bank of England notes to Mundy and his intention at the time was to send the second halves and so liquidate the debt due by Williams. Mundy

(1) 29 L.J.Q.B., 172.

acknowledged receipt of the first halves and said he would send a stamped acknowledgment on receipt of the second halves. Smith, however, did not send the second halves but wrote to Mundy demanding return of the first halves as the proposed partnership between himself and Williams had fallen through. Mundy claimed the right to retain the half notes. Smith sued to recover them, and judgment was given in his favour, on the ground that the property in the notes had not passed to Mundy. It has been sought to distinguish this case from the present on two grounds, viz., that Smith was not Mundy's debtor, and that Mundy indicated that he did not accept the first halves as payment by saying he would send a stamped acknowledgment when he received the second halves. As to the first ground it is clear from the report that nothing turned upon it and that the result would have been the same if Smith had owed the money himself. As to the second ground two of the learned Judges do not refer to it at all, and as observed by the learned Commissioner, Cockburn, C.J., merely referred to it by way of strengthening his view as to the intention of the parties. I am of opinion therefore that *Smith* v. *Mundy*(1), cannot be distinguished. Applying the decision in that case, it follows that instead of the appellant being entitled to demand the second halves from Arbuthnot & Co., that latter were entitled to demand the return of the first halves from the appellant. Miller, J., was however of opinion that if it was the intention of Arbuthnot & Co. in sending the half notes to set apart for the appellant specific notes and to pay by means of them, and if this intention was communicated to the appellant there was a specific appropriation which the appellant can rely upon against the Official Assignee. But exactly the same thing might have been said in *Smith* v. *Mundy*(1), leaving out the matter of insolvency with which we are not concerned. Again Miller, J., observes that Arbuthnot & Co. made representations amounting to a pledge that they would remit the second halves of the particular notes of which the appellant held the first halves and for this he evidently relies upon *Ranken* v. *Alfaro*(2). Beyond agreeing to send the amount of the deposit to the appellant's brother-in-law and sending the first halves of the notes, there is no evidence that Arbuthnot & Co.

(1) 29 L.J.Q.B., 172. (2) (1877) 5 Ch.D., 786.

made any representations at all, and there is again nothing more in this case than there was in *Smith* v. *Mundy*(1). In *Ranken* v. *Alfaro*(2), it was held that there was a pledge to apply the proceeds of certain coffee in payment of bills held by the plaintiffs, but the decision turned upon the special facts of the case, and with all respect, I do not think it has any application to a case like the present. I am of opinion that the appellant's claim was rightly rejected, and would dismiss this appeal with costs.

ABDUR RAHIM, J.—Messrs. Arbuthnot & Co. upon a demand for payment being made by a customer of theirs to whom Rs. 4,934-7-0 was due on a fixed deposit account sent a money order for Rs. 4-7-0, and the first halves of currency notes for Rs. 4,930 to a person named by the customer. The bankers having stopped payment before sending the remaining halves of the notes, the customer now seeks to recover them from the Official Assignee. He could only succeed if, by delivery of the halves, property in the notes passed to the customer, or if it can be said, as held by Miller, J., that the customer became by some rule of equity entitled to the notes or to hold the first halves as security for the debt and to call for delivery of the other halves. *Smith* v. *Mundy*(1) clearly establishes that the first proposition cannot be sustained. It is not alleged that the property in the notes was intended to be severed. What was intended by Arbuthnot & Co. was to deliver to the customer the other half notes as well which still remained with them so as to complete the payment. This is the utmost that can be inferred in favour of the customer. The delivery of the notes was never completed and *Smith* v. *Mundy*(1) lays down that so long as the act of delivery is not completed the property in Bank of England notes—and the same rule must be held to be applicable to the Government of India promissory-notes—does not pass where the passing of the property in such notes is alleged to have been affected by delivery. This view of the law has not, so far as I am aware, been doubted, and I feel myself bound to follow it unless it is shown that the law is otherwise on the point in India. The learned vakil for the appellant has however argued that section 92 of the Indian Contract Act IX of 1872 makes a difference. But it is obvious that that section which occurs in the chapter relating to sale of goods does not apply

(1) 29 L.J.Q.B., 172.

(2) (1877) 5 Ch.D., 786.

to money or currency notes which are made legal tender by statute, and as such are governed by different considerations although the definition of goods, as found in section 76, would *primâ facie* seem to be wide enough to cover coins and currency notes. (See *In the matter of Captain Michell*(1).) (*In re The Collector of Salem*(2), and *In re Mathur Lalbhai*(3), where the applicability of the definition of goods in section 76 of the Indian Contract Act of 1872 to currency notes for the purpose of chapter VII was considered.)

Mr. Justice Miller, as I understand him, does not dispute the law as laid down in *Smith* v. *Mundy*(4). But he says that by sending the first halves Arbuthnot & Co. intended to set apart the specific notes for payment to the appellant, and if this intention was communicated to the latter then the notes were specifically appropriated towards such payment and the appellant became entitled to them as against the Official Assignee. This means, I take it, that although title to the notes was not passed by delivery and change of possession, yet it must be held that the appellant acquired a right to them in equity by virtue of an implied agreement by which the relationship of debtor and creditor ceased to exist between the parties and the debtor constituted himself a bailee or trustee of his creditor with respect to these notes. To my mind there is nothing before us from which such an agreement can be inferred, and without evidence of some such agreement the original relationship of debtor and creditor must be held to continue. The plain intention of Arbuthnot & Co. was to discharge the debt by delivery of the notes and not to hold the notes as bailees or trustees of the appellant. A similar answer is applicable to the other suggestion that the notes were pledged as security for payment of the debt, for it seems to me that nothing was farther from the minds of Arbuthnot & Co. or of their customer than that the latter should retain the half notes sent to him as security. In that view of the facts as alleged in the case, the principle of the decision in *Ranken* v. *Alfaro*(5) has no application. I would therefore dismiss the appeal with costs.

BAKEWELL, J.—In this case Miller, J., was of opinion that it was the intention of the parties that the creditor should accept the

(1) (1878) I.C.L.R., 339 at pp. 341-2.
(2) (1873) 7 M.H.C.R., 233.
(3) (1901) I.L.R., 25 Bom., 702.
(4) 29 L.J.Q.B., 172.
(5) (1877) 5 Ch.D., 786.

MUNRO, ABDUR RAHIM AND BAKEWELL, JJ.

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receipt of the first half notes as sufficient security for the payment of his claim, till the other halves could reach him, and that there was a representation by the debtors amounting to a pledge that they would remit the second halves, which gave the creditor a right in equity to call for delivery of the notes.

The actual correspondence between the parties has not been produced, and the only evidence before the Court is the appellant's affidavit which states the facts as stated by Munro, J.

With all respect to the learned Judge, I fail to see any evidence of the intention which he ascribes to the parties, or of any representation by the debtors that the half notes in their possession would be held by them as security for their debt; and in my opinion there is no evidence in the case that either party intended that the original simple debt should become a secured debt. I think that the facts show simply an intention of the creditor to pay, and of the debtor to receive payment, in cash or its equivalent legal tender, and that owing to the debtors' insolvency this intention was never fully carried out.

The question therefore is whether the delivery of the half notes to the creditor can be construed as a delivery of the notes so as to pass the property therein. I think that the delivery of the half notes was only one step towards or preparatory to the actual delivery of the notes, and is merely indicative of the intention of the parties to transfer, and does not constitute a delivery of the notes. This was in effect the decision in *Smith* v. *Mundy*(1) which in my opinion governs the present case.

With reference to the case of *Ranken* v. *Alfaro*(2) cited by Miller, J., I may point out that there was in that case an express agreement supported by valuable consideration that certain goods should be held as security for certain debts, and that decision is really only as to the intention of the parties as contained in a particular correspondence.

I agree that this appeal should be dismissed with costs.

P. W. Partridge, attorney, for respondents.

(1) 29 L.J.Q.B., 172.

(2) (1877) 5 Ch.D., 786.

APPELLATE CIVIL.

Before Sir Ralph Sillery Benson, Officiating Chief Justice, and Mr. Justice Krishnaswami Ayyar.

1909. October 26.

THOMAS PILLAI AND OTHERS (DEFENDANTS NOS. 1 TO 4), APPELLANTS,

v.

MUTHURAMAN CHETTIAR AND ANOTHER (PLAINTIFFS AND FIRST DEFENDANT), RESPONDENTS.*

Transfer of Property Act, IV of 1882, *s.* 53—*Subsequent creditors are within the rule in cl.* (1) *of the section—Presumption in cl.* 2 *of section applies to subsequent creditors.*

Subsequent creditors are within the rule enunciated in the first clause of section 53 of the Indian Transfer of Property Act and a settlement can be avoided at the instance of subsequent creditors.

Hussain Bhai v. *Haji Ismal Sait*, (5 Bom., L.R., 255), referred to.

The presumption in clause 2 of section 53 of the Transfer of Property Act applies in the case of subsequent creditors.

SECOND APPEAL against the decree of T. T. Rangachariar, Subordinate Judge of Trichinopoly, in Appeal Suit No. 40 of 1906, presented against the decree of S. Authynarayana Aiyar, District Munsif of Trichinopoly, in Original Suit No. 369 of 1903.

The plaintiff obtained a decree against the first defendant and some others who were not parties to the suit on a debt bond executed by them. The suit was instituted in 1900 on a bond dated 1898.

In execution of the said decree, a house belonging to the first defendant was attached and sold in Court auction on 24th October 1901, and the same was purchased by the plaintiff himself.

When the plaintiff through his agent went to take possession of the said house on 9th June 1902, in pursuance of the said sale, the defendants Nos. 2 and 3 at the instigation of first and fourth defendants, obstructed delivery of the property in dispute to the plaintiff.

The plaintiff filed a petition under section 335 of the Civil Procedure Code for delivery of the property on removing the obstruction of second and third defendants.

Second and third defendants contended that the property in dispute did not belong to the first defendant, but belonged to them

* Second Appeal No. 36 of 1907.

under a settlement deed executed by the first defendant on 26th October 1896 in favour of second, third and fourth defendants, and under a subsequent settlement deed, dated 16th October 1899, executed by the fourth defendant in favour of second and third defendants.

The Court dismissed the plaintiff's petition referring the plaintiff to establish his right by a regular suit.

The plaintiff brought this suit to set aside the order aforesaid and to establish his claim to the property.

It was contended by the defendants *inter alia* that the plaintiff having become a creditor subsequent to the settlement could not impugn it.

The Court of First Instance decreed for plaintiff. The decree was confirmed on appeal.

Defendants Nos. 2 to 4 appealed to the High Court.

T. R. Venkatarama Sastri for The Hon. The Advocate-General for appellant.

A. Krishnaswami Ayyar for *V. C. Seshachariar* for first respondent.

JUDGMENT.—The first question argued is that subsequent creditors are not within the rule enunciated in the first clause of section 53 of the Indian Transfer of Property Act, IV of 1882. Reliance was placed on sections 1 and 2 of 13 Eliz., Chap. 5, and it was suggested that the use of the words "and others" in section 1 and "person or persons" instead of "creditors" in section 2 led to the decisions of the English Courts that "subsequent creditors" fell within the prohibition of the English statute, while the absence of such words in section 53 of the Indian Transfer of Property Act made in favour of restricting the benefit to existing creditors. We are unable to agree with this argument. The English cases cited by Mr. Venkatarama Sastri (*Taylor* v. *Jones*(1) and *Holmes* v. *Penney*(2)) do not lay it down that if the word "creditors" stood alone it would not include subsequent creditors. The change in the language of the Indian Act is not therefore an index to a change of intention. Moreover subsequent creditors are within the mischief of the Act. We are clearly of opinion that the settlement can be avoided by subsequent creditors. See *Hoosein Bhai* v. *Haji*

(1) 26 E.R., 758. (2) 69 E.R., 1035.

Ismail Sait(1) in which the question was decided, and *Sadashiv* v. *Trimbak*(2) and *Ebrahimbhai* v. *Fulbai*(3) in which the same rule of law was assumed.

It was next contended that the presumption in clause 2 of section 53 of the Indian Transfer of Property Act did not apply in the case of subsequent creditors. The section does not say so. The words are that the intent "may be presumed." The Indian Evidence Act treats such presumptions as presumptions of fact. We decline to allow the decisions of English Courts if they lay down a different rule to influence us to hold that the Judge of fact was not at liberty to make the presumption he did make in the circumstances of the case.

The second appeal is dismissed with costs.

APPELLATE CIVIL.

Before Sir Ralph Sillery Benson, Officiating Chief Justice, and Mr. Justice Krishnaswami Ayyar.

KUTTATH KRISHNAN, KARNAVAN AND MANAGER OF THE TARWAD (FIRST DEFENDANT), APPELLANT,

v.

CHATHU MENON AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

1909. October 26.

Easement Act, V of 1882, s. 13—Right to channel cut subsequent to severance of tenements.

Land belonging to Government was granted to *A*, who dug and used a channel across other Government land. The lands across which the channel was dug was subsequently granted to *B*. *B* thereupon filled up the channel, which had been in existence for 16 years. In a suit by *A* to establish his right to such channel:

Held, that *A* had no claim to an apparent and continuous easement under section 13 of the Easements Act and had not acquired a prescriptive right by user of the channel.

SECOND APPEAL against the decree of M. Mundappa Bangaru, Subordinate Judge of South Malabar at Calicut, in Appeal Suit No. 238 of 1906, presented against the decree of V. S. Krishna

(1) 5 Bom., L.R., 255. (2) (1899) I.L.R., 23 Bom., 146.
(3) (1902) I.L.R., 26 Bom., 577. * Second Appeal No. 22 of 1907.

BENSON, C.J., AND KRISHNA-SWAMI AYYAR, J.

KUTTATH KRISHNAN v. CHATHU MENON.

Ayyar, District Munsif of Ponnani, in Original Suit No. 374 of 1904.

The facts necessary for this report appear in the judgment.

M. Kunjunni for appellant.

G. S. Ramachendra Ayyar for *T. R. Ramachandra Aiyar* for respondents.

JUDGMENT.—The plaintiffs claim the right to a channel marked F in the plan (exhibit A) across the defendant's land. The plaintiffs' and defendants' lands originally belonged to Government. There was no channel then. There can be, therefore, no claim to an apparent and continuous easement under section 13 of the Easements Act. The plaintiffs had the channel cut subsequent to the severance of the tenements; and they have not had enjoyment sufficient to enable them to acquire a prescriptive right. If the decision in *Morgan* v. *Kirby*(1) be opposed to this view, we must, with all respect, hold that it has not been rightly decided. Any how it is not a decision on the language of section 13 of the Act, which is clear. We may add that *Morgan* v. *Kirby*(1) may have proceeded on the view of the facts that the artificial channel there existed when both properties were in the hands of Government. We must reverse the decree of the lower Appellate Court and dismiss the suit with costs throughout. The memo. of objections is dismissed with costs.

APPELLATE CIVIL.

Before Sir Ralph Sillery Benson, Officiating Chief Justice, and Mr. Justice Krishnaswami Ayyar.

1909. October 22.

MUVVULA SEETHAM NAIDU (PLAINTIFF), APPELLANT,

v.

DODDI RAMI NAIDU (DEFENDANT), RESPONDENT.*

Hereditary Village Offices Act (Madras) III of 1895, ss. 13, 21—Prohibition in s. 21 applies only when jurisdiction is conferred on Revenue Courts by s. 13—Construction of statute.

Notwithstanding the apparent generality of the language of section 21 of Madras Act III of 1895, it must be held that the section takes away the

(1) (1878) I.L.R., 2 Mad., 46.

* Second Appeal No. 551 of 1907.

BENSON, C.J., AND KRISHNA-SWAMI AYYAR, J.

MUVVULA SEETHAM NAIDU v. DODDI RAMI NAIDU.

jurisdiction of Civil Courts only in those cases in which jurisdiction is conferred on Revenue Courts by section 13.

A suit for a village officer's inam land on the expiry of a lease granted by such village officer to the defendant is cognisable by the Civil Courts as the plaintiff has only to prove the letting and expiry of the term and he is not called upon to prove his title which the defendant will be estopped from disputing. The plaintiff cannot, however, lease his claim on his title to the land.

Narasimhulu v. *Narasimhulu*, [(1906) 16 M.L.J., at p. 336], referred to. *Kesireim Narasimhulu* v. *Narasimhulu Patnaidu*, [(1907) I.L.R., 30 Mad., 126], referred to.

It is a general principle of law that every presumption shall be made in favour of the jurisdiction of a Civil Court and that it shall not be taken away except by express words or by necessary implication.

SECOND APPEAL against the decree of D. Raghavendra Row, Temporary Subordinate Judge of Vizagapatam in Appeal Suit No. 278 of 1905, presented against the decree of A. Venkataramiah, District Munsif of Pârvatipuram, in Original Suit No. 331 of 1905.

Suit to eject defendant from, and to recover possession of a portion of village munsif's akaram lands with past profits from Subhakrut to Krodhi.

The plaintiff's case was that he was the village munsif of Balagudaba; that in the year *Vilambi* he leased to the defendant the suit-lands which formed part of his village munsif's akaram, for a cist of Rs. 40 and got a Kadapa executed in his favour; that after the expiration of the lease the defendant held possession of the land that the plaintiff having made a demand on the defendant to pay the cist and to deliver possession of the land, the latter refused to do so.

The defendant pleaded *inter alia* that the suit-lands being part of village munsif's akaram, the suit could not lie under the provisions laid down in section 21 of Madras Act III of 1895.

The suit was dismissed by the Court of first instance and by the lower Appellate Court.

Plaintiff appealed to the High Court.

V. Ramesam for appellant.

P. Narayanamurti for respondent.

JUDGMENT.—The question is whether a suit for a village officer's inam land on the expiry of a lease to the defendant granted by the plaintiff is cognizable by a Civil Court. The Courts below have decided against the plaintiff. The Subordinate Judge relies on the decision in *Kesiram Narasimhulu* v. *Narasimhulu*

Patnaidu(1). Far from supporting his view the observations in that case of Miller, J., at page 131 are in favour of the plaintiff; and the other learned Judges do not dissent from his remarks. Indeed it may be said that the *ratio decidendi* of that case supports the appellants argument. Both the learned Chief Justice and Mr. Justice Miller say that sections 13 and 21 of Act III of 1895 should be read together. Section 13 confers jurisdiction on the Revenue Court and defines the class of suits of which a Revenue Court may take cognizance. Section 21 specifies the class of suits of which the Civil Court shall not take cognizance. It is reasonable to hold notwithstanding the apparent generality of the language of section 21 that the jurisdiction of the Civil Court is taken away in those cases in which it is conferred on the Revenue Court by section 13. Moreover it is a general principle of law that every presumption shall be made in favour of the jurisdiction of a Civil Court and that it shall not be taken away except by express words or by necessary implication. We are, therefore, inclined to hold that the Civil Court has jurisdiction in this case. The express words of section 13 make it impossible to bring such a suit as the present within them. The case put by Mr. Justice Subramaniya Ayyar in *Narasimhulu* v. *Narasimhulu*(2) is we think right. He says, "suppose an office-holder in possession of an inam land, which is admittedly inam land, lets it out to a tenant for cultivation for a year, and that the tenant at the expiry of the term refuses to quit. According to the general law the landlord can eject the tenant without showing more than the letting and the expiry of the term, as he is not called upon to allege or prove his right to the land or to the office, the tenant being estopped in such a case from raising any question as to the title of the party, etc."

Mr. Justice Boddam has taken the same view in Civil Revision Petition No. 3.

The decision in *Basappa* v. *Venkatappa*(3) was under Regulation VI of 1831 and the language of section 4 of that regulation which corresponds to section 13 of Act III of 1895 is very different.

We must reverse the decrees of the Courts below and remand the suit to the District Munsif for disposal according to law. The plaintiff will not be entitled to base his suit on his title to the inam.

The costs of this and the lower Appellate Court will be provided for in the revised decree.

(1) (1907) I.L.R., 30 Mad., 126.
(2) (1906) 16 M.L.J., 336.
(3) (1868) 4. M.H.C.R., 70.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Munro.

SESHAGIRI AIYAR (PLAINTIFF), APPELLANT,

v.

VYTHILINGA PILLAI AND OTHERS (FIRST DEFENDANT, SECOND DEFENDANT'S REPRESENTATIVE NOS. 3, 4, 6 TO 19, AND L.R. OF THE TWELFTH AND EIGHTEENTH DEFENDANTS), RESPONDENTS.*

1906. March 11, 28. November 15, 16.

Contribution, right to, of purchaser of mortgaged property—Mode of calculating amount as between purchasers of different items of mortgaged property.

M mortgaged 3 items of property to one *S* for 1,300 rupees. Two of these items were sold to two persons for Rs. 1,200, and the deeds of sale provided that the amounts for which the profits were sold should be paid to the mortgagee. The sale of the third item was for cash, but the property was not sold free of encumbrance and there was no contract between *M* and the third purchaser that the lands sold to the other purchasers should be liable for the 1,200 rupees of the mortgage money. *S* assigned his mortgage and the assignee obtained a decree for the full amount due on the mortgage and in execution the properties sold to the third purchaser were brought to sale and the third purchaser paid up the amount to avoid the sale. In a suit by the third purchaser for contribution, it was contended by the third purchaser, that the amount of 1,200 rupees should be borne by the other two purchasers and the rateable contribution on all the properties should be only in respect of the balance left after deducting such amount:

Held, that the contribution must be calculated on the footing that all the properties were liable for the full amount.

The benefit of the covenants in the sale-deeds to the other two purchasers did not run with the land and the third purchaser could claim the benefit of such covenants only on a contract with the mortgagor giving him such benefit.

SECOND APPEAL against the decree of T. M. Rangachariar, Additional Subordinate Judge of Tanjore, in Appeal Suit No. 1052 of 1903, presented against the decree of C. V. Visvanatha Sastriar, District Munsif of Shiyali, in Original Suit No. 102 of 1902.

* Second Appeal No. 46 of 1905.

The facts for the purpose of the report are sufficiently set out in the judgment.

K. Srinivasa Ayyangar and *T. Natesa Ayyar* for appellant.

V. Purushotham Ayyar for The Hon. The Advocate-General for 1st, 4th, 6th to 9th, 12th, 13th, 16th, 18th, 19th, 22nd and 23rd respondents.

JUDGMENT.—Of the whole property mortgaged in 1889 to Sabapati for Rs. 1,300, three parcels were sold by the mortgagors on the 16th of April 1892; one parcel to the third defendant's father for Rs. 1,000, one to the fourth defendant for Rs. 200 and one to the plaintiff for Rs. 500. The plaintiff paid cash for his purchase, but the other purchasers each undertook to pay the price to the mortgagee towards the mortgage. Subsequently, Sabapathi's assignee brought to sale the property purchased by the plaintiff; and the plaintiff, to save it, paid up part of what was due on the mortgage. He now seeks contributions from the present owners of the other two parcels and the first question for our determination is as to the correct method of calculating the contribution.

The plaintiff claims that the third and the fourth defendants being bound to pay Rs. 1,200 towards the mortgage must be held liable for that amount and the rateable distribution over all the property should be made only for the balance. Section 40 of the Transfer of Property Act was relied on by Mr. Srinivasa Aiyangar on the plaintiff's behalf; but, as we understand that section, it could apply to this case only if there were found to be a contract between the plaintiff and his vendors that the land sold to other purchasers should be liable for Rs. 1,200 of the mortgage money —and it is not found that there was such a contract.

Mr. Srinivasa Aiyangar placed his chief reliance on an equitable rule propounded as follows in Jones on Mortgages (6th edition, section 743).—"A purchaser of a portion of the estate subject to a mortgage has no equity to have his land relieved of the burden of the mortgage as against a subsequent purchaser, when it was a part of his contract of purchase that he should pay the purchase money directly in satisfaction of the mortgage. On the contrary the subsequent purchaser has an equitable right to have the purchase money so applied in exoneration of his own land."

In some cases, the Courts in applying this rule have, it would seem, based it on the ground that the benefit of the covenant by the prior purchaser may be regarded as running with the title,

and so passing to the subsequent purchaser of another part of the land (see foot-note No. 99, page 761 of Jones on 'Mortgages,' 6th edition). But the decisions from which extracts are given in foot-notes 102 and 103 on the next page take a different ground. In the latter case *Pearson* v. *Bailey*(1) the Chief Justice said "the benefit of the contract as a contract goes to the plaintiff (the subsequent purchaser) no more in equity than by the common law. The promise in its entirety does not concern the plaintiff's interests. The only question is whether the plaintiff can get any help from it to relieve her land . . . . if the mortgagor had seen fit to convey his land as free from the mortgage the plaintiff would have taken it free as against the defendant (a prior purchaser who assumed the mortgage) not on the ground of succession to the mortgagor, but because in no other way could the rights of the mortgagor be made effectual . . . . That was what was decided in *Jager* v. *Vollinger*(2)." This last appears to be the case from which an extract is given in foot-note 102, in which the same learned Judge (Holmes, C.J.) is reported to have said: "The successor to Ballon's" (the mortgagor's) "title in the Hatfield land" (the land last sold and sold free of encumbrances) "in like manner succeeded to the benefit of the agreement" (by which the prior purchaser of another parcel of the land assumed the whole mortgage). Though succession is here mentioned it would seem that the Court did not intend to put the subsequent purchaser in the shoes of the mortgagor, judging from the extract we have given from the judgment in the later case.

The difference between the two cases was that in the latter case the mortgagor did not convey the parcel last sold free of encumbrances although the first purchaser had assumed the whole mortgage, and the Chief Justice deals with the distinction as follows.

"In the present case (*Pearson* v. *Bailey*(1)) . . . . the mortgagor conveyed his other lot subject to the mortgage. He did not see fit to avail himself of the estoppel against the defendant . . . . in order to enhance the consideration which he received by conveying the land as unencumbered. It follows that the plaintiff cannot claim the benefit of an estoppel of the defendant as against the mortgagor when it is not necessary to give it to her in order to preserve any of the mortgagor's rights."

(1) 177 Mass., 318, 320 (*vide* foot-note 103). (2) 174 Mass., 521.

From this it is clear that in the opinion of the Court the benefit of the covenant did not pass, with the title, to the mortgagor's assignee, but might be accorded to the assignee if the Court should find it necessary in order to make effectual and preserve any rights of the mortgagor.

Now Mr. Srinivasa Aiyangar in asking us to apply the rule laid down in Jones on 'Mortgages' did not, if we understood him aright, base his request on the ground that the benefit of the covenant ought to be held to pass to the plaintiff with his title; and it is not clear to us that he could hope to succeed on this ground in a case like the present where it has not been ascertained whether the sale to the plaintiff was before or after the sales containing the convenant in question and when the plaintiff purchased subject to the mortgage.

If the case be put on the other ground, the plaintiff must equally in our opinion fail. The Subordinate Judge finds that the plaintiff must be taken to have purchased subject to the mortgage, and if that is so, he cannot claim the *benefit* of the agreement between the third defendant and the mortgagors because, to quote again the decision in *Pearson* v. *Bailey*(1), it is not necessary to give it to him in order to preserve any of the mortgagor's rights. The mortgagors did not care to ask the plaintiff to pay the price of the land calculated on the footing that the mortgage money would be reduced by Rs. 1,200, and the liability on the land would be reduced to the same extent. The plaintiff cannot therefore claim the benefit of a right in them to deal with the property as they have not attempted to deal with it. This seems to be the effect of the decision to which Mr. Srinivasa Aiyangar invited our attention, and it does not in the circumstances help him.

Nor can he succeed on the ground that we have here a suit for contribution in which all the parties, the mortgagors included, are before the Court; and we can therefore, without leaving the plaintiff to a suit against the mortgagors and the mortgagors to a suit against the purchaser—defendants' decree against the purchaser—defendants or the mortgagors or both payment of the amount which in our opinion the plaintiff ought as the final result of all possible litigation to receive.

(1) 177 Mass., 318, 320 (*vide* foot-note 103).

Here again the plaintiff is met with the finding that his purchase was subject to the mortgage. He has paid for the equity of redemption of the land purchased by him and he has no equity having paid nothing more, to demand from the other purchasers any portion of that share of the mortgage debt for which his lands are liable.

The decree of the Subordinate Judge therefore seems to be right except upon the question of valuation. As the parties seemed to be agreed that whatever changes have occurred in the value of land since the date of the mortgage have evenly affected all the mortgaged lands, it does not matter much what date is chosen for the valuation, provided that the same date be chosen for all; but the Subordinate Judge has valued the defendants' lands as at the date of the sales (the 16th April 1892) and the plaintiff's lands at the date of the trial. This is clearly wrong, and we must have a re-valuation. The date of the sales will be a convenient date to choose, because the value of the defendants' land on that date has already been determined, it remains only to determine that of the plaintiff's land.

The necessary finding will be called for within six weeks and seven days will be allowed for filing the objections.

In compliance with the above order, the Subordinate Judge submitted the following

FINDING.—The High Court has remanded the above case for a finding on the following issue, viz., "What is the value of plaintiff's land calculated as on the date of the sale, viz., the 16th April 1892?"

2. The pleader for the plaintiff (appellant) and the pleader for the respondents, 1, 4, 6 to 11 and 13 to 17 (the other respondents not being present either in person or by vakil), are agreed that the value of plaintiff's land on the date of sale, viz., the 16th April 1892, should be fixed at Rs. 500 (*vide* Exhibit H). I therefore find accordingly on the issue remitted to this Court.

This second appeal again coming on for final hearing after the return of the Lower Court's finding the Court delivered the following

JUDGMENT.—Accepting the finding we modify the decree of the Subordinate Judge by directing that the sixth defendant pay to the plaintiff Rs. 103-4-0; the seventh defendant Rs. 54-11-0 the eighth, ninth and tenth defendants jointly and severally

MILLER AND MOORE, JJ.

SWAMIGIRI AIYAR v. VYTHILINGA PILLAI.

Rs. 266-4-0; the eleventh defendant Rs. 6-10-6; the twelfth defendant Rs. 46-10-0; the thirteenth defendant Rs. 78-12-0; the fourteenth defendant Rs. 87-13-6; the fifteenth defendant Rs. 206-10-0; the sixteenth defendant Rs. 68-13-6; the seventeenth defendant Rs. 161-9-0; the eighteenth defendant Rs. 129-3-6 and the nineteenth defendant Rs. 175-6-0 with interest in each case at 6 per cent. per annum from the date of plaint to the date of payment. The amounts have been fixed by agreement between the parties. We also give the plaintiff a decree for sale of the lands held respectively by the defendants in the event of non-payment within four months from this date.

The parties will pay and receive proportionate costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Miller.

1909. October 27.

VENKATASAMI CHETTI (PLAINTIFF), PETITIONER,

v.

SUPPA PILLAI (DEFENDANT), RESPONDENT.*

Registration Act III of 1877, s. 17 (d) and proviso—Lease not reserving a yearly rent not within the exemption.

The proviso to section 17 (*d*) of the Registration Act will apply only in the case of leases which reserve an annual rent. A lease for a term of 3 years which reserves no annual rent but only provides for the payment of a lump sum, is compulsorily registrable even when such lump sum is less than the aggregate of three annual instalments of Rs. 50.

PETITION, under section 25 of Act IX of 1887, praying the High Court to revise the decree of T. Jivaji Rao, District Munsif of Periakulam, in Small Cause Suit No. 1965 of 1908.

The facts are fully stated in the judgment of the lower Court the material portion of which is as follows:—

"I think the lease in question is compulsorily registrable and is invalid for want of registration. The lease on which the suit is based is for a term of three years and the rent Rs. 56-4-0 and 10 bundles of betel leaves is payable in one lump about the middle of the term. The lease is terminable on non-payment of rent.

* Civil Revision Petition No. 29 of 1909.

MILLER, J.

VENKATASAMI CHETTI v. SUPPA PILLAI.

Defendant's vakil contends that under section 17, clause (*d*) of the Registration Act the plaint lease being for more than one year is compulsorily registrable and the exemption in favour of leases for a term of less than five years and reserving a rent not exceeding Rs. 50 does not apply inasmuch as the plaint lease does not reserve an yearly rent. I think this contention is correct. The exemption can only apply when both the qualifications mentioned therein are combined. Although in the present case the rent payable for each year calculated on the footing that Rs. 56-4-0 and 10 bundles of betel leaves are payable for three years and the rent for each year is a third of that is less than Rs. 50, the lease does not belong to the class of leases contemplated by the exemption and cannot obtain its benefit."

The lower Court dismissed the plaintiff's suit.

The plaintiff applied to the High Court under section 25 of the Small Cause Courts Act.

K. N. Aiya for petitioner.

M. Narayanaswami Ayyar for respondent.

JUDGMENT.—The lease is a lease for a term of three years and is therefore compulsorily registrable under section 17 (*d*) of the Indian Registration Act, unless it is saved by the proviso to the section. The District Munsif reads the proviso as exempting leases for a term and reserving an annual rent, provided that the term does not exceed five years and the rent Rs. 50. I am asked to read it differently, as exempting leases the terms granted by which do not exceed five years, and the annual rent (if any) reserved by which does not exceed Rs. 50. In other words when a lease reserves no annual rent, it will not, if the contention is correct, be compulsorily registrable, unless it grants a term of more than five years.

I have not been referred to any authority on the question: it is not really touched by *Venkatachellam Chetti* v. *Audian*(1) in which there was an annual rent reserved.

The question is one of some difficulty, but I think on the whole, though I was at first disposed to take the other view, that the District Munsif is right and that unless the lease reserves an annual rent the proviso will not apply to it.

I therefore dismiss the petition with costs.

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(1) (1881) I.L.R., 3 Mad., 358.

APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur Collins, Kt., Chief Justice, Sir T. Muthusami Ayyar, K.C.I.E., Mr. Justice Parker and Mr. Justice Wilkinson.

1891. September 24. October 19. 1892. August 9. September 26.

KERALA VARMAH VALIA RAJAH AVARGAL OF CHERAKKAL KOVILAGAM AND OTHERS (PLAINTIFFS NOS. 1 TO 3 AND 5 TO 17), APPELLANTS,

v.

ONDAN RAMUNNI, KARNAVAN AND MANAGER OF HIS TARWAD AFFAIRS AND OTHERS (DEFENDANTS NOS. 1 TO 15), RESPONDENTS.*

Malabar Compensation for Tenants Improvements Act (Madras) Act I of 1887, s. 7—Stipulation in lease to receive compensation at ordinary rate does not exclude operation of the Act—Rate of compensation claimable is that prevailing when compensation is paid.

The terms of a lease executed before the passing of Madras Act I of 1887 provided that the tenant at the time of surrender should receive compensation for fruit trees at the customary rate. Before the surrender Madras Act I of 1887 was passed and provided a rate of compensation for fruit trees. In a suit by the tenant to recover compensation under the lease:

Held, that the stipulation aforesaid did not exclude the operation of the Act, there being no such special contract as is contemplated by section 7 of the Act and that compensation must be paid at the rate provided by the Act.

APPEAL against the decree of C. Gopalan Nair, Subordinate Judge of North Malabar, in Original Suit No. 26 of 1889.

The appeal first came on for hearing before Sir Arthur Collins, Chief Justice, and Mr. Justice Parker who made the following:

ORDER OF REFERENCE TO THE FULL BENCH.—"A question has been raised in this appeal as to the applicability of the Malabar Improvements Act. By the terms of the lease under which the defendants hold it is provided that 'when the fruit trees begin to bear fruit we shall receive their kuikanam which you will cause to be paid at the ordinary rate and surrender the paramba.'"

It is contended that having regard to the terms of the lease the Subordinate Judge was wrong in giving the defendants

* Appeal No. 47 of 1890 reported under directions of Benson and Krishnaswami Ayyar, JJ.

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compensation calculated in accordance with the provisions of the Act; and our attention is called to similar cases in which it has been held by the Court that the operation of the Act is effectually excluded by the agreement of the parties.

The argument in the principal case in *Unichennan* v. *Rarukutti*(1) is that, as section 7 is by its terms distinctly prospective, it must be inferred that it was intended that special contracts made before the date mentioned should stand unaffected by the Act. In the case of a contract, imposing obligations on the parties different from those under which they would have come by virtue of the customary law, there can be no doubt that it was intended to save such contracts relating to improvements from the operation of the Act. But in the present case, by the terms of the lease, no other obligation is imposed on the landlord than that which would have arisen in the absence of contract. He merely binds himself to do what the customary law, now replaced by the Act, required him to do. There was no intention to limit the tenant's right to compensation. In our opinion there is room for serious doubt as to whether the decisions above quoted are right, and therefore as the point is one of importance and likely to recur frequently, we resolve to refer to a Full Bench the following question, viz.:—

"Whether in the case of a lease containing a clause such as is found in the present one, the tenant is entitled to compensation in accordance with the provisions of the Act?"

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

The Hon. Mr. *C. Sankaran-Nair* and *Ryru Nambiar* for appellants.

K. P. Govinda Menon for first respondent.

The Court expressed the following:

OPINION.—Exhibit A provides for the planting of four kinds of fruit trees for which compensation at the ordinary rate is to be paid on the surrender of the paramba. There is no special contract such as is contemplated in section 7, Madras Act I of 1887, which would exempt the agreement from the operation of the Act. The stipulation is apparently for the benefit of the landlord. Nothing is said about other improvements, but the

(1) Second Appeal No. 834 of 1890 (unreported).

COLLINS, C.J., MUTHUSAMI AYYAR, PARKER AND WILKINSON, JJ.

KERALA VARMAH VALIA RAJAH v. ONDAN RAMUNNI.

right of the tenant to make customary improvements is not excluded.

The landlord is therefore bound to pay compensation for improvements at the ordinary rate, and the only question is whether that rate is to be the rate prevailing at the time compensation has to be paid or that prevailing at some former date.

We have no doubt that the landlord is bound to pay the rate prevailing at the date the compensation is paid.

That rate is now governed by Madras Act I of 1887 and we answer the question referred to the Full Bench in the affirmative. The compensation must of course be limited to improvements recognized as such in section 3 of the Act.

The appeal again came on for final hearing before Sir Arthur Collins, C.J , and Parker, J., who delivered the following :—

JUDGMENT.—The vakil for the appellants admits that as the opinion of the Full Bench is against him, the appeal must be dismissed. But as the Full Bench overruled some previous decisions we shall direct that each party bear his own costs in this appeal.

APPELLATE CIVIL.

Before Sir R. S. Benson, Officiating Chief Justice, and Mr. Justice Miller.

1909. September 27. October 7.

R. G. ORR AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

R. M. M. S. T. V. E. CHIDAMBARAM CHETTIAR AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code, Act XIV of 1882, *ss.* 2, 474—*Order dismissing interpleader suit as not maintainable appealable as a decree within the meaning of s.* 2—*Under what circumstances a tenant can bring an interpleader suit against his landlord.*

An order dismissing an interpleader suit is a decree within the meaning of section 2 of the Code of Civil Procedure (Act XIV of 1882) and is, as such, appealable.

The prohibition in section 474 of the Code of Civil Procedure against a tenant bringing a suit against his landlord and compelling him to interplead with another person not claiming through him, does not apply where the title of the landlord to grant the lease is not disputed but it is alleged by such other person that the landlord only acted as trustee in granting such lease.

A granted a lease of certain villages in favour of his wife *B*. *B* sub-leased them to *C*. After *A*'s death, his son *D*, alleging that the lease to *B* was colourable and was for *A*'s benefit, gave notice to *C* claiming the rents of the villages. The assigns of *B* also claimed the rents from *C*.

Held, that *C* was entitled to maintain an interpleader suit against the assigns of *B* and *D*.

Dungey v. *Angove*, (1794 30 Eng. Rep., 644), referred to.

The title of *B* and her assigns was derivative from *A* and consistent with it. Neither *C* nor *D* denied the title of *B* to grant the lease, the only question being whether *B* acted in her own right or as trustee for *A*—a question with which *C* had no concern.

Held, that *D* claimed through *B* within the meaning of section 474 of the Code of Civil Procedure, as his claim was to stand in the shoes of *B*.

* Appeal No. 38 of 1907.

BENSON, OFFG. C.J., AND MILLER, J.

ORR v. CHIDAMBARAM CHETTIAR.

APPEAL against the decree of I. L. Narayana Row, Subordinate Judge of Madura (East), in Original Suit No. 55 of 1906. The facts of this case are sufficiently stated in the judgment.

The Hon. *The Advocate-General* and *T. Rangachariar* for appellants.

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

K. N. Aiya for third to fifth respondents.

C. V. Anantakrishna Ayyar for sixth respondent.

JUDGMENT.—This is an interpleader suit which has been dismissed by the Subordinate Judge as not sustainable in law. The plaintiffs appeal against this dismissal and we think the appeal is well founded.

For the purpose of this appeal it is sufficient to state the following facts. The late Zamindar of Sivaganga granted a perpetual lease of certain villages to his wife, Raku Nachiar, in 1887. Subsequently, in the same year, he leased to the plaintiffs, for a long term of years, the whole zamindari, excluding the villages already leased to his wife and other relations. In 1889 Raku Nachiar gave a sub-lease of five of her villages to the plaintiff for twenty-nine years on a rent of Rs. 10,000 a year and put the plaintiffs in possession, receiving the rent in advance up to June 1900.

Raku Nachiar died in 1892, leaving her surviving four daughters, who are defendants, Nos. 3 to 6, and an adopted son. In 1898 the Zamindar died, and his adopted son (seventh defendant) became the minor Zamindar. In Original Suit No. 18 of 1901, the

sixth defendant and one Ramanathan Chetty, the late father of the defendants Nos. 1 and 2, to whom the sixth defendant had leased the above five villages, sued to recover them from the defendants Nos. 3 to 5; and the seventh defendant put in a petition stating that the villages belonged to him and claiming to be made a party, but his petition to be made a party was dismissed. In March 1902 the parties to Original Suit No. 18 of 1901 entered into a compromise, and in pursuance of it gave notice to the plaintiffs that the plaintiffs should pay the rent of the five villages in future to Ramanathan Chetty, the father of defendants Nos. 1 and 2.

On the 22nd of June in the same year the Court of Wards, as guardian of the minor Zamindar (the seventh defendant) also gave notice to the plaintiffs, stating that the leases executed in 1887 by the late Zamindar in favour of Raku Nachiar were colourable transactions executed by him *benami* in the name of his wife, but for his (the late Zamindar's) benefit, and that the lease of the five villages granted by her to the plaintiffs in 1889 was for the benefit of the late Zamindar and requiring the plaintiffs to pay the rents of the villages to the Court of Wards on account of the minor Zamindar. In these circumstances the plaintiffs, not knowing whether they should pay the rent to the defendants Nos. 1 to 6 or to the seventh defendant filed this interpleader suit and deposited in Court the rent due (Rs. 56,060).

The Subordinate Judge having held that the suit was unsustainable with reference to the provisions of sections 474, Civil Procedure Code (Act XIV of 1882) the plaintiffs appeal.

The vakil for defendants Nos. 1 to 6 takes the preliminary objection that the order of the Subordinate Judge dismissing the suit is not one of the orders in interpleader suits against which an appeal is provided for in clause 23, section 588 of the Code of Civil Procedure nor is it a decree within the definition in section 2 of the Code. We think the latter contention is not sustainable. The order of the Subordinate Judge was the formal expression of his adjudication on the defence set up in the suit and it decided the suit so far as the Subordinate Judge was concerned. It is therefore a "decree" within the meaning of section 2 of the Code. We disallow the objection.

The main reason given by the Subordinate Judge for holding that an interpleader suit will not lie on the facts stated in this

case, is that section 474, Civil Procedure Code, expressly prohibits a tenant from sueing his landlord for the purpose of compelling the landlord to interplead with any person other than a person making claim "through the landlord," and he considered that in the present case the seventh defendant could not be said to claim through Raku Nachiar (the landlord under whom the plaintiffs held) but must be regarded as claiming adversely to her. He also dwelt on various circumstances which, in his view, went to show that the seventh defendant's plea of *benami* was not true, and on the argument that the lease of the plaint villages having been given with the late Zamindar's consent, the seventh defendant would be estopped from again demanding from the plaintiffs any rent paid by them to Raku Nachiar's representatives (defendants Nos. 1 to 6). Whatever might be the case with regard to payments made *bonâ fide* before the plaintiffs had notice of the seventh defendant's claim, it is difficult to see how the plaintiffs would be protected if they wrongly paid away the rents after notice of his claim; and in the case of *Suart* v. *Welch*(1), the Lord Chancellor referring to the case of *Nickolson* v. *Knowles*(2), stated that the authorities at law show that Sir J. Leach was not warranted in refusing the injunction upon the ground that the case of the party giving the notice was so clearly unfounded as not to entitle the plaintiff to have it tried. In the present case the Court of Wards has made a formal claim to the rent of the plaint villages on behalf of the seventh defendant and we must proceed to deal with the question of interpleader without reference to any alleged weakness in his case. We must in fact decide the question on the supposition that the case put forward by him is, or may be, true. If that case is true, then Raku Nachiar was in the position of a trustee for the real owner, who was the Zamindar; and the defendants Nos. 1 to 6, who claim as her heirs, are trustees for the seventh defendant, who is now the Zamindar. No doubt the general rule of English Law is that an interpleader suit will only be maintainable if the landlord subsequent to the letting has done some act whereby his right to recover the rent is entangled (*Cook* v. *The Earl of Rosslyn*(3)), but there are exceptions to this rule. In the case of *Dungey* v. *Angove*(4), the

(1) (1838) 4 Myl. & C., 305 at p. 323. (2) (1820) 56 E.R., 812; 5 Mad. 47.
(3) (1859), 65 E.R., 871 at p. 873. (4) (1794) 30 E.R., 644 at p. 645.

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Solicitor-General referred to the case of *Wood* v. *Kaye*(1) tried before Lord Thurlaw and said "a house was devised to trustees for the separate use of Mrs. Kaye, with a provision for the rent to be paid to the person to whom she should give a letter of attorney. The trustees not acting, Mr. and Mrs. Kaye entered. In 1783 they executed a lease to Wood for seven years if she should so long live. In 1787 the trustees at the instigation of her son insisted, that as the estate was devised to them, they had a right to receive the rent and apply it to answer repairs on other parts of the estate; and they gave notice to the tenant not to pay. In consequence of his refusal the lessor proceeded upon the lease; and the tenant filed a bill. It was insisted as it is now, that a person, who had taken a lease from another, could not file such a bill. The Chancellor said, it would be the most detrimental thing to the public and to tenants; because nothing can be more material, than that tenants shall be safe in the occupation of the estate; that if the landlord has a complete title, he may indemnify them; but that if he does not take care of the defence, the consequence is, the tenant has a right to come into equity," and the Lord Chancellor after expressing his concurrence with the decision in *Wood* v. *Kaye* said "The title of the trustees was derivative from that of the *cestui que trust*; and was consistent with it. The tenant did not come to disavow the title of the landlord. It was a question between trustees and the *cestui que trust*; with which the tenant had nothing to do." *Dungey* v. *Angove*(2). The principle of that case seems to us to be applicable to the present case. According to the allegations of the seventh defendant the title of Raku Nachiar (and of defendants Nos. 1 to 6) was derivative from the Zamindar and was consistent with it. The plaintiffs do not deny the title of Raku Nachiar to grant them the lease but they do not know whether she did so in her own right or *benami* for the Zamindar. The plaintiffs have no interest in the matter except to be protected from being made to pay the rent twice over. The seventh defendant does not deny the title of Raku Nachiar to grant the lease. He affirms it, but says that it was granted on his father's behalf and he has now succeeded to his father's rights. Then it was argued that

(1) Cited in Dungey *v.* Angove (1794), 80 E.R., 644.
(2) (1794) 30 E.R., 644 at p. 646.

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section 474, Civil Procedure Code, which contains the rule applicable to the Courts in India, is narrower than the rules deducible from the English cases and forbids a tenant to sue to compel his landlord to interplead with any person other than a person "making claim through such landlord." We must therefore see whether the seventh defendant makes claim through Raku Nachiar and it is not difficult to hold that he does so. What he says is that Raku Nachiar was entitled by arrangement with her husband to hold the position of the landlord and what he claims is the right to stand in her shoes. In other words he makes claim through her when he claims to occupy as between himself and the plaintiffs, the same position which she occupied. So far as the plaintiffs are concerned, the seventh defendant does not claim any right different from that of Raku Nachiar. He no doubt claims the right when he has received the rent to appropriate it to himself as being the owner of the land and denies that Raku Nachiar held that position, but that claim makes no difference so far as the plaintiffs are concerned. As against them the claim of the seventh defendant is simply to occupy the position of Raku Nachiar. He claims to be the landlord by reason of the lease executed by her, and so he claims through her.

For these reasons we think that it is open to the plaintiffs to maintain this interpleader suit. We accordingly set aside the decree of the Subordinate Judge, and remand the suit for disposal accordingly to law.

Appellants will have their costs both in this and in the Lower Court. Costs of the other parties will be provided for in the fresh decree of the lower Court.

APPELLATE CIVIL.

Before Sir R. S. Benson, Officiating Chief Justice and Mr. Justice Krishnaswami Ayyar.

1909. October 20, 26.

MEENAKSHI ANNI (PLAINTIFF), APPELLANT,

v.

APPAKUTTI (DEFENDANT), RESPONDENT.*

Hindu Law—Succession—Illegitimate son succeeds as a co-heir with the widow.

The illegitimate son of a separated Hindu, who dies without legitimate male issue, succeeds as a co-heir with the widow, daughter or daughter's son.

Ramalinga Muppan v. *Pavadai Goundan* [(1902) I.L.R. 25, Mad., 519, at p. 521], approved.

Chinnammal v. *Varadarajulu*, [(1892) I.L.R. 15, Mad. 307], followed.

SECOND APPEAL against the decree of F. D. P. Oldfield, District Judge of Tanjore, in Appeal Suit No. 417 of 1906, presented against the decree of C. S. Mahadeva Aiyar, District Munsif of Shiyali, in Original Suit No. 170 of 1905.

The facts for the purpose of this case are sufficiently stated in the judgment.

S. Muthiah Mudaliar for *appellant.*

P. S. Subrahmania Ayyar for *The Hon. The Advocate-General* for respondent.

JUDGMENT.—The plaintiff as the widow of Sethu Mudali claims the entire property of her deceased husband as against his illegitimate son, the defendant. The Courts below gave her a decree for one-half of the property. She appeals for the other half alleging that under the Hindu Law the widow excludes the illegitimate son altogether. We do not think this contention can be upheld. The decision in the case of *Chinnammal* v. *Varadarajulu*(1) is a direct authority against the appellant and though it rests upon a misapprehension of the grounds of decision in *Parvathi* v. *Thirumalai*(2), it is supported by the observations at page 343 of the report and also by the reasoning at page 559 of the decision in *Ranoji* v. *Kandoji*(3). We think the remarks of Mr. Justice Bhashyam Ayyangar in *Ramalinga Muppan* v. *Pavadai Goundan*(4) are correct. He says "the rights of an illegitimate son in the

* Second Appeal No. 212 of 1907.

(1) (1892) I.L.R., 15 Mad., 307. (2) (1887) I.L.R., 10 Mad., 334.
(3) (1885) I.L.R., 8 Mad., 557. (4) (1902) I.L.R., 25 Mad., 519, at p. 521.

paternal estate when the father has died a separated holder have now been clearly defined by judicial decisions" and adds at page 522 "If the father left a widow, daughter or daughter's son but no legitimate male issue, the illegitimate son succeeds as a co-heir with the widow, daughter or daughter's son as the case may be, and as sole heir in default of any other heir down to a daughter's son." The *ratio decidendi* in the case of *Parvathi* v. *Thirumalai*(1) is not, as supposed in the case of *Chinnammal* v. *Varadarajalu*(2) that the widow is preferable to the illegitimate son in the case of an impartible estate though it may be supported on that ground. Reliance was then placed on the decision of Mr. Justice Holloway and Mr. Justice Innes in *Kulanthai Natchiar* v. *Ramamani*(3) wherein it was held that the widow excluded the illegitimate son altogether though the estate to which succession was claimed does not seem to have been impartible property. We have referred to the decision in that case which however, it must be noted in passing, was reversed by the Privy Council on another ground (See *Ramamani Ammal* v. *Kulanthai Natchear*(4)). The opinion of the learned Judges in that case was based on the text of Yagnavalkya without reference to the commentary of the Mitakshara and the passage in 1 Strange's Hindu Law, III Edition, page 69, citing it. The test of Yagnavalkya simply postpones the illegitimate son till after the daughter's son. The Mitakshara however (see Chapter I, section 12, placita 1 and 2) expressly lays down that he participates for half a share with a daughter or daughter's son. The Mitakshara therefore repudiates the idea of his being postponed. We cannot therefore treat the decision in *Kulanthai Natchiar* v. *Ramamani*(3) or the remarks in *Parvathi* v. *Thirumalai*(1) at page 346, based upon it, as of binding authority. It must also be pointed out that they are opposed to the reasoning at page 559 in *Ranoji* v. *Kandoji*(5). As the widow excludes the daughter and as the daughter according to the express text of the Mitakshara shares with the illegitimate son, it follows that the widow cannot be excluded altogether by the illegitimate son as supposed in the earlier Bombay cases. The authority of those cases has however been doubted in *Shesgiri* v. *Girewa*(6) and *Ambabai* v. *Govind*(7). It is not easy to explain why the

(1) (1887) I.L.R., 10 Mad., 334. (2) (1892) I.L.R., 15 Mad., 307.
(3) Appl. No. 86 of 1865 (unreported). (4) (1871) 14 M.I.A., 346.
(5) (1885) I.L.R., 8 Mad., 557. (6) (1890) I.L.R., 14 Bom., 286.
(7) (1899) I.L.R., 23 Bom., 257, at p. 565.

BENSON, OFFG. C.J., AND KRISHNASWAMI AYYAR, J.

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Mitakshara while mentioning the daughter who is not named by Yagnavalkya in the text commented on does not mention the widow as well. Whatever the reason may be, the illegitimate son who is declared entitled to half the share of a legitimate son amongst Sudras cannot in reason be excluded by a widow when there is no legitimate son. The express authority of the Dattaka Chandrika, Chapter V, placita 30 and 31, is in favour of the widow sharing equally with the illegitimate son. We may add that Mr. Mayne (see Mayne's Hindu Law, 7th Edition, section 551) and Mr. Ghose (see Ghose's Hindu Law, 2nd Edition, page 656) are of the same opinion. We dismiss the second appeal with costs. The memorandum of objections is not pressed and is also dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Miller.

1908. November 13. December 4.. 1909. September 16. October 5.

ADIVI SURYAPRAKASA RAO (PLAINTIFF), APPELLANT,

v.

NIDAMARTY GANGARAJU AND OTHERS (DEFENDANTS AND SECOND AND FOURTH DEFENDANTS' LEGAL REPRESENTATIVES), RESPONDENTS.*

Hindu Law—Adoption—Adoption by widow of predeceased coparcener after estate had vested in the widow of survivor invalid, though made with the consent of the latter.

A power given to a widow to adopt is absolutely at an end when once the estate has vested in the heir of her deceased son and is not revived even if she afterwards succeeds to the estate.

Ramakrishna v. *Shamrao*, [(1902) I.L.R., 26 Bom., 526], and *Manikyamala Bose* v. *Nandakumar Bose* [(1906) I.L.R., 33 Calc., 1306], referred to.

Held also that, in such a case, the consent of the son's heir in whom the estate had vested, will not validate the adoption.

WALLIS, J.—*Semble*: The same rule would apply in the case of an adoption by the widow of a coparcener who has lost her right to adopt, independently of such consent by reason of the estate having devolved on the widow of the last coparcener.

Annammah v. *Mabbu Bali Reddy*, [(1875) 8 M.H.C.R., 108], referred to.

SECOND APPEAL against the decree of T. Varada Row, Additional Subordinate Judge of Godavari at Rajahmundry, in Appeal Suit No. 482 of 1902, presented against the decree of P. N. Satagopa

* Second Appeal No. 1040 of 1904.

WALLIS AND MILLER, JJ.

ADIVI SURYAPRAKASA RAO v. NIDAMARTY GANGARAJU.

Naidu, District Munsif of Bhimavaram, in Original Suit No. 810 of 1900.

N and *L* were undivided brothers. *N* died first leaving a widow *P*. *L* who succeeded to the property died afterwards leaving a widow *R*, who died in 1897. The plaintiff alleging that he and first defendant were the next reversioners after the death of *R* sued to recover from defendants Nos. 2—4, the properties enjoyed by *R*. The second defendant resisted the suit on the ground that he was adopted by *P* after the death of *L* and was thus entitled to the property.

Both Courts found the adoption proved and dismissed the suit.

Plaintiff appealed to the High Court.

T. V. Seshagiri Ayyar for appellant.

P. Nagabhushanam for seventh and eighth respondents.

V. Ramesam for fifth respondent.

JUDGMENT.—The plaintiff denied the alleged adoption and it was for the defendant to show that there was a valid adoption. If Lakshminarasayya did not predecease his brother, then unless the adoption by the brother's widow was made in his life-time, it was bad at any rate in the absence of the consent of Lakshminarasayya's widow. It was therefore for the defendant to show that the adoption was made at a time when the widow was competent to adopt after the death of Lakshminarasayya's widow, or that it was made with the consent of this widow and validated by such consent. We must therefore call for a finding as to whether the adoption was made after the widow's death or in her life-time, and if in her life-time whether her consent was obtained, and was sufficient to validate the adoption.

Fresh evidence may be taken.

The finding must be submitted within six weeks. Seven days will be allowed for filing objections.

This second appeal again coming for hearing on Friday the 4th day of December 1908 on receipt of a letter from the District Judge of Gódávari for the transfer of Appeal Suit No. 482 of 1902 from the file of the Additional Subordinate Judge's Court of Gódávari at Rajahmundry to that of the Subordinate Judge's Court of Kistna at Ellore, the Court made the following

ORDER.—In addition to the finding called for it should also be found whether, if the adoption took place after Lakshminarasayya's death, it took place with the consent of his widow.

WALLIS AND MILLER, JJ.

ADIVI SURYA-PRAKASA RAO v. NIDAMARTY GANGARAJU.

In compliance with the above orders the Subordinate Judge of Ellore found that the adoption took place in *R*'s life-time and with her consent.

This second appeal coming on for final hearing after the return of the finding on Thursday the 16th day of September 1909 and having stood over for consideration till this day, the Court delivered the following

JUDGMENTS (WALLIS, J.).—It has been held by the Privy Council in *Mussumat Bhoobum Moyee Debia* v. *Ram Kishore Acharj Chowdry*(1), *Velanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi*(2), *Padmakumari Debi Chowdhrani* v. *The Court of Wards*(3), *Thayammal* v. *Venkatarama*(4) and *Manik Chand Golecha* v. *Jagat Settani Pran Kumari Bibi*(5), that an adoption made by a widow to her husband after their son had died leaving a widow in whom the estate had vested was void and did not take effect when, after the death of the son's widow, the estate devolved by inheritance on the adoptive widow herself. These decisions of their Lordships have been interpreted by Full Benches of the Bombay and Calcutta High Courts in *Ramakrishna* v. *Shamrao*(6) and *Manikyamala Bose* v. *Nandakumara Bose*(7) as meaning that a widow's power is absolutely at an end once the estate has vested in the heir of her deceased son, and is not revived even if the widow herself afterwards succeeds to the estate. If the widow having once lost the right to adopt when her son's inheritance devolves on another does not regain it on becoming herself the owner of the estate—if, that is to say, she cannot in those circumstances by her consent as owner validate an adoption made by her as widow, it would seem to follow that the consent of the person on whom the estate has devolved by inheritance from the son is ineffective to validate an adoption made by the widow, and this was apparently the view taken by Jenkins, C.J., in *Anandibai* v. *Kashibai*(8). This was expressly decided by a Full Bench of this Court in *Annamah* v. *Mabbu Bali Reddi*(9), where it was held that, when after the son's death the estate had vested by inheritance in his grandfather, and the grandfather signified

(1) (1865) 10 M.I.A., 279.
(2) (1876) I.L.R., 1 Mad., 174.
(3) (1882) I.L.R., 8 Calc., 302.
(4) (1887) I.L.R., 10 Mad., 205.
(5) (1890) I.L.R., 17 Calc., 518.
(6) (1902) I.L.R., 26 Bom., 526.
(7) (1906) I.L.R., 33 Calc., 1306.
(8) (1904) I.L.R., 28 Bom., 461.
(9) (1875) 8 M.H.C.R., 108.

WALLIS AND MILLER, JJ.

ADIVI SURYA-PRAKASA RAO v. NIDAMARTY GANGARAJU.

his consent to the widow's adoption by himself giving the boy in adoption, his consent as owner did not render the adoption valid.

In the present case we have to deal with an estate which was vested in two undivided co-parceners A and *B*, and on the death of A passed by survivorship to B, and on B's death descended to his widow; and the question is as to the effect of an adoption to A made by A's widow with the consent of the Sapindas and also, it is alleged, with the consent of B's widow. Now it is clear that A's widow might, with proper consent, have validly adopted a son to A during the life-time of his surviving coparcener *B*, *Sri Virada Pratapa Raghunadha Deo* v. *Sri Brozo Kishoro Patta Deo*(1), and *Chandra* v. *Gojarabai*(2), but in the last case it was held that such an adoption if made after the death of the surviving coparcener and the vesting of the estate in his widow could not divest the estate, as of course it would if valid.

Then as to the alleged consent of B's widow, the question whether the consent of the person in whom the estate had vested by inheritance would validate such an adoption was left open by a Full Bench of the Bombay High Court in *Vasudeo* v. *Ramchandra*(3); in *Payapa* v. *Appanna*(4), it was held that it would, but this was before the decision of the Full Bench in *Ramakrishna* v. *Shamrao* (5) that a widow cannot adopt when the estate comes to her by inheritance after it has devolved on her son's widow; and in *Anandibai* v. *Kashibai*,(6) Jenkins, C.J., seemed to think, as already observed, that in such a case consent would be ineffective. This was also the decision in *Annamah* v. *Mabbu Bali Reddi*(7), by which we are bound. If in these cases consent is inoperative, there does not appear to be any sound reason for applying a different rule in the case of an adoption by the widow of a coparcener who has lost her right to adopt independently of such consent by reason of the estate having devolved on the widow of the last coparcener. In this view it is unnecessary to consider whether the evidence justifies the presumption drawn by the lower Court that the widow in whom the estate was vested duly gave her consent.

(1) (1876) I.L.R., 1 Mad., 69.
(2) (1890) I.L.R., 14 Bom., 463.
(3) (1898) I.L.R., 22 Bom., 551.
(4) (1899) I.L.R., 23 Bom., 327.
(5) (1902) I.L.R., 26 Bom., 526.
(6) (1904) I.L.R., 28 Bom., 461.
(7) (1875 8 M.H.C.R., 103.

WALLIS AND MILLER, JJ.

ADIVI SURYA-PRAKASA RAO v. NIDAMARTY GANGARAJU.

In the result the appeal is allowed and the plaintiff's suit decreed with costs throughout.

MILLER, J.—I do not think this is at all a clear case but I am not prepared to differ.

If the power to adopt is at an end, then on the authorities no consent can revive it, but if the only obstacle to the divesting of Ramanamma's estate is the fact that it had vested in her and was not in Peramma at the time of the adoption, the power to adopt being still alive, then I find some difficulty in seeing why the obstacle should not be removeable by consent. And it is not very clear to me that the power to adopt is at an end in this case within the meaning of the Privy Council rulings. In all the cases cited the deceased had a son natural or adopted before the proper limit was reached: nevertheless seeing that in *Rajah Vellanki Venkata Krishna Row* v. *Venkata Rama Lakshmi Narasayya*(1) the fact that the adoption is in derogation of another estate is stated as the feature which distinguished that case from *Mussumat Bhoobun Moyee Debia* v. *Ramkishore Acharj Chowdhry*(2), I cannot say that the rule which my learned brother proposes to apply could not be deduced from the decisions to which he has referred.

I therefore, though with some hesitation, agree in making the decree which he proposes to make.

APPELLATE CIVIL.

Before Mr Justice Benson, and Mr. Justice Krishnaswami Ayyar.

1909. November 1, 2.

SUBRAMANIA IYER (DEFENDANT), APPELLANT,

v.

RUNGAPPA REDDI AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Contract Act IX of 1872, s. 69—'Interested in paying'—Meaning of—When payment not voluntary.

A person is interested in making a payment within the meaning of section 69 of the Contract Act, when there is an apprehension of any loss or inconvenience or of any detriment capable of being assessed in money.

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* Second Appeal No. 35 of 1907.

(1) (1876) L.R., 4 I.A., 1 at p. 9. (2) (1865) 10 M.I.A., 279.

BENSON AND KRISHNA-SWAMI AIYAR, JJ.

SUBRAMANIA IYER v. RUNGAPPA REDDI.

A person whose immoveable property is attached for a debt due by another is 'interested' in paying the debt to save the property and can recover from the person by whom it is due.

Payment under such circumstances is not a voluntary payment.

SECOND APPEAL against the decree of D. Venkoba Rao, Subordinate Judge of North Arcot, in Appeal Suit No. 575 of 1904, presented against the decree of V. K. Desikachariar, District Munsif of Arni, in Original Suit No. 326 of 1903.

Suit for recovery of money. Plaintiff's case was as follows:—

Plaintiff purchased for Rs. 1,950 the properties of defendant by a sale deed, dated the 22nd September 1902. On the 24th September 1902, one Kanniah Chetti got the said properties attached before judgment in Original Suit No. 764 of 1902 on the file of the Tindivanam Munsif's Court for a debt of Rs. 526 and odd due to him by the defendant. It was alleged that as the defendant had requested the plaintiff to discharge Kanniah Chetti's debt on his behalf and had also promised to repay the amount paid by him, and that in view also, to save the properties purchased, plaintiff paid to the said Chetti on 21st October 1902 Rs. 550 in full satisfaction of his claim including costs. The plaintiff sued to recover the said amount with interest at 1 per cent. per mensem in the shape of damages.

The defendant pleaded *inter alia* that he did not request the plaintiff to pay the amount. The District Munsif found the request not proved and dismissed the suit. On appeal the Subordinate Judge held that, though the request was not proved, the plaintiff was interested in paying the amount and passed a decree for the same with interest at 6 per cent.

Defendant appealed to the High Court.

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

L. A. Govindaraghava Ayyar for second respondent.

JUDGMENT.—Property purchased by the plaintiffs from the defendant was attached before judgment in a suit instituted by a third party for recovery of a debt due by the defendant. The plaintiffs paid the money and sue for its recovery. The question is whether the plaintiffs were "interested in the payment of the money" within the meaning of section 69 of the Contract Act. In his notes to section 69 Sir Frederick Pollock says: "The words

'interested in the payment of money which another is bound by law to pay' might include the apprehension of any kind of loss or inconvenience, or at any rate of any detriment capable of being assessed in money." In *Tulsakunwar* v. *Jageshar Prasad*(1), the Allahabad High Court, in a case of attachment of moveables belonging to the plaintiff for revenue due by the defendant held that the plaintiff was interested in the payment for the release of the goods attached and was entitled to be reimbursed by the defendant. It may be said that mere attachment of immoveable property does not constitute a trespass like the attachment of goods. But there is undoubtedly reasonable apprehension of loss or inconvenience and even detriment assessable in money. Whether it is so in every case of attachment so that even where there is not the shadow of a foundation for a claim to proceed against the property, the person whose property is attached can be said to be interested in making a payment it is unnecessary to determine. On the facts of this case we think the view was justifiable that the plaintiffs were interested. It may be doubtful whether the word 'interest' covers any interest other than pecuniary. (See, however, *Vaikuntam Ammangar* v. *Kallipiran Ayyangar*(2) and *Vaikuntam Ammangar* v. *Kallipiran Ayyangar*(3).) The Privy Council said in *Dulichand* v. *Ramkishen Singh*(4): "In this country if the goods of a third person are seized by the sheriff and are about to be sold as the goods of the defendant and the true owner pays money to protect his goods and prevent the sale, he may bring an action to recover back the money he has so paid; it is the compulsion under which they are about to be sold that makes the payment involuntary." The case of *Valpy* v. *Manley*(5) referred to by the Privy Council is authority for the position that the payment by the plaintiff under circumstances similar to those found in the present case is not voluntary. The decision in *Bojasellappa Reddi* v. *Vridhachala Reddi*(6) relied on by Mr. Ramachandra Ayyar is only authority for the position that the defendant should be bound by law to make the payment which the plaintiff is interested in making.

(1) (1906) I.L.R., 28 All., 563.
(2) (1903) I.L.R., 26 Mad., 497.
(3) (1900) I.L.R., 23 Mad., 512.
(4) (1881) I.L.R., 7 Calc., 648 at p. 653.
(5) (1845) 68 R.R., 778.
(6) (1907) I.L.R., 30 Mad., 35.

We consider the Subordinate Judge is right in deciding in favour of the plaintiff. The second appeal fails and is dismissed with costs.

APPELLATE CIVIL.

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

1909. November 29.

GAVARA RAMANNA (PLAINTIFF), APPELLANT,

v.

ADABALA RATTAYYA (DEFENDANT), RESPONDENT.*

Hereditary Village Office Act (Madras), III of 1895, ss. 13, 21—S. 21 is no bar to suit for recovery of land.

A suit in the Civil Courts for land, not based on the ground that such land constituted part of the emoluments of any of the offices described in section 13 of Madras Act III of 1895, is not barred by section 21 of the Act.

The effect of the words in section 13 of the Act, "but such decision, etc.," is to preserve the jurisdiction of the Civil Courts even in cases where the Collector decided the case on the assumption mentioned therein and not to oust such jurisdiction where he did not.

SECOND APPEAL against the decree of N. Lakshmana Rao, Subordinate Judge of Ellore, in Appeal Suit No. 232 of 1905, presented against the decree of P. V. Ramachendra Ayyar, District Munsif of Tanuku, in Original Suit No. 431 of 1904.

Suit to recover lands on the ground that they were the private property of the plaintiff.

In a previous summary suit brought against the plaintiff by the defendant under Madras Act III of 1895 for the recovery of these lands on the ground that they formed the emoluments of the office of village Naik it was contended by the present plaintiff, who was second defendant in the summary suit, that the revenue of the lands and not the lands themselves formed the emoluments of the office. The Sub-Collector found that the lands formed part of the office inam but dismissed the suit on the ground that the defendant was not duly appointed to the office.

On appeal, the Collector held that defendant was validly appointed and decreed possession of the lands.

* Second Appeal No. 1412 of 1907.

On these facts, the defendant raised the plea that the Civil Courts had no jurisdiction to entertain the suit. The District Munsif upheld the plea and dismissed the suit. On appeal, the decision was confirmed. The material portion of the lower appellate judgment is as follows :

"Since the appellant contended in the Sub-Collector's Court that at the best only the assignment of revenue payable in respect of the suit land and not the land itself formed the emoluments of the office of Naik, the Revenue Courts should perhaps have decided the claim on the assumption that only the said assignment constituted the emoluments; and then the respondent could have sued in a Civil Court for the recovery of the land itself (section 13, Madras Act III of 1895). To the present suit by the appellant therefore the aforesaid section 13 has no application. If the appellant had pleaded before the Revenue Courts that no emoluments appertained to the office of Naik, then, since the District Collector has decreed the suit land to the respondent, the appellant could sue under section 21 of the aforesaid Act to set aside the decree of the District Collector. But as the appellant never raised the plea in the Revenue Courts that emoluments appertained to the Naik's office, section 21, paragraph 2, has no application to the present case.

Civil Courts are debarred from entertaining suits (1) for the recovery of any one of the offices specified in section 3 of Madras Act III of 1895, (2) for settling the rate or amount of the emoluments of any such office, or (3) except as laid down in proviso (ii) to sub-section of section 13 for the recovery of the emoluments of any such office. Now this is practically a suit for the recovery of the emoluments of the Naikwadi office and no Civil Court may entertain it. I must decide that the District Munsif could not try the suit. Exhibit C is put in to show that the land is not a village service inam but it can serve no useful purpose in this appeal as the plaintiff did not in express terms contend that no emoluments attached to the Naik's office."

Plaintiff appealed to the High Court.

P. Narayanamurti for appellant.

P. C. Lobo for *T. Prakasam* for respondent.

JUDGMENT.—Except in the cases in which the jurisdiction of the Civil Courts is taken away by Act III of 1895 that jurisdiction remains.

The section of the Act of 1895 which bars the jurisdiction of the Civil Courts is section 21. The present suit does not fall within that section. It is not a claim to succeed to any of the offices mentioned in section 13. It does not raise a question as to the rate or amount of the emoluments of any such office. If it did, every claim to recover lands would be outside the jurisdiction of the Civil Courts, which is opposed to the words "but such decision shall not bar the right of the claimant to institute a suit in a Civil Court for recovery of the land itself," the last sentence in proviso (ii) to section 13 (1) of the Act. A claim to recover lands, in our judgment, does not raise a question as to the rate or amount of the emoluments of the office. Section 21 itself contains an express provision as to any claim to recover the emoluments of the office which may include land. The words "any claim to recover the emoluments of any such office" in section 21 do not apply to the present suit, since the suit is not a suit for land based on the ground that the land constitutes part of the emoluments of the office.

The general provision in the Act which bars the jurisdiction of the Civil Courts does not, in our view, apply to the present suit.

In this view it is unnecessary to consider whether proviso (ii) to section 13 (1) applies.

In the view that proviso (ii) applies, we think that the question whether the emoluments of the office consisted of land or of an assignment of revenue was "one of the facts in issue" within the meaning of the proviso and the Collector was therefore bound to decide the claim on the assumption that only the assignment constituted the emoluments. The Collector not having done so the right of suit to establish the claim to the land remains unaffected. The effect of the words "but such decision, etc.," is to preserve the jurisdiction of the Civil Courts even in cases where the Collector decided the claim on the assumption and not to oust the jurisdiction in cases where he did not. Section 13 is an enabling section conferring jurisdiction on Revenue Courts and, by itself, cannot oust jurisdiction which would otherwise exist. This view is not inconsistent with the decision of the Full Bench in *Kesiram Narasimhuiu* v. *Narasimhulu Patnaidu*(1).

(1) (1907) I.L.R., 30 Mad., 126.

As in our opinion section 21 does not bar the suit, we must set aside the decrees of the Courts below and send the case back to the Court of First Instance to be disposed of according to law. We desire to point out that this decision does not entitle the plaintiff to reopen the question as to the assignment of revenue forming part of the emoluments of the office. The decree of the Collector must be regarded as binding to that extent.

Costs will abide the event.

APPELLATE CIVIL.

Before Sir Ralph S. Benson, Officiating Chief Justice, and Mr. Justice Krishnaswami Aiyar.

1909. November 1, 2.

SHUPPU AMMAL AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

SUBRAMANIYAN AND OTHERS (DEFENDANTS, NOS. 1, 2, 5 AND 8), RESPONDENTS.*

Right of suit—Suit by person not a party to an instrument sustainable when charge created in such person's favour—Decree for relief not specifically asked for; when allowable.

A plaintiff asking for certain specific reliefs and for such other relief as the Court should deem fit, should, on being found disentitled to the specific reliefs asked for, be given such relief as the circumstances justify.

A person who is no party to a document but in whose favour a charge is created by such document is entitled to maintain a suit to enforce its terms, either as the actual beneficiary or as the charge-holder.

SECOND APPEAL against the decree of J. H. Munro, District Judge of South Malabar at Calicut, in Appeal Suit No. 394 of 1906, presented against the decree of P. P. Raman Menon, District Munsif of Palghat, in Original Suit No. 122 of 1905.

The facts are fully stated in the judgment of the Court of First Instance as follows :—

The first plaintiff had two sons, the second plaintiff and the deceased Krishna Pattar, the father of defendants Nos. 1 and 2. In 1896, the second plaintiff and the said Krishna Pattar divided

* Second Appeal No. 70 of 1907.

and it was provided by the deed of partition that second plaintiff and Krishna Pattar should each contribute Rs. 150 and invest the Rs. 300 on some landed property and make the interest directly payable to first plaintiff towards her maintenance. Till the money is invested on land, second plaintiff and Krishna Pattar were each to pay Rs. 1½ a month to first plaintiff. On first plaintiff's death the deed of partition provides that the second plaintiff is to collect the money, perform the obsequies and divide the balance between himself and Krishna Pattar. The first plaintiff is no party to this partition deed, and, so long as first plaintiff lives, the second plaintiff has no right whatever to sue for the amount which Krishna Pattar undertook to contribute towards first plaintiff's maintenance. It therefore follows that, while second plaintiff has no right to join the first plaintiff in bringing the suit, the first plaintiff cannot enforce the agreement contained in the deed of partition to which she was no party. What is more, there is no provision in the deed of partition for the payment of the Rs. 150 to first plaintiff. All that is provided for by the partition deed (Exhibit A) is that second plaintiff and Krishna Pattar should each contribute Rs. 150 and invest the Rs. 300 on landed property for the benefit of the first plaintiff. Under no circumstances was Krishna Pattar to pay the Rs. 150 to first plaintiff. Such being the agreement in Exhibit A the suit to recover the Rs. 150 is clearly unsustainable. As to the interest the second plaintiff has no right whatever to recover it and the first plaintiff cannot sue for it, there having been no privity of contract between her and Krishna Pattar. No doubt the first plaintiff has a right to sue for her maintenance, but certainly she has no right to sue for the enforcement of the agreement contained in the deed of partition to which she was no party. Second plaintiff might, no doubt, have invested the whole Rs. 300 on land for first plaintiff's benefit and then sued his brother's sons for contribution, but he did not choose to do so, and, as the suit is now framed, the second plaintiff has no right whatever to be on record. In these circumstances I find the first and third issues against plaintiff and dismiss the suit with costs.

This judgment was confirmed on appeal.

Plaintiffs appealed to the High Court.

T. R. Ramachandra Ayyar for appellants.

Dr. *S. Swaminadhan* for third respondent.

S. Ranganadhan Ayyar for fourth respondent.

BENSON, C.J., AND KRISHNASWAMI AIYAR, J.

SHUPPU AMMAL v. SUBRAMANIYAN.

JUDGMENT.—We think the Courts below are wrong in dismissing the suit altogether. It is true the first plaintiff is not entitled to be paid the sum of Rs. 150 she asks for. But, under the claim for further relief, she is entitled to such relief as the nature of the case admits of. The lower Courts are not right in saying that the first plaintiff is not entitled to sue on Exhibit A. It is true she is no formal party to it. But the executants of the document have given a charge in her favour for Rs. 300 till the money is contributed by both the sons and then it ought to be invested on the security of immoveable property in her favour. It is clear that she has a charge for Rs. 300 and that she is entitled to have that amount invested in her favour. The decisions in *Rakhmabai* v. *Govind*(1) and *Husaini Begam* v. *Khwaja Muhammad Khan*(2) justify an action by her on the ground that she is the beneficiary. But even apart from the relation of trustee and *cestui que trust* she is as charge-holder entitled to maintain the action. She would be entitled to a decree on production of a duly executed mortgage deed by a third party compelling the defendants Nos. 1 to 3 and the second plaintiff (he consents to it by his Vakil) to pay Rs. 150 each for investment on such a mortgage. As the Courts below have dismissed the suit without trying the other issues, we reverse the decrees of the Courts below and remand the case to the District Munsif for disposal according to law. The costs of this and the lower Appellate Court will be provided for in the revised decree.

(1) 6 B.L.R., 421.

(2) (1907) I.L.R., 29 All., 151.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Krishnaswami Ayyar.

1909. October 14, 15. November 9.

CHANDRAMATHI AMMAL (PLAINTIFF'S LEGAL REPRESENTATIVE), APPELLANT,

v.

NARAYANASAMI AIYAR AND OTHERS (DEFENDANTS NOS. 1 TO 12 15 TO 43, 45 TO 51, 53 TO 74, 76 TO 78, 80 TO 91, 93 TO 105, 107 TO 158, 160 TO 183, 185 TO 191, 193, 194 AND 196 TO 207, AND LEGAL REPRESENTATIVES OF THE 13TH AND 14TH AND THE 184TH DEFENDANTS), RESPONDENTS.*

Civil Procedure Code, Act XIV of 1882, *ss.* 102, 157, 158—*Circumstances under which ss.* 157 *and* 158 *are applicable—On party's default to appear, Court must proceed under s.* 157 *and not under s.* 158.

Sections 157 and 158 of the Code of Civil Procedure are independant and mutually exclusive and neither can be treated as an exception to the other.

When a case is set down for hearing on the original or adjourned date, the first question for the Court is "Are the parties in attendance?" If both or either of the parties be not present, the Court is bound to deal with the case under Chapter VII or under that chapter read with section 157, as the case may be, whether or not there has been default of the kind referred to in section 158.

Shrimant Sagaji Rao v. *Smith*, [(1896) I.L.R., 20 Bom., 736], referred to.

Marianissa v. *Ramkalpa Gorain*, [(1907) I.L.R., 34 Calc., 225], referred to.

SECOND APPEAL against the decree of S. Ramaswami Aiyangar, Subordinate Judge of Madura (East) in Appeal Suit No. 396 of 1904, presented against the decree of V. S. Krishna Aiyar, District Munsif of Manamadura, in Original Suit No. 212 of 1903.

The facts for the purpose of this case are fully set out in the judgment.

K. Srinivasa Ayyangar for appellant.

S. Srinivasa Ayyangar for 60th, 93rd and 94th respondents.

C. V. Anantakrishna Ayyar for 11th, 29th, 60th, 93rd, 94th and 99th respondents.

JUDGMENT.—This case has had an unfortunate history. On the 16th June 1904, time was given to the plaintiff to produce his evidence and the suit adjourned to the 25th of June. On that date the plaintiff was absent and as noted in the diary his vakil

* Second Appeal No. 795 of 1906.

stated he had no instructions. This according to the authorities clearly constituted a default in appearance (see *Soondarlal* v. *Goorprasad*(1), *Ramanuja Reddiar* v. *Rangaswami Aiyangar*(2), *Lalta Prasad* v. *Nand Kishore*(3) and *Mariannissa* v. *Ramkalpa Gorain*(4)). The District Munsif instead of dealing with the case under section 157 of the Code decided the suit under section 158 against the plaintiff on the issues raised. The plaintiff who had been ill for some days having died two days after the disposal of the suit, his representative treating the Munsif's judgment as under sections 102 and 157 applied for restoration of the suit under section 103. The Munsif ordered it on terms. The defendants applied to the High Court in revision. A Division Bench set aside the Munsif's order of restoration holding that the disposal of the 25th June 1904 was under section 158 on the merits and that section 103 had no application to such a case. The plaintiff's representative had in the meanwhile preferred an appeal to the District Court against the original decree of the District Munsif dismissing the suit. The appeal was transferred to the Subordinate Judge. He has dismissed it holding that the Munsif disposed of the case rightly under section 158 and that under that section what the Munsif adopted was in the circumstances the proper course, though the language of the section gave him a discretion to pass some other order. The plaintiff's representative has preferred this second appeal. The question is whether the District Munsif was right in dealing with the case under section 158 or whether he should have acted under section 157. The point is not free from difficulty. We agree with the contention of Mr. S. Srinivasa Aiyangar that sections 157 and 158 should if possible be read as mutually exclusive. Section 157 deals with cases of failure to appear and section 158 with cases of failure to do the thing for which time has been granted. Neither can be treated as an exception to the other, for there may be failure to do the thing for which time has been granted, the parties themselves being present, and there may be failure to appear even when no time is granted to do anything in particular. Treating the sections then as independent and mutually exclusive, which of the sections has the first application? The problem arises only when the facts answer the conditions of

(1) (1899) I.L.R., 23 Bom., 414.
(2) (1908) 18 M.L.J., 51.
(3) (1900) I.L.R., 22 All., 66.
(4) (1907) I.L.R., 34 Calc., 235.

both the sections. It is argued for the respondent that we should apply section 158 first. If the facts render it inapplicable we are according to him at liberty to apply section 157. We are unable to agree with the above contention. It seems to us that when a case is set down for hearing, whether it is on the original or the adjourned date, the first question for the Court is are the parties in attendance. If both or either of the parties have or has failed to appear, the Court is bound to deal with the matter under chapter VII or section 157 read with chapter VII, as the case may be. Any other defect in the case or default of any party is matter for investigation and orders only after the question of default in appearance has been settled. The appearance of the parties or more correctly the determination of the consequences of non-appearance has a natural precedence over the disposal of the matters arising in the trial of the cause. We are therefore inclined to hold, that, if there be default in appearance on the adjourned date of hearing, section 157 should alone be applied, no matter whether there has or has not been default of the kind referred to in section 158. It is only in case the parties are in attendance and there is failure to do what a party is given time to do that section 158 is to be put in requisition. This view is in accordance with the pronouncement of Jardine and Ranade, JJ., in *Shrimant Sagajirao* v. *S. Smith*(1). The learned Judges observe at page 744 "If he had put in any appearance in person or by pleader, his default in producing the evidence might have been a reason for a decision under section 158. But *as he did not appear*, we think the most appropriate section to which the order must be referred is section 157, and its consequential section 102." The decision in *Mariannissa* v. *Ramkalpa Gorain*(2) has adopted substantially the same view though part of the reasoning by which it has been arrived at does not commend itself to us. We entirely agree with the following observations of Mookerjee and Holmwood, JJ: "The scope of the two sections is quite distinct, and there is no justification for applying section 158 to a case to which section 157 is more appropriately applicable. Section 157 clearly contemplates two things, first that the original suit is pending, and secondly that one or other of the parties does not appear. If these

(1) (1896) I.L.R., 20 Bom., 736.
(2) (1907) I.L.R., 34 Calc., 235.

conditions are satisfied, the Court may dispose of the suit in the mode directed by chapter VII, when one or other of the parties does not appear, even though any of the contingencies contemplated by section 158 has happened." When however the learned Judges go on to say that section 158 contemplates the presence of materials on the record for the decision of the suit and that section 157 presumes the absence of such materials, for, the Court is *to dispose of*, not decide, the suit, we are unable to agree with them. The employment of the different phrases "disposal of the suits" and "decision of the suits" in the two sections is well explained by the fact that the various modes of disposal specified in chapter VII do not all involve any decision of the suit (see the orders under sections 98 and 102 as compared with the decree under section 100), while the decision under section 158 has the operation of a decree. However as we have pointed out already the Calcutta decision is on the whole in support of our view.

Our attention has been drawn to certain Madras decisions, notably to the cases of *Comalammal* v. *Rangasawmy Iyengar*(1) and *Rangasawmy Mudaliar* v. *Sirangan*(2). Certain of the observations in those cases are opposed to our view. They were cases decided under the Act VIII of 1859, sections 147 and 148 of which corresponded to sections 157 to 158 of the Code of 1882. The language of section 148 is no doubt somewhat different but we cannot regard the difference as material for the present purpose. In our opinion the criticism of those cases by the Calcutta Judges that section 147 would be superfluous on the view therein put forward, is not well founded, for provision would be necessary for cases of default in appearance when no time was granted. Section 147 would also be necessary for the further reason that it contains a direction in the alternative to make such other order as the Court thought fit. But we agree that these early Madras cases do not sufficiently realize the true scope of the two different sections in the Code and we are unable, with all respect, to agree with the reasoning therein adopted. Perhaps the position of the sub-heading "Of Adjournments" in chapter III of the Code of 1859 under which sections 147 and 148 are found is not so suggestive of the interpretation we have put upon the corresponding sections 157 and 158 in the order in which they stand in the scheme of the Code of 1882

(1) (1868) 4 M.H.C.R., 56.

(2) (1868) 4 M.H.C.R., 254.

where the order of the headings of the successive chapters up to adjournments shows the importance of section 157 also preceding section 158. However this may be, we feel satisfied that the view we have adopted is the sound one. None of the other Madras cases cited has any bearing on the point. The decision in *Badam* v. *Nathu Singh*(1) seems also to us to be open to question for section 158 was applied there in preference to section 157. We must therefore reverse the decrees of the Courts below and direct the Munsif to restore the case to his file. We do not think it necessary to direct him to proceed under section 157 and then hear the application under section 103 for restoration. We have before us the grounds of the application for restoration. At one stage the Munsif considered them sufficient and ordered restoration. We are of opinion that having regard to the extreme illness of the plaintiff on the date on which the case was originally disposed of, evidenced by the further fact of his death two days later, he was prevented by sufficient cause from appearing when the suit was called on for hearing. Under Order XLI, Rule 33 of Act V of 1908, we have not merely power to make the order which ought to have been made by the Munsif under section 157 of the Code of 1882, but in the circumstances also the further order that the suit do stand restored and the Munsif do proceed to try the suit according to law. We direct accordingly. All costs hitherto incurred will be provided for in the revised decree.

(5) (1903) I.L.R., 25 All., 194.

APPELLATE CIVIL.

Before Sir Ralph S. Benson, Officiating Chief Justice, and Mr. Justice Krishnaswami Aiyar.

1909. October 11, 12, 27.

DURI BHAGAVANLU (APPELLANT),

v.

TADEPATRI VEERAVADHANULU AND OTHERS (RESPONDENTS).*

Hindu Law, partition—Temporary partition, to be followed by final partition, does not destroy the tenancy-in-common—Purchaser of part from one parcener entitled to enforce his right by partition—Alience of portion—Necessary party to such suit.

An award, which purported to effect a division between several individual co-parceners, allotted each co-parcener a share and provided that each should enjoy the share allotted to him for a time and that at the end of such period, a re-partition according to profit and loss should be effected of all the properties. One of the co-parceners sold a portion of the share allotted to him to *A* and a portion was sold in execution of a decree for rent obtained by the landlord against all the co-parceners and purchased by *B*. *A* brought a suit for partition against all the co-parceners without making *B* a party. *B* was subsequently added more than 12 years after the date when the re-partition was directed by the award :

Held, (1) that the partition was not final and the co-parceners, till the final partition, continued to be joint-tenants or tenants-in-common, subject to the separate enjoyment of the portions allotted to each ;

(2) that the proper remedy of *A* was by a suit for partition of the whole under the terms of the award ;

(3) that *B* was a necessary party and as he was joined after the suit as against him was barred, the suit ought to be dismissed.

SECOND APPEAL against the decree of Vernon A. Brodie, District Judge of Vizagapatam, in Appeal Suit No. 73 of 1904, presented against the decree of C. Subrahmania Iyer, District Munsif of Vizagapatam, in Original Suit No. 139 of 1900.

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

H. Sitaramaswami for appellant.

V. Ramesam for first respondent.

JUDGMENT.—Defendants Nos. 1, 2 and 3 owned amongst themselves four vrithis 13 visams and one pie of land in the agraharam of Sangavalsa. In 1876 there was an award of arbitrators on a submission made by them dividing the common

* Second Appeal No. 1853 of 1905.

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properties. That document is exhibit H. The plaintiff purchased half a visam of land from the first defendant on the 28th March 1897 out of the lands that had fallen to the first defendant in the division made by the award. The District Munsif gave the plaintiff a decree for his half visam by directing a division of the entire property of the three brothers.

The District Judge has dismissed the suit. The first question to be decided is whether the plaintiff was entitled to the division and this turns on the right understanding of the provision contained in exhibit H. Exhibit H says "Time is fixed for the partition of the said paddy fields up to the end of the year Sarvajith (1887–1888). So it is settled that each should enjoy the lands allotted for his share until then, and that, at the end of the said term they should again divide the said lands so that the profits and losses are equal and then enjoy."

* * * *

"Time is fixed for the partition of the said palmyra tope and mango tope lands up to the end of the year Sarvajith (1887–1888). So it is settled that, until then, each should enjoy the lands allotted to his share according to the above arrangement, and that at the end of the said term the profits and losses should be made equal and the said lands divided by the parties equally."

* * * *

What is the effect of the foregoing clauses? The arbitrators do not make a final division of the properties. They direct enjoyment separately of the plots specifically assigned to each of the sharers and instead of making a final partition direct a future division to be made in the year Sarvajith. It is clear that subject to the separate enjoyment of the shares allotted to each the parties are entitled jointly or as tenants-in-common to all the properties temporarily divided until the division to be made after Sarvajith. Every part of the property comprised in this allotment is subject to the common ownership to be finally terminated by partition after Sarvajith. The plaintiff as the purchaser of an undefined half visam or of definite plots amounting in extent to a half visam must be entitled to claim a partition after Sarvajith as the second and third defendants would, notwithstanding the alienation of a portion of the lands by the first defendant, be entitled to claim a partition against the first defendant. It is impossible to construe exhibit H as a contract entered into by defendants

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Nos. 1 to 3. See *Krishna Panda* v. *Balaram Panda*(1), *Sornavalli Ammal* v. *Muthayya Sastrigal*(2) and *Bhajahari Saha Banikya* v. *Behary Lal Basak*(3). Their joint-tenancy or tenancy-in-common which existed before the award (exhibit H) is not finally put an end to, but continues to remain till the end of Sarvajith though subject to separate enjoyment of special allotments till then. No objection was taken in the written statement of the contesting defendants and no issue was framed as to whether the plaintiff as a mere purchaser of a portion of the property allotted to the first defendant under the award was entitled to claim a partition under the terms of the award. And the District Judge in paragraph 8 of his judgment distinctly concedes "that as a purchaser from the first defendant the respondent (plaintiff) stands in his shoes and if the first defendant can now claim re-partition from his brothers respondent can claim a re-division." We may usefully add the remarks of Freeman in his book on 'Co-tenancy' at p. 279 in support of the District Judge "If, however, there remain any states wherein the Courts really intend to assert that a conveyance by one co-tenant of part of the common property is void, in any other sense than that such conveyance will not operate to diminish or impair the rights of the non-assenting co-tenants such Courts are falling into minority, as the more recent decisions tend strongly towards the recognition of such conveyance as a valid transfer of all the grantor's interest in the property therein described entitling the grantor to certain rights that the co-tenants of the grantor cannot wantonly disregard," section 204. The District Judge however comes to the conclusion that the first defendant must be deemed to have elected to forego the privilege he possessed of claiming a fresh division at the end of Sarvajith by his failure to preserve his share intact. Some portion of the land which had fallen to the share of the first defendant was sold for arrears of kattubadi under a decree obtained by the Zamindar against defendants Nos. 1 to 3 and other sharers. Assuming for the sake of argument that the first defendant was responsible for the sale of a portion of his property because he could have avoided it by payment, the property sold must be held to have been impressed with the liability to re-partition at the end of

(1) (1896) I.L.R., 19 Mad., 290. (2) (1900) I.L.R., 23 Mad., 593.
(3) (1906) I.L.R., 33 Calc., 881.

Sarvajith in the same manner that the half visam purchased by the plaintiff in private sale was itself liable to repartition if the second and third defendants chose to insist upon it.

It cannot be therefore said that the first defendant lost his right to repartition by the sale of a portion for arrears of rent. The District Judge himself points out that if the property when sold had been the joint property of the three brothers they could have no complaint that it was not kept available for repartition. All that can be said is that the properties divided by the award in sangavala being liable to repartition the plaintiff is not entitled any more than the first defendant was to claim a repartition of a portion of the properties divided omitting those that were sold for arrears of rent and have come into the hands of the first defendant's wife (the fourth defendant) as transferee of the purchaser in auction. We may refer by way of analogy to suits by purchasers from one of several co-parceners in a Hindu family of his share in a portion of the family property where the whole family property is required to be partitioned for the purpose of assigning the plaintiffs their share. See Mayne's 'Hindu Law,' section 494. We must therefore hold that the plaintiff was entitled to maintain this suit for the recovery of his half visam by a repartition.

It remains however to consider whether in the above view the suit was rightly conceived without the fourth defendant having been impleaded as a party in the first instance. The remarks already made are sufficient to show that no repartition could be made without the lands in the possession of the fourth defendant being brought into hotch pot. At the time the fourth defendant was added as a party more than 12 years had elapsed from the end of Sarvajith and the suit would as against her be barred by limitation. And as she was a necessary party the whole suit was liable to be dismissed. See *Imam-ud-din* v. *Liladhar*(1) and *Kalidas Kevaldas* v. *Nathu Bhagvan*(2). If relief could be given to the plaintiff against defendants Nos. 1 to 3 without joining the fourth defendant and including the lands bought by her the claim might be dismissed as against her merely. See *Ram Kinkar Biswar* v. *Akhil Chandra Chaudhuri*(3). That being impossible

(1) (1892) I.L.R., 14 All., 524. (2) (1888) I.L.R., 7 Bom., 317.
(3) (1908) I.L.R., 35 Calc., 519.

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1909. November 8, 9.

the whole suit fails. We would on this ground support the decree of the District Judge and dismiss the second appeal, but without costs.

APPELLATE CIVIL.

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

MARI VEETIL CHATHU NAIR AND OTHERS (DEFENDANTS NOS. 2 TO 14), APPELLANTS,

v.

MARI VEETIL MULAMPAROL SEKARAN NAIR AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Malabar Law—Acquisition by manager of branch tarwad who is only anandravan of the whole tarwad—Property acquired by anandravan to be deemed property of the tarwad, in the absence of evidence to show self-acquisition.

The rule of Hindu Law that if nothing appears in the case except that a member of a joint family is in possession of property, the burden of proving self-acquisition lies on such person, applies to property in the possession of an anandravan of a Malabar tarwad.

Where such anandravan is also the manager of a branch tarwad and was in possession of funds belonging to such branch, the presumption will be that such property belongs to the branch.

SECOND APPEAL against the decree of W. W. Phillips, District Judge of North Malabar, in Appeal Suit No. 209 of 1906, presented against the decree of K. Gopalan Nair, District Munsif of Quilandi, in Original Suit No. 594 of 1904.

This was a suit for a declaration of plaintiffs' right to certain money deposited in Court in payment of a kanom due under exhibit A. The kanom deed was executed to one Ukaran Nair and in 1046 the Kanaris assigned their whole interest to him under exhibit B, and plaintiffs claim the amount as being members of a separate tavazhi of which Ukaran Nair was managing member at the date of B. Defendants, the members of the main tarwad, claimed that the money was due to their tarwad, as it was lent from tarwad funds, when Ukaran Nair was managing member.

* Second Appeal No. 1034 of 1907.

WHITE, C.J. AND KRISHNASWAMI AYYAR, J.

MARI VEETIL CHATHU NAIR v. MARI VEETIL MULAMPAROL SEKARAN NAIR.

Both the lower Courts found that Ukaran Nair was not managing the main tarwad but the branch alone and passed a decree in favour of the plaintiff. Defendants Nos. 2–4 appealed to High Court.

T. R. Krishnaswami Ayyar for appellants.

J. L. Rosario for respondents.

JUDGMENT.—It is found by the Courts below that the plaintiffs constituted the members of the tavazhi tarwad of Mulamparol and that they are entitled to the kanom amount in deposit. It is contended for the defendants that this finding is not correct. The decision in *Koroth Amman Kutti* v. *Perungottil Appu Nambiar*(1) is cited as opposed to the view of the lower Courts. It was there held by Moore and Sankaran Nair, JJ., "that when a female and some of, or all, her children obtain any property from their father or karnavan they are not thereby constituted into a tarwad by themselves, the senior member among them having the ordinary rights of the karnavan of a Malabar tarwad so far as the other members in his branch are concernod." This view has been adopted in *Ramachendra Ejaman* v. *Venkatesha Ejaman*(2). All that these cases can be said to decide is that the mere circumstances of such a gift without more is insufficient to create a tavazhi tarwad. But where, as in this case, there is the gift of property, enjoyment by the tavazhi for more than eighty years, and separate living by the members of the branch, we are not prepared to say that the Courts below were not justified in coming to the conclusion that the branch constituted a tavazhi tarwad. But whether this view is correct or not the question is whether property acquired by the manager of the branch who is only an anandravan of the whole tarwad when there is no evidence as to the source out of which the property was acquired is to be deemed the property of the tarwad or of the branch. It is admitted that Ukaran Nair who was the manager of the branch and an anandravan of the entire tarwad at the time acquired the kanom interest under exhibits A and B. It is a well recognized principle of Hindu law "that if nothing appears upon the case except that a member of a joint family is in possession of property and he alleges that it is his own self-acquisition he is alleging an exception to the general rule and it lies upon him to prove the exception." See 'Mayne', paragraph

(1) (1906) I.L.R., 29 Mad., 322. (2) Appeal No. 59 of 1905 (unreported).

WHITE, C.J., AND KRISHNASWAMI AYYAR, J.

MARI VEETIL CHATRU NAIR v. MARI VEETIL KULAMPAROL SEKARAN NAIR.

289. This rule is applicable to acquisitions by anandravans in Malabar families and has been so applied. In *Vira Rayen* v. *Valia Rani of Pudia Kovilagam, Calicut*(1) it was stated "it lay on the first appellant, who being a member of the kovilagam is found in possession of property, to prove a separate title to it." See *Vasudevan Nambudri* v. *Iswaren*(2) and *Ramen Menon* v. *Kandu Nair*(3), also. There is no evidence worth the name that Ukaran Nair had separate property of his own from which the kanom could have been acquired.

It remains then to consider whether the acquisition by Ukaran Nair was for the plaintiff's branch and out of its funds or for the tarwad. Self-acquisition being out of the way we think the Courts below were justified in finding that the property belonged to the branch of which Ukaran Nair was manager and whose funds he handled.

It is unnecessary to lay it down as a broad proposition of law that every acquisition by the manager of the branch even though it has not become a tavazhi tarwad is to be presumed to be the property of the branch. The fact that Ukaran Nair was only an anandravan of the tarwad and was at the time of the acquisition in possession of the funds of the branch, but none of his own, is sufficient to justify the finding of the Courts below that it was made out of the funds of the plaintiff's branch. The second appeal fails and is dismissed with costs.

(1) (1881) I.L.R., 3 Mad., 141 at p. 145.
(2) Second Appeal No. 970 of 1883 (unreported).
(3) Second Appeal No. 1153 of 1888 (unreported).

APPELLATE CIVIL.

Before Sir R. S. Benson, Officiating Chief Justice, and Mr. Justice Krishnaswami Ayyar.

1909. October 28, November 1.

GANGAMMA AND ANOTHER (DEFENDANTS NOS. 2 AND 3), APPELLANTS,

v.

BHOMMAKKA AND OTHERS (PLAINTIFFS AND FIRST DEFENDANTS), RESPONDENTS.*

Transfer of Property Act IV of 1882, s. 108, cl. (o)—Principle applicable to agricultural leases—Mulgeni tenant has no right to fell timber standing at time of grant.

Although Chapter V of the Transfer of Property Act does not apply to agricultural leases, the principles embodied therein may be applied to such leases.

The rules contained in section 108 (*h*) (o) will apply to mulgeni leases and a mulgeni tenant is not entitled to cut trees standing at the date of grant. The law applicable to occupancy tenants will not apply to such leases as the former is not a tenant but one holding divided ownership.

SECOND APPEAL against the decree of H. O. D. Harding, District Judge of South Canara, in Appeal Suit No. 179 of 1906, presented against the decree of C. D. J. Pinto, District Munsif of Udipi, in Original Suit No. 82 of 1905.

The facts of this case are sufficiently set out in the judgment.

M. Kunjunni Nair for *J. L. Rosario* for appellants.

P. C. Lobo for *K. P. Madhava Rau* for respondents.

JUDGMENT.—The question is whether a mulgeni tenant is entitled to cut down trees in existence at the time of the grant of the lease. There is no evidence worth the name of any local usage. The District Manual (see vol. I, page 130) throws no light on the matter. If the lease is agricultural, chapter V of the Transfer of Property Act has no application. But we think we are entitled to rely upon the analogy of the Act. See *Vasudevan Nambudripad* v. *Valia Chattu Achan*(1). Clause (*o*) of section 108 prohibits a lessee from felling timber and clause (*h*) authorizes the lessee to remove all things which *he has attached to the earth* provided he leaves the property in the state in which he received

* Second Appeal No. 601 of 1907.
(1) (1901) I.L.R., 24 Mad., 47 at p. 56.

BENSON, C.J., AND KRISHNASWAMI AYYAR, J.

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it. Lease is defined by section 105 of the Act to include one in perpetuity. It follows from the foregoing provisions that the defendants had no authority to cut down the jack trees which are both timber and fruit trees. "Cutting down, destroying or topping all trees which are timber either by the general law or by the particular custom of the country, is waste." See Woodfall's 'Landlord and Tenant,' 16th edition, page 660. The plaintiffs are therefore entitled to recover damages.

It has however been argued on the authority of *Sharoda Soondari Debia* v. *Gonce Sheik and others*(1) that the above view is erroneous. The decision in that case proceeded on the ground that the lessor reserved no reversionary interest in the land or in the trees which were growing on it. That decision in our opinion has no application. The question has been discussed in several cases whether an occupancy tenant has or has not any right to the trees on the holding and whether he is entitled to cut them and different views have been entertained. See *Bodda Goddeppa* v. *The Maharaja of Vizianagram*(2); *Goluck Rana and others* v. *Nubo Soondaree Dossee*(3) and *Deoki Nandan* v. *Dhian Singh*(4). But an occupancy tenant is not a lessee. And whatever rule of law may be applied with reference to the rights of an occupancy tenant to the trees on his holding it has no necessary application to the case of a lessee for a term or in perpetuity. There is no question of injury to the reversion in the former case which is one of divided ownership. The second appeal is dismissed with costs.

(1) (1868) 10 W.R., 419.
(2) (1907) I.L.R., 30 Mad., 155.
(3) (1874) 21 W.R., 344 at p. 346.
(4) (1886) I.L.R., 8 All., 467 at p. 475.

APPELLATE CIVIL.

Before Sir Ralph S. Benson, Officiating Chief Justice, and Mr. Justice Krishnaswami Ayyar.

NARAYANASWAMI NAIDU GARU, RECEIVER OF NIDADAVOLE ESTATE (PLAINTIFF), APPELLANT,

v.

CHELLAPALLI HANUMANULU (DEFENDANT), RESPONDENT.*

1909. November 4

Pleader, right of retainer of—Has no right to retain moneys in one cause for dues in another cause.

A pleader in India has no right of retainer in moneys realised by him in one cause for his dues in other causes conducted by him.

SECOND APPEAL against the decree of J. W. Hughes, District Judge of Kistna at Masulipatam, in Appeal Suit No. 218 of 1906, presented against the decree of C. Rama Rao, District Munsif of Bezwada, in Original Suit No. 21 of 1905.

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

In a suit for the partition of Nidadavole, Repoodi and Medur estates, which was filed in the District Court, Godavari, Mr. D. Jagannadha Rao was appointed as the sole Receiver of the three estates. As such, he used to give the defendant, who is a pleader, work in connection with the three estates. Defendant was granted a vakalat to execute a decree in Small Cause Suit No. 1163 of 1893 on the file of the Subordinate Court, and, in execution, he recovered Rs. 564 which he adjusted towards his dues. The plaintiff, who is the present Receiver and who was only appointed Receiver of Nidadavole and Repoodi estates, contends that he had no business to do so as the alleged dues were due on account of the Medur estate. The real question for decision in this appeal is whether the defendant can set off what is due to him in one case from one estate against what he has received in another case belonging to a different estate. In other words, can the defendant, who, in execution proceedings, has realised Rs. 500 and odd for Nidadavole estate, adjust that amount to his dues from the Medur estate?

* Second Appeal No. 546 of 1907.

BENSON, C.J., AND KRISHNASWAMI AYYAR, J.

NARAYANASWAMI NAIDU GARU v. CHELLAPALLI HANUMANULU.

Both the lower Courts held that the defendant had the right of retainer and dismissed plaintiff's suit.

Plaintiff appealed to High Court.

C. R. Tiruvenkatachariar for appellant.

E. V. R. Sarma for respondent.

JUDGMENT.—In the face of the specific instructions contained in exhibits E and F, the defendant had no business to appropriate the amounts realised in execution of the small cause decree towards his dues in other cases conducted by him, even if we are to assume a previous course of practice according to which it was usual to make such appropriations. It is not suggested that these instructions were subsequently cancelled or varied. The cases cited by Mr. Tiruvenkatachariar are good authority for the position that a solicitor has no right of retainer in moneys realised by him in one cause for his dues in other causes conducted by him. See *Boson* v. *Bolland*(1), *Hall* v. *Laver*(2), *Mackenzie* v. *Mackintosh*(3). A pleader in India has no larger rights. Section 217 of the Contract Act does not help the defendant. We must therefore reverse the decrees of the Courts below. The plaintiff will have a decree for Rs. 556-14-4 with interest at 6 per cent. from the 1st June 1903 to this date with further interest at 6 per cent. on the whole sum until realisation not exceeding six months from this date. The plaintiff is entitled to his costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Sankaran-Nair and Mr. Justice Krishnaswami Ayyar.

1909. November 12.

SILAMBAN CHETTY (DEFENDANT), APPELLANT,

v.

RAMANADHAN CHETTY (PLAINTIFF), RESPONDENT.*

Limitation Act (Act XV of 1877), s. 12, sched. II, art. 152—Party applying for portions of the record, entitled to deduct time spent in obtaining them.

Where a party appealing from the decree of a lower Court applies for copies of the judgment and decree at different times, the time which he is entitled to exclude in computing the period of limitation for such appeal is the aggregate of the periods required to grant the copies after the applications were made.

Raman Chetty v. *Kadirvelu*, [(1898) 8 M.L.J., 148,] referred to and approved.

(1) (1891) 46 R.R., 121.
(2) (1842) 66 E.R., 1158. (1 Hare, 571).
(3) (1891) 64 L.T.N.S., 706.

* Second Appeal No. 698 of 1907.

SANKARAN-NAIR AND KRISHNASWAMI AYYAR, JJ.

SILAMBAN CHETTY v. RAMANADHAN CHETTY.

SECOND APPEAL against the decree of V. Swaminatha Aiyar, Subordinate Judge of Madura (West), in Appeal Suit No. 150 of 1906, presented against the decree of T. Jivaji Rao, District Munsif of Tirumangalam, in Original Suit No. 305 of 1904.

V. Purushothama Ayyar for The Hon. The Advocate-General for appellant.

C. S. Venkatachariar for respondent.

JUDGMENT.—The decree was passed on the 12th October 1905. The respondent applied for a copy of the decree on the 18th October and obtained it on the 19th December. He then applied for a copy of the judgment on the 22nd December and obtained it on the 16th February 1906. The appeal was filed on the 3rd March and the question is whether the appeal to the lower Appellate Court was barred under article 152 of schedule II to the Limitation Act of 1877. The Subordinate Judge has held that under section 12 the respondent is entitled to a deduction of the time between the 18th October and the 19th December and the further time between the 22nd December and the 16th February, and he relies upon the decision in *Raman Chetti* v. *Kadirvelu*(1). This decision, no doubt, supports the Judge's conclusion though in that case the later application was made before the copy of the record first applied for was ready and a portion of the time in obtaining one record formed a part of the time in obtaining the other. The learned Judges held that such overlapping period should not be counted twice over and with that exception both the two periods should be excluded. It is true no doubt that this would enable a party to apply for the copy of one record and then after obtaining that copy to apply for the copy of the other record and thus extend the time while if he had applied for both the copies at the same time, the time requisite for obtaining the copies would have been less. But we are unable to say that the learned Judges who decided the case in *Raman Chetti* v. *Kadirvelu*(1) were wrong in holding that the time requisite for obtaining a copy is the period required to grant the copy after the application is

(1) (1898) 8 M.L.J., 148.

SANKARAN-NAIR AND KRISHNA-SWAMI AYYAR, JJ.

SILAMBAN CHETTY v. RAMANADHAN CHETTY.

made. It may no doubt be fairly argued that the time requisite for obtaining the copy is not necessarily the period after the date of the application but any other construction will introduce other complications. We are not therefore prepared to differ from the decision in *Raman Chetti* v. *Kadirvelu*(1), especially as it is a rule of practice, and hold that the appeal was filed in time. There is no other question of law.

The second appeal is dismissed with costs.

APPELLATE CIVIL.

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

1909. November 19.

ROBERT FISCHER (DECEASED) AND OTHERS (APPELLANTS IN SECOND APPEALS NOS. 1093 TO 1097 OF 1907),

v.

NAGAPPA MUDALY (RESPONDENT IN SECOND APPEAL No. 1093 OF 1907).

SUBBARAYA MUDALY AND ANOTHER (RESPONDENTS IN SECOND APPEAL No. 1094 OF 1907).

LAKSHMI AMMAL (RESPONDENT IN SECOND APPEAL No. 1095 OF 1907).

MUTHAN AMBALAM AND ANOTHER (RESPONDENTS IN SECOND APPEAL No. 1096 OF 1907).

KUMARAPPA MUDALY AND OTHERS (RESPONDENTS IN SECOND APPEAL No. 1097 OF 1907).*

Civil Procedure Code, XIV of 1882, *ss.* 30, 375—*Subsequent suit filed after breach of condition on which permission to withdraw previous suit given—Right of one not a tenant to sue for himself and others, tenants under s.* 30, *Civil Procedure Code.*

Where permission to withdraw from a suit with leave to bring a fresh suit was given to a party, on condition of costs being paid within a certain time, such party, on failing to fulfil the conditions, is precluded from bringing a fresh suit.

Abdul Asis Molla v. *Ebrahim Molla*, [(1904) I.L.R., 31 Calc., 965], distinguished.

(1) (1898) 8 M.L.J., 148.

* Second Appeals Nos. 1093, 1094, 1095, 1096 and 1097 of 1907.

WHITE, C.J., AND KRISHNA-SWAMI AYYAR, J.

FISCHER v. NAGAPPA MUDALY.

A person, who is not a tenant, cannot maintain a suit on behalf of tenants under section 30, Civil Procedure Code.

SECOND APPEAL against the decree of S. Ramaswami Ayyangar, the Subordinate Judge of Madura (East), in Appeal Suits Nos. 214, 215, 216, 217 and 218 of 1906, presented against the decree of T. K. Subbier, District Munsif of Manamadura, in Original Suits Nos. 240 to 244 of 1905.

The deceased first plaintiff instituted a prior suit against the defendants to establish his right to certain threshing floors, etc. Permission to withdraw with leave to bring a fresh suit was given on his undertaking to pay costs within a certain date, which was not done. The present suit was brought by the same plaintiff, on his own behalf and on behalf of his tenants, to establish the right to the same threshing floors, etc. Leave was obtained under section 30, Civil Procedure Code.

The Court of First Instance and the lower Appellate Court dismissed the suit as unsustainable.

Plaintiff appealed to High Court.

T. Rangachariar for appellants.

K. Ramachandra Ayyar for respondents.

JUDGMENT.—The leave to withdraw with liberty to bring a fresh suit given by the District Munsif was conditional on the plaintiff paying the costs of the former suit on or before a specified date. The time fixed for the performance of the condition had expired when the present suit was instituted. This distinguishes the present case from the case of *Abdul Aziz Molla* v. *Ebrahim Molla*(1) where no time was specified within which the condition was to be performed and in fact the condition had been performed when the second suit came on for trial. *Peria Muthirian* v. *Karappanna Muthirian*(2) is not in point, for there the time for payment had been extended by the Court which made the order for payment.

As regards the second point the plaint as correctly translated alleges that the plaintiff sues on behalf of himself and the villagers. So far as the plaintiff is concerned there is no new title and no new cause of action, so far as the villagers (by which word tenants are intended) the plaintiff is not entitled to sue on their behalf, for it is not alleged in the plaint that he is a tenant.

(1) (1904) I.L.R., 31 Calc., 965.

(2) (1906) I.L.R., 29 Mad., 370.

WHITE, C.J., AND KRISHNASWAMI AYYAR, J. — FISCHER v. NAGAPPA MUDALY.

The Second Appeals Nos. 1093 and 1097 are dismissed with costs.

Second Appeals Nos. 1094, 1095 and 1096 are dismissed without costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Krishnaswami Ayyar.

1909. November 3, 4, 12.

SUBBRAVETI RAMIAH (PLAINTIFF), APPELLANT,

v.

GUNDALA RAMANNA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Limitation Act, sch. XV of 1887, *sch. II, arts.* 139, 144—*Suit against representatives of deceased tenant governed by art.* 139 *and not* 144.

A suit against the representatives of a tenant after the determination of the tenancy to recover the property leased is governed by article 139 and not by article 144 of schedule II of the Limitation Act.

Such a suit would be barred against the representatives if it would be barred against the tenant if alive.

Vadapalli Narasimham v. *Dronamraju Seetharama Murthy*, [(1908) I.L.R., 31 Mad., 163 at 167], doubted.

SECOND APPEAL against the decree of M. J. Murphy, District Judge of Kurnool, in Appeal Suit No. 30 of 1906, presented against the decree of K. Krishnamachariar, District Munsif of Gooty, in Original Suit No. 777 of 1904.

The facts for the purpose of this case are sufficiently set out in the judgment.

H. Balakrishna Rao for *P. S. Parthasarathy Ayyangar* for appellant.

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

JUDGMENT.—The question in this case is whether article 139 or article 144 of the Limitation Act applies. Kondanna, the father of defendants Nos. 3 and 4, was a lessee under Exhibit A which was a lease for a term certain. It is found by the District Judge that the lease was determined about the year 1891. It appears Kondanna died some time afterwards. It is not found exactly when. But he was succeeded by his sons in the possession of the property.

* Second Appeal No. 636 of 1907.

BENSON, C.J., AND KRISHNASWAMI AYYAR, J. — SUBBRAVETI RAMIAH v. GUNDALA RAMANNA.

The District Judge does not find adverse possession for 12 years to bar the suit. The tenancy having determined in 1891, if article 139 is applicable the suit is clearly barred. The appellant argues that the suit is not one to recover possession from a tenant. It is urged that although Kondanna was a tenant and a suit against him after the determination of the tenancy might be described as a suit against a tenant on account of his former tenancy, the suit against the sons cannot be described as one to recover possession from a tenant, for they were not tenants at any time. Reliance is placed on *Vadapalli Narasimham* v. *Dronamraju Seetharama Murthy*(1). It is there stated "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." With great respect we find ourselves unable to accept this reasoning. Kondanna remained in possession after the expiry of the term. The tenancy was determined within the meaning of article 139, for under section 111 of the Transfer of Property Act, "a lease of immoveable property is determined by efflux of the time limited thereby." Time began to run therefore in Kondanna's favour. He is succeeded by his sons in the possession of the property. They are entitled to tack on the time of their father's possession after the determination of the tenancy to the period of their own possession. The time that had begun to run in favour of their father continues to run in favour of the sons. It seems to us therefore difficult to hold that article 139, which would be applicable to the suit against Kondanna, ceases to be applicable because Kondanna is succeeded by his sons in the possession of the property. Suppose, for example, Kondanna was alive and in possession for 12 years after the termination of the tenancy, and he having died subsequently the suit is brought against the sons. Can it be then contended that article 139 becomes inapplicable. It seems to us that the article should be read as if it ran "By a landlord to recover possession from a tenant or his representative in interest." Such a reading of the language of the Act would appear to be necessary in the case of other articles as well to give effect to the intention of the legislature. See for example, articles 78, 81 and 82. The Calcutta

(1) (1908) I.L.R., 31 Mad., 163 at p. 167.

BENSON, C.J., AND KRISHNASWAMI AYYAR, J.

SUBBAVETI RAMIAH v. GUNDALA RAMANNA.

High Court in *Madan Mohan Gossain* v. *Kumar Rameswar Malia* (1) has adopted the same view. Kondanna, it is said, is a tenant by sufferance and his possession is under the common law not adverse, while his representatives are trespassers.

It seems doubtful whether the fiction of a tenancy by sufferance should be kept up after the Transfer of Property Act, according to which a lease is determined by efflux of the time limited thereby (see section 111). Such a tenancy does not operate in England to interrupt the running of time. See *Day* v. *Day* (2). Nor under article 139, is it of any avail to the landlord. Whether for purposes of article 144 a distinction should be made between Kondanna and his sons appears to us to be doubtful. But however this may be, there seems to us to be nothing wrong in holding that if the plaintiff would be barred against Kondanna if now alive, he would be likewise barred against his sons.

The second appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim.

1909. July 19, 22.

KARUMBAYIRA PONNAPUNDAN AND ANOTHER (DEFENDANTS NOS. 1 AND 2), PETITIONERS,

v.

AUTHIMOOLA PONNAPUNDAN AND ANOTHER (PLAINTIFFS), RESPONDENTS. *

Plaint, amendment of, by party to whom it is returned for proper valuation.

A plaintiff, to whom a plaint was returned for properly valuing the properties claimed therein, altered the valuation as directed therein and struck out some of the properties to bring the suit within the jurisdiction of the Court:

Held, that there was nothing illegal in the amendment and that it was competent to the Court to accept such amended plaint.

CIVIL Revision Petition under section 622 of Act XIV of 1882 presented against the order of K. S. Lakshmi Narasaiyar, District Munsif of Valangiman, in Original Suit No. 337 of 1907.

The facts of this case are set out in the judgment.

(1) (1907) 7 C.L.J., 615 at p. 626. (2) (1908) L.R., 3 P.C., 751 at p. 761.

* Civil Revision Case No. 740 of 1908.

ABDUR RAHIM, J.

KARUMBAYIRA PONNAPUNDAN v. AUTHIMOOLA PONNAPUNDAN.

T. R. Venkatarama Sastriar for petitioners.

N. R. K. Thathachariar for respondents.

JUDGMENT.—In this case the Munsif having found on the trial of an issue to the effect that the subject-matter of the suit was undervalued and that if properly valued it would exceed the pecuniary jurisdiction of his Court returned the plaint for presentation to the proper Court after the valuation had been corrected in accordance with his finding. The plaintiff amended the plaint by correcting the valuation and also struck off some of the properties from the plaint so as to bring the rest of the claim within the jurisdiction of the Munsif. He then re-presented the plaint so amended in the same Court and put in a petition stating that he relinquished his claim to the properties which he had struck out. The Munsif thereupon admitted the plaint and the question is, had he the power to do so. The vakil for neither party has been able to refer me to any authority which covers the exact point, nor does the Civil Procedure Code afford a clear answer. But I think in dealing with a question of this nature I ought to act upon the principle that unless there is anything in the nature of a definite enactment which curtails its powers a Court has inherent power to adopt a course of procedure which obviously tends to facilitate justice in preference to one which though it may have the appearance of being more technically correct, is likely to result in many cases to unmerited hardship and even to denial of justice to a litigant. Besides I do not see why the action of the Munsif should not be held to fall within the letter of section 57, Civil Procedure Code, read with section 54, Civil Procedure Code. And since under section 53, Civil Procedure Code, clause (*c*), the Court itself may at any time before judgment amend the plaint, I do not think that, when an amendment is made by the plaintiff and is sanctioned by the Court, it can be said that the Court had no power to allow or accept the amendment.

I hold therefore that the order of the Munsif is right and dismiss the petition with costs.

This judgment was appealed against and confirmed in Letters Patent Appeal No. 120 of 1909 by Benson and Sankaran-Nair, JJ., on 20th January 1910.

APPELLATE CRIMINAL.

Before Mr. Justice Munro and Mr. Justice Abdur Rahim.

1909. October 27,

PADMANABHA PANJIKANNAYA

v.

EMPEROR.*

Criminal Procedure Code, Act V of 1898, ss. 237, 238, 423—Person convicted of an offence cannot on appeal be convicted of abetment of such offence.

The power of an Appellate Court under section 423 of the Code of Criminal Procedure to alter a finding must be used in accordance with the provisions of sections 237 and 238 of the Code.

Where a person who has been convicted of an offence has appealed, the Appellate Court cannot, after acquitting him of such offence, convict him of the abetment of such offence.

APPEAL against the conviction and sentence of H. O. D. Harding, Sessions Judge of South Canara division, in Calendar Case No. 14 of 1909.

The facts for the purpose of this report are fully set out in the judgment.

Dr. *Swaminadhan* and *B. Sitarama Rau* for appellant.

The Public Prosecutor *contra.*

Annaji Rau for complainant.

JUDGMENT.—In this case the appellant and another were charged with offences under sections 467 and 468 of the Indian Penal Code. The appellant was convicted under these sections. Such evidence as there is however shows that the alteration of the document was made not by the appellant, but by the man who was charged along with him. The conviction of the appellant under sections 467 and 468 of the Indian Penal Code was therefore wrong. We are asked however to consider the propriety of convicting the appellant for abetment of these offences. We have not been referred to any authority in support of the proposition that when a person has been charged with a certain offence and has been convicted of that offence the Appellate Court can, on finding that the conviction is not sustainable, convict the accused of abetment of that offence. No doubt, under section 423 of the Criminal Procedure Code, the Appellate Court has power to alter a finding, but

* Criminal Appeal No. 522 of 1909.

MUNRO AND ABDUR RAHIM, JJ.

PADMANABHA PANJI-KANNAYA *v.* EMPEROR.

we take it that that power cannot be used arbitrarily but only in accordance with other provisions of the Code. Those provisions are to be found in sections 237 and 238 of the Criminal Procedure Code, and neither of these covers a case like the present. The ruling in *Regina* v. *Chand Nur*(1) is clear authority for holding that it is not open to a Court to find a man guilty of the abetment of an offence on a charge of the offence itself, and we agree with the reasoning on which the ruling is based. We set aside the conviction and acquit the accused of offences under sections 467 and 468 of the Indian Penal Code. His bail bond is discharged.

APPELLATE CIVIL—FULL BENCH.

Before Sir Ralph Sillery Benson, Officiating Chief Justice, Mr. Justice Wallis and Mr. Justice Sankaran-Nair.

1909. March 29, 30. August 2. September 13, 14. October 27.

KAILASAM PILLAI (SECOND RESPONDENT), APPELLANT,

v.

NATARAJA THAMBIRAN AND OTHERS (DEFENDANTS NOS. 1 TO 3 AND FIRST PLAINTIFF), RESPONDENTS.*

Mutt, head of, whether trustee or life tenant of mutt properties.

It cannot be predicated of the head of a mutt, as such, that he holds the mutt properties as a life tenant or trustee. The question must be determined in each case upon the conditions on which they were given or which may be inferred from the long established usage and custom of the institution.

Giyana Sambandha Pandara Sannadhi v. *Kandasami Tambiran*, [(1887) I.L.R., 10 Mad., 375], referred to.

Vidyapurna Tirtha Swami v. *Vidyanidhi Tirtha Swami*, [(1904) I.L.R., 27 Mad., 435], referred to.

APPEAL presented against the decree of J. Hewetson, District Judge of Madura, in Original Suit No. 1 of 1905.

The appeal came on for hearing in the first instance before (Munro and Abdur Rahim, JJ.) who made the following:—

ORDER OF REFERENCE TO A FULL BENCH.—In Appeal No. 91 of 1906 the question has been raised as to the correctness of the

(1) (1874) II B.H.C.R., 240.

* Appeal No. 91 of 1906.

BENSON, Offg. C.J., SANKARAN-ARAYANA PILLAI v. NATARAJA THAMBIRAN.

decision reported in *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami*(1), which rules that under the general Hindu Law the head of a mutt does not occupy the position of a trustee in relation to its endowments but holds the mutt properties as a life tenant with absolute dominion over the income. This ruling seems to us to be opposed to the view of the law as expressed in *Giyana Sambandha Pandara Sannadhi* v. *Kandasami Tambiran*(2) and *Sammantha Pandara* v. *Sellappa Chetti*(3), and is mainly based on the analogy of certain religious institutions of Europe rather than on any texts of the Hindu shastras or proved usages. In *Giyana Sambandha Pandara Sannadhi* v. *Kandasami Tambiran*(2) where the question to be decided was whether the head of a certain mutt was duly appointed and this involved determination of the relations between the offices of the head of an *adhinam* and that of a mutt and of the character of these offices, there can be no doubt, as we shall presently point out, that Collins, C.J., and Muttusami Ayyar, J., regarded the head of a mutt as the trustee of its endowments and not as the owner of a life-estate in the properties forming the endowment. In the earlier case of *Sammantha Pandara* v. *Sellappa Chetti*(3) the question for decision was whether the property of a mutt was liable for the debts incurred by the head of the mutt in execution of his duty and the answer given was in the affirmative. There also the position of the head of a mutt was considered and is described, if we read the judgment of Turner, C.J., and Muttusami Ayyar, J., aright, as that of a trustee though the language used is not so precise and clear as in the subsequent case in *Giyana Sambandha Pandara Sannadhi* v. *Kandasami Tambiran*(2), they say in *Sammantha Pandara* v. *Sellappa Chetti*(3), "the property is in fact attached to the office and passes by inheritance to no one who does not fill the office. It is in a certain sense trust property, it is devoted to the maintenance of the establishment, but the superior (meaning the head of the mutt) has large dominion over it, and is not accountable for its management nor for the expenditure of the income, *provided* he does not apply it to any purpose other than what may fairly be regarded as in furtherance of the objects of the institution." Muttusami Ayyar, J., it will be noted, was

1909. March 30, August 2, September 13, 14, October 27.

(1) (1904) I.L.R., 27 Mad., 435. (2) (1887) I.L.R., 10 Mad., 375.
(3) (1879) I.L.R., 2 Mad., 175.

party to both the decisions, and there is no reason to suppose that in defining the position of the head of the mutt in the later case in *Giyana Sambandha Pandara Sannadhi* v. *Kandasami Tambiran*(1) the learned Judge was laying down anything substantially different from what he had stated in *Sammantha Pandara* v. *Sellappa Chetti*(2).

The term "mutt" as stated in *Giyana Sambandha Pandara Sannadhi* v. *Kandasami Tambiran*(1) at page 386 in its original and narrow sense signified the residence of an ascetic or sanniyasi or paramahansa. But since the time of Sankaracharya these mutts developed into institutions devoted to the teaching of different systems of Hindu religious philosophy presided over by ascetics who were held in great reverence as religious preceptors, and princes and noblemen endowed these institutions with large grants of property. Thus, it is said (see page 386), a class of endowed mutts came into existence in the nature of monastic institutions, presided over by ascetics or sanniyasis who had renounced the world. Here, the ascetic who originally owned little or no property, came to own the mutt and its endowment, in trust for the maintenance of the mutt, for his own support, for that of his disciples, and for the performance of religious and other charities in connection with it, according to usage. There is no uncertainty of statement here as to the legal position of the head of a mutt with reference to its endowments, and the conclusion summarised in the passage was apparently the unquestioned result of the voluminous evidence, both documentary and oral, adduced in the case, which showed that whatever properties were granted, whether in the name of the mutt or of its head for the time being and his successors in office, or were acquired by the head of the mutt with the income of the dedicated properties, were held by the head of the mutt in trust for the institution and not for his personal use. Even apart from evidence one would have been naturally led to the same conclusion by the fact that these sanniyasis or Hindu monks, one of whom is appointed the chief of the institution, are professed ascetics vowed to a life of celibacy and mendicancy having renounced the world and its possessions and enjoyments. And if we further remember that when in the later stages of their growth the mutts received large

(1) (1887) I.L.R., 10 Mad., 375. (2) (1879) I.L.R., 2 Mad., 175.

endowments from pious donors who regarded them as seats of religious learning where learned ascetics, the custodians of such learning, assembled not only to initiate neophytes into the mysteries of the order, but also to impart religious instruction to lay members of the public for their spiritual benefit, the impress of trust on these grants becomes still clearer. In fact to speak of an endowment of a charitable institution and to say that the person in charge of it has a life-estate in the properties constituting the endowment, sounds *primâ facie* like a contradiction in terms. It is quite likely that the chief of such a body of ascetics was held in unusual reverence approaching to a feeling of awe by the disciples and the public and consequently his management of the institution would be seldom questioned. But at the same time it would be repugnant to the whole idea of such an endowment to suppose for a moment that, large and perhaps unlimited as were his powers of disposition over the income so long as those powers were exercised for the maintenance of its religious and charitable objects, he should be at liberty to spend the same, if so inclined, for his own personal advantage. It seems to us that the fair conclusion to be drawn is that the head of a mutt is the trustee of its property vested with a wide discretion as to the mode in which to apply its profits and receipts for the behoof of the institution. It is only in that sense that we understand the passage which has been cited from *Sammantha Pandara* v. *Sellappa Chetti*(1), or otherwise it would be inconsistent with the statement of the law contained in *Giyana Sambandha Pandara Sannadhi* v. *Kandasami Tambiran*(2).

In *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami*(3), what was decided was that the Swami or head of the mutt in that case who was found to be a lunatic by inquisition did not forfeit his office by reason of the distemper, because he did not stand in the position of a trustee in relation to its endowments like the shebait of a temple but was rather a corporation sole having an estate for life in the permanent endowment of the mutt and an absolute property in the income derived from offerings, subject only to the burden of maintaining the institution, a burden which in another part of the judgment is spoken of as being in the

(1) (1879) I.L.R., 2 Mad., 175. (2) (1887) I.L.R., 10 Mad., 375.
(3) (1904) I.L.R., 27 Mad., 485.

nature merely of a moral obligation. Subrahmania Ayyar, Offg. C.J., in his judgment in that case says that the cardinal principle of law that properties given for the maintenance of charities, religious or otherwise, were ordinarily inalienable, was applicable to mutts, and the properties forming part of the endowment of a mutt could not be alienated except for necessary purposes. Then he goes on to observe, "Swamis were not mere employees or subordinates in the institutions, but heads thereof, whose duty it was to promote learning and further the interests of religion; such heads moreover were as ascetics not prone to be affected by motives incident to worldly life, requiring less restraint in dealing with property than ordinary men. It followed therefore that the law gave them over what remained of the income after defraying the established charges of the institutions, a full power of disposition, while in respect of the corpus it treated the individuals composing the line of succession as in the position of tenants for life." Upon this reasoning two observations at once occur: the premises do not necessarily lead to the conclusion sought to be reached and there is an apparent inconsistency in saying that the law which governs charities applies in so far that the properties which form the endowments of a mutt must be held to be inalienable but that an unending succession of individuals were to hold the property as life-tenants and they were under no legal obligation to apply the properties to the charity at all. The cases cited in support of the position are, *Mohunt Burm Suroop Dass* v. *Khashee Jha*(1) and *Khusalchand* v. *Mahadevgiri*(2). As regards the first, the facts of this case are not given in the report but the learned Judges in dealing with the question of the status of the Mohunt seemed to rely in their judgment upon what was proved as an usage of the particular institution. The decision in *Khusalchand* v. *Mahadevagiri*(2) was based on the terms of a particular grant made by a Mahratta sovereign chief and is therefore no authority in support of any such general rule of Hindu Law as is contended for. Subramania Ayyar, Offg. C.J., thus taking the law to be as he states it in his judgment, proceeds to consider the juridical character of the head of a mutt. Bhashyam Ayyangar, J., who delivered a separate judgment seems to think that the conception of trusts though not quite alien to the Hindu system is

(1) (1873) 20 W.R. (C.R.), 471. (2) (1875) 12 B. H.C.R., 214.

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less congenial to it than that of corporations sole and is of opinion that the head of a mutt occupies the position of an ecclesiastical corporation sole in England. Both of them express dissent from the decision in *Sammantha Pandara v. Sellappa Chetti* (1), in so far as it lays down that the endowment is liable for debts incurred by the superior in discharge of the duties of his office. With all respect due to the learned Judges in our opinion, however interesting from the point of view of comparative jurisprudence it might be to compare with the legal position of bishops in the ecclesiastical system of England the position of the head of a mutt in the Hindu system, when once the latter's legal position has been ascertained according to the law governing such institutions it seems to us that having regard to the essential difference between the conceptions of Christianity and Hinduism and their respective histories the analogy of an institution peculiar to one religion can hardly be made use of to establish the legal character of an institution which had its origin in wholly dissimilar circumstances and in the especial needs of an entirely different form of society and religious beliefs. As laid down by their Lordships of the Privy Council in *Greedharee Doss v. Nundokissore Doss* (2), the only law as to these Mohunts and their offices, functions and duties, is to be found in custom and practice, which is to be proved by testimony."

It should be noticed that in the reported cases including *Vidyapurna Tirtha Swami v. Vidyanidhi Tirtha Swami* (3), the property attached to a mutt is spoken of as the endowment of the mutt, there is a distinct religious and charitable purpose for the promotion of which the endowment is created; admittedly the presiding ascetic cannot alienate such properties except in the course of good management; he is not supposed to hold property for his own benefit and confidence is reposed in him by the donors that he would devote the properties for the maintenance of the mutt, composed as it is of a fluctuating body of ascetic teachers and of such accessories in the shape of school-rooms, temples, books, etc., as may appertain to the institution for the propagation of religion. These, in our opinion, are strong indicia of a trust and the case of a mutt does not therefore seem to us to differ

(1) (1879) I.L.R., 2 Mad., 175. (2) (1867) 11 M.I.A. 405 at p. 428.
(3) (1904) I.L.R., 27 Mad., 485.

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so far as the present question is concerned, from that of a Devasthanam. On the other hand, to hold that an endowment of individuals who happened to be occupants of the office of a head of a mutt, from which he could not be removed in spite of any supervening disqualification or however gross their misconduct, were to enjoy life estates in the mutt properties without their being alienable or chargeable for their debts and exempt from the operation of rules of limitation and prescription would be to countenance a pernicious form of perpetuity in favour of individuals. This is just the kind of mischief which was condemned by their Lordships of the Privy Council in *Abul Fata Mahomed Ishak v. Rasamaya Dhur Chowdhry* (1), where a Mussalman attempted to tie up his property in perpetuity by dedicating it to charity by the provision made for charity was not to take effect until the grantor's descendants who were to enjoy the income in a particular line of succession came to an end. The grant to charity in that case was regarded as illusory and the settlement was held to offend against the rule regarding perpetuities. It is not necessary to consider in this case whether the Muhammadan Law as to perpetuities would be applicable to Hindu Law as laid down by their Lordships of the Privy Council in *Greedharee Doss v. Nundokissore Doss* (2), but we are clearly of opinion that no more than life estates can be created by the head of a mutt in favour of himself and his successors in office. In the view of the law enunciated by Subrahmania Ayyar, Offg. C.J., and Bhashyam Ayyangar, J., before whom the petition in the present case was originally heard, the position of the head of a mutt as a charitable institution at all would be even worse than that of 'the poor,' the so-called donee in *Abul Fata Mahomed Ishak v. Rasamaya Dhur Chowdhry*. For in the case of the mutt the endowment would be kept for the maintenance of the institution. It may be that in ancient usage we clearly perceive sanctioning such a type of property the Courts would uphold it but no such proof was alluded to in *Vidyapurna Tirtha Swami v. Vidyanidhi Tirtha Swami* (3), nor have we been referred to any authoritative books on Hindu Law which lay down the proposition enunciated in that case. On the other hand, we may point out that at least two modern writers on the Hindu Law of Endowments think that the position of the head of a mutt as stated in that decision is not in accordance with Hindu notions, see Mr. R. Ganapathi Aiyar's "The Law relating to Hindu and Muhammadan

(1) (1894) I.L.R., 22 Cal., 1022. (2) (1904) I.L.R., 27 Mad., 485.
(3) (1904) I.L.R., 27 Mad., 485.

*Original Petition No. 1 of 1909.

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Religious Endowments," page CVIII, and Tagore Lectures, 1904, by Jogendra Chundra Ghose on the Hindu Law of Impartible Property including Endowments, pp. 422 to 424. The question, therefore, which we refer to the Full Bench is, does the head of a mutt hold the properties constituting its endowment as a life-tenant or as a trustee.

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

K. Srinivasa Ayyangar and *K. N. Aiya Ayyar* for appellant.

S. Srinivasa Ayyangar for first respondent.

The Court expressed the following :—

OPINION—(SIR R. S. BENSON, OFFG. C.J.)—The question referred for the decision of the Full Bench is this :—" Does the head of a mutt hold the properties constituting its endowment as a life-tenant or as a trustee ?"

I do not think that the question admits of a categorical answer, as the incidents attaching to the endowments of a mutt depend upon the conditions on which the endowments were given, or, when these are no longer discoverable through the mists of antiquity, the incidents may be inferred from the long continued practice and usage of the institution in respect of the endowments in question. As laid down by their Lordships of the Privy Council in *Greedharee Doss* v. *Nundokissore Doss*(1)," the only law as to these Mohunts and their offices, functions and duties is to be found in custom and practice, which is to be proved by testimony."

The origin and growth of mutts and the position of the head of the mutt, usually called the Mohunt or Swami have been discussed by learned Hindu Judges of this Court in the cases of *Sammantha Pandara* v. *Sellappa Chetti*(2), *Giyana Sambandha Pandara Sannadhi* v. *Kandasami Tambiran*(3) *and Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami*(4) and the present reference has been made in consequence of the difficulty which was felt in reconciling some of the dicta in the last case with the views enunciated in the two earlier cases. If, however, it is borne in mind that general observations made in the course of a judgment must be applied with reference to the facts of the case in connection

(1) (1867) 11 M.I.A.C., 405 at p. 428.
(2) (1879) I.L.R., 2 Mad., 175 at p. 179.
(3) (1887) I.L.R., 10 Mad., 375.
(4) (1904) I.L.R., 27 Mad., 435 at p. 456.

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with which they were made, and also subject to limitations expressed in other parts of the judgment, much of the difficulty is removed.

In *Sammantha Pandara* v. *Sellappa Chetti*(1) it is stated " the origin of mattams is ordinarily as follows :—A preceptor of religious doctrine gathers around him a number of disciples whom he initiates into the particular mysteries of the order, and instructs in its religious tenets. Such of these disciples as intend to become religious teachers, renounce their connection with their family and all claims to the family wealth, and, as it were, affiliate themselves to the spiritual teacher whose school they have entered. Pious persons endow the schools with property which is vested in the preceptor for the time being, and a home for the school is erected and a mattam constituted. The property of the mattam does not descend to the disciples or elders in common; the preceptor, the head of the institution, selects among the affiliated disciples him whom he deems the most competent, and in his own life-time installs the disciple so selected as his successor, not uncommonly, with some ceremonies. After the death of the preceptor the disciple so chosen is installed in the gaddi and takes by succession the property which has been held by his predecessor. The property is in fact attached to the office and passes by inheritance to no one who does not fill the office. It is in a certain sense trust property ; it is devoted to the maintenance of the establishment, but the superior has large dominion over it, and is not accountable for its management, nor for the expenditure of the income, provided he does not apply it to any purpose other than what may fairly be regarded as in furtherance of the objects of the institution." As regards the statement of the law it may be observed that the concluding words " in furtherance of the objects of the institution " are too wide. As pointed out in *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami*(2), the limitation should rather be to purposes " necessary for the maintenance of the mutt as such." It may also be observed that the property is spoken of as being " in a certain sense trust property," and it is expressly stated in the judgment that it is not intended to lay it down that there are not mattams which may have been

(1) (1879) I.L.R., 2 Mad., 175 at p. 179.
(2) (1904) I.L.R., 27 Mad., 435 at p. 456.

established or supposed other than those described, or that appropriately notions may be held on different conditions and subject to different incidents.

In the case (1) *Chinna Swamidhas Pandara Sannadhi* v. *Kandasami Tambiran*(1), the question was as to the relations that existed between the head of a mutt and the head of the Adhinam to which the mutt was affiliated. Some 2,000 documents were filed and 150 witnesses were examined. The statement of the law is quoted from *Saminatha Pandara* v. *Sellappa Chetti*(2), and referred to with approval (page 474), and it was pointed out that in its original and narrow sense the term mutt signified the residence of an ascetic (who was styled a Sanyasi if a Brahmin or Paramahansa if a Sudra) but that from the time of Sankaracharier these mutts developed into institutions devoted to the teaching of different systems of religious philosophy and centres of classical learning. The ascetics who presided over them were held owing to their position as religious preceptors and often also in consequence of their own learning and piety in great reverence by Hindu Princes and Noblemen, who from time to time made large presents to them and endowed the mutts under their control with grants of land. Thus a class of endowed mutts came to existence in the nature of monastic institutions presided over by ascetics or sanyasis who had renounced the world. Thus the ascetic who originally owned little or no property, came to own the mattam under his charge and its endowment, in trust for the maintenance of the mutt, for his own support for that of his disciples, and for the performance of religious and other charities in connection with it according to usage. "It will be remembered that the ascetic is prevented by the usage of his order from owning or managing property for personal enjoyment. The administration of a mattam endowment presided over by an ascetic was an exception to the rule recognised on the ground that such administration was in furtherance of the cause of religion. In the evidence in that case it was proved that in many instances Rajas and others had entrusted extensive properties to the heads of the mutts for the purpose of carrying out specified charities. In such cases there can be no doubt but that the head of the mutt is a trustee in regard to such properties, bound to carry out the

(1) (1887) I.L.R., 10 Mad., 375.

(2) (1879) I.L.R., 2 Mad., 175 at p. 179.

trust, and subject to the ordinary liabilities of a trustee though, doubtless, with a wide discretionary power of dealing with the income of the trust property in carrying out the trust. In other instances it was shown that landed properties were acquired by the head of the mutt in his own name and apparently with his own funds, and the deeds specified that the properties were to be enjoyed by the purchasers and their successors in the line of disciples. In such cases, in the absence of evidence to the contrary, it would be difficult to presume that the properties were acquired as trust properties, since it is well known that gifts are made to pious Brahmins and to ascetics who are heads of mutts not for any specific charitable or religious object or with any intention of creating a trust, but rather for the spiritual benefit of the donor, since gifts of the kind are considered to be meritorious on the part of the giver. But if in any case it is proved that according to the well established practice and usage of the mutt, the income of any specified property has for very many years been devoted to a particular charity or religious object, it would be evidence from which a trust in respect of such property might be inferred. Tudor's 'Charitable Trusts,' 4th edition, page 160.

If we turn now to the case of *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami*(1), we find that the question for decision was whether the head of a mutt forfeited his position as such by becoming a lunatic. No custom to that effect was proved, and it was admitted that under the Hindu Law, lunacy does not operate to divest rights already acquired, but it was argued by the appellant that the head of a mutt was, as such, a trustee, or in a position analogous to that of a trustee, and that therefore, on the analogy of the English Law of Trusts—now stringently reproduced in sections 73 and 74 of the Indian Trusts Act—a new head of a mutt should be appointed if the person holding the position became unable personally to act in the trusts by reason of lunacy. It was to show that that contention was untenable that the judgments of the learned Judges were directed; and their observations must be understood with reference to that contention. The conclusion of Sir Bhashyam Ayyangar, I was that "the head of a mutt, as such, is not a trustee in the sense in which that term is generally understood in the Law

(1) (1904) I.L.R., 27 Mad., 485 at p. 486.

of Trusts, and the decision of the question under consideration cannot therefore properly be governed by the principles regulating the appointment of new trustees or by analogies derived therefrom. I may also add that in the case of hereditary trustees in India and other trustees having a beneficial interest in the trust property, the principles of the English Law of Trusts—embodied in the Indian Trusts Act—as to the appointment of new trustees, when a trustee becomes incapable of acting by reason of unsoundness of mind, etc., are inapplicable." It was apparently the possession of this beneficial interest in the income of the mutt which largely influenced the decision of the learned Judge, and we find the same argument prominently relied on by Sir Subrahmania Ayyar, J., at page 442 of the report. But neither Judge denied that the head of the mutt might be a trustee in regard to any portion of the mutt property that was devoted to any charitable or religious trust. Indeed Sir Bhashyam Ayyangar, J., specially points out that the head of a mutt may be a trustee in this way, and responsible as such, just as the dharmakarta or trustee of a temple is responsible. But he points out that whereas the dharmakarta of a temple is a mere trustee rarely having any beneficial interest in the endowments, and bound to carry out the daily worship and periodical ceremonies in the temple according to a well-defined and settled usage and custom, in the case of mutts, on the other hand, "such defined and specific purposes immediately connected with the maintenance of the mutt as an institution, are, in the nature of things, very limited and a large part of the income derived from the endowments of the mutt as well as from the money-offerings of its disciples and followers—which offerings as a rule are very considerable—is at the disposal of the head of the mutt for the time being, which he is expected to spend, at his will and pleasure, on objects of religious charity and in the encouragement and promotion of religious learning. His obligation to devote the surplus income to such religious and charitable objects is one in the nature only of an imperfect or moral obligation resting in his conscience and regulated only by the force of public opinion, and he is in no way, whether as a trustee or otherwise accountable for it in law." It is to be observed that the learned Judge does not say that there are no defined and specific purposes connected with the maintenance of the mutt on which the head of the mutt is bound to spend at least a portion of the income, but only that such purposes are very limited,

and that "a large part"—not the whole—of the income is at his free disposal, but which he is expected by public opinion to spend on charitable, or religious objects. And again it is only the "surplus" income that is at his free disposal, and in regard to which he is not accountable in law as a trustee or otherwise. So when the learned Judge says again "in legal contemplation, therefore, the head of a mutt, as such, has an estate for life in its permanent endowments and an absolute property in the income derived from the offerings of his followers, subject only to the burden of maintaining the institution," these words must be understood as subject to the limitations above expressed, and "the burden of maintaining the institution" must, I think, be understood to include "the maintenance of the mutt, the support of its head and of his disciples and the performance of religious and other charities in connection with it, in accordance with usage" which are the purposes specified in *Giyana Sambandha Pandara Sannadhi* v. *Kandasami Thambiran*(1), as those for which the head of the mutt owns the mutt and its endowments in trust. So too, when Sir Subrahmania Ayyar, J., says that the heads in succession of a mutt "are given, for the welfare of the foundation itself, real, and, so to speak, beneficial interest in the usufruct, the restrictions governing the disposition whereof by them being in the nature of a mere moral obligation," these words must, I think, be understood as referring not at all to the income of property specially made the subject of a trust by the donors, or in respect of which a trust might properly be inferred from the long established usage and practice of the institution, but, in fact, only to "what remained of the income after defraying the established charges of the institution" as is clear from his language at page 439 of the report.

I think, then, that it cannot be predicated of the head of a mutt, as such, that he holds the properties constituting its endowments as a life-tenant or as a trustee. The incidents attaching to the properties depend in each case upon the conditions on which they were given, or which may be inferred from the long continued and well established usage and custom of the institution in respect thereto.

WALLIS, J.—I am of the same opinion.

(1) (1887) I.L.R., 10 Mad., 375 at p. 386.

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If the learned Judges who decided *Sammantha Pandutha Sethuppa Chetti*(1) and *Giyana Sambandha Pandara Sannathi* v. *Kandasami Tambiran*(2) meant to lay down that the head of a mutt is trustee of all the mutt properties and holds them in trust for the objects mentioned which was not the question before them, I am unable to agree with them and prefer to follow the decision in *Vidyapurana Tirtha Swami* v. *Vidyanidhi Tirtha Swami*(3). It was not suggested in argument that any attempt has ever yet been made to make heads of mutts accountable at law for their application of the income of mutt properties on the footing that they hold them as trustees for charitable purposes, and this appears to me to be a consideration of some importance in dealing with institutions in which usage is the governing factor. Of course if property be given to the head of a mutt for the time being, for a specific charitable purpose, he will be a trustee for that purpose just as any one else would be in the same circumstances, and if it be the usage to devote any particular mutt property to any particular charitable purpose that will be sufficient to raise a presumption that the property was granted for that purpose and that the head of the mutt is a trustee in regard to it (Tudor's Charitable Trusts, 4th edition, page 160). It may I think be taken that the property of this and other mutts is very largely derived from gifts made by the faithful to the head of the mutt for the time being without any statement as to the purposes for which they were to be applied, and it would, I think, be going too far to hold that such gifts were given and accepted on an implied charitable trust. Where the intention of the donor to make a gift to charity is made out, equity no doubt will not allow the gift to fail because the charitable purpose is indicated in too vague and uncertain a manner for the Court to execute it, but will provide for its application by framing a scheme; but this is only when the charitable intention is clearly made out and as pointed out by Tudor at page 86, any uncertainty as to the charitable intention tends to the gift being upheld as charitable. The further observation that if the objects of a trust are not stated they cannot be presumed to be charitable. An illustration of this principle is to be found in *Corporation of Gloucester* v. *Wood*(4). In that case the testator

(1) (1879) I.L.R., 2 Mad., 175. (2) (1887) I.L.R., 10 Mad., 375 at p. 386.
(3) (1904) I.L.R., 28 Mad., 405 at p. 415. (4) (1842) 1 Hare, 131 and 1 H.L.C., 272.

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stated in a codicil that he had left £140,000 to the Corporation of Gloucester and desired to leave another £40,000 for the same purpose. What that purpose was, could not be ascertained as no codicil bequeathing £140,000 was forthcoming. In these circumstances the Courts declined to presume that the gift in the missing codicil was for a charitable purpose, although thinking it most likely that it was so. In the present case it seems to me that gifts made to heads of mutts without any mention of the purposes to which they were to be applied, cannot be considered to have been given upon trust for charitable purposes. Even if we were at liberty to resort to implication it would be difficult to imply any trusts which could be regarded as valid charitable trusts. Nothing could well be vaguer than the trusts suggested in *Sammantha Pandara Sannathi* v. *Sethuppa Chetti*(1) and *Giyana Sambandha Pandara Sannathi* v. *Kandasami Tambiran*(2), and they would certainly appear to include purposes which the law does not regard as charitable. What is still more important, no attempt has been made to show that there is any usage that gifts made to mutts should be applied exclusively to purposes which the law regards as charitable. If not the conditions of a valid charitable trust are not made out, and the effect of raising such trusts would be to bring the validity of the gifts in question, and if English principles apply to render them invalid, *Morice* v. *The Bishop of Durham*(3), and *Hunter* v. *Attorney-General*(4). In the last case Lord Davey says at page 823: "Where charitable purposes are mixed up with other purposes of such a shadowy and indefinite nature that the Court cannot execute them (such as 'charitable or benevolent' or 'charitable or philanthropic' or 'charitable or pious' purposes) or where the description includes purposes which may or may not be charitable (such as 'undertakings of public utility') and a discretion is vested in the trustees, the whole gift fails for uncertainty; see also *In re Davidson-Minty* v. *Hunter*(5). Further in my opinion where gifts were given to heads of mutts without any specific mention of the purposes suggested by the circumstances of the case and by usage is that it was not intended to fetter the discretion by any trusts in

(1) (1879) I.L.R., 2 Mad., 175. (2) (1887) I.L.R., 10 Mad., 375 at p. 386.
(3) (1804) 9 Ves., 399. (4) (1842) 1 Hare, 131 and 1 H.L.C., 272.
(5) (1909) 1 Ch., 567.

Sannadhi to the presence of the idol of the titular deity where he renounces all desire for women and land, which is accepted as a renunciation of the world. The Pandara Sannadhi then admits him into the order by teaching him the 'Mulamantram' or the distinctive doctrine of the order, gives him a consecrated red cloth called mantra kashayam as the visible symbol of initiation and gives him an image of sandal powder called Partiva Puja to worship. The novitiate then solemnly makes a gift of his body, soul and wealth to the Pandara Sannadhi. After his admission he is called Thambiran, continues his religious studies and is expected to do everything in his power for religion, learning and charity. It was also proved that the senior and junior Pandara Sannadhis are solemnly consecrated as preceptors with certain ceremonies and thereby become fit to admit Thambirans. The others have not that power.

About 300 years ago, a certain Thambiran of this Adhinam named Gurupara, went on pilgrimage to Benares, acquired a great reputation for learning and piety, visited various Rajas, etc., and acquired great wealth and on his return to the Adhinam offered it to the Pandara Sannadhi, in compliance with his vow at the initiation; but the latter directed him to take it back to found a mutt at Benares which was accordingly done. This mutt at Benares, came to own several subordinate mutts both in Northern and Southern India, at Chidambaram, Rameswaram, Kumbakonan, Trichinopoly, Morange in Nepaul, Achiram in Travancore. All the members of the Benares mutt were Dharmapuram Thambirans.

About 1720, one Tillanayaka, the Thambiran in charge of the Benares mutt, came to the south, built the mutt at Tiruppanandal and purchased property for its benefit with the funds he brought with him from Benares. The properties which he purchased were in his own name and each document contained a clause that the land mortgaged or sold should be enjoyed by the alienee and "his successors in the line of disciples." He obtained other properties from the Rani of Tanjore, the Zamindars of Ramnad, Torayur, etc., which were expressly stated to be endowments for charities. In one of them the succession to management was stated to be in the line of disciples Gurupara who succeeded him about 1756 also invested money in land and made purchases in his own name, the properties to be enjoyed by himself and his

successors in the line of disciples and also obtained villages from Rajas, etc., for specified charities, for instance, one from the Kalahastri Raja for a charity at Rameswaram. Chithambaranatha who succeeded him in 1790 also founded new charities and endowed them. Sadayappa, who succeeded in 1798, purchased lands for the mutt and founded new charities at Benares, Rameswaram and Kumbakonam, endowed with grants of villages by the Karvetnagar Zamindar. A new charity at Karuppur was endowed by the Tanjore Raja. The next man, Ganapathi, who succeeded in 1836 only purchased some small property for Rs. 24. There was no new charity. Ramalinga who succeeded in 1838 made new purchases for large sums of money in his own name and to be enjoyed after him in the line of disciples. Chockalinga succeeded in 1841 and like his predecessors, he made purchases in his own name for himself and his successors in the line of disciples. The Supreme Court at Madras made over to him about Rs. 60,000, the bequest of Pacheappa Mudali for carrying out certain charities at Benares indicated by the testator. Ganapathi, who succeeded in July 1852, similarly purchased lands for himself and successors as above. Ramalinga, who succeeded next in 1853, died in 1880. He also purchased extensive properties for which it was provided as usual that they were to be enjoyed by the purchaser and his successors in the line of disciples. He nominated a Thambiran of the Tiruvaduthorai mutt as his successor and in 1881 the head of the Dharmapuram Adhinam claimed the estate of Tirruppanandal. In this suit it was finally decided that a Thambiran of Dharmapuram mutt alone can be the Pandara Sannadhi of Tiruppanandal, though otherwise the one Adhinam is independent of the other. It was also decided, that the Benares Adhinam is subordinate to Tiruppanandal though in a previous litigation between those two Adhinams it had been decided that the latter is subordinate to the former.

We are thus able to trace the growth of two mutts which developed into Adhinams: Benares Adhinam and later Tiruppanandal. We find that Rajas and other persons entrusted extensive properties to the heads of these Adhinams to carry out specified trusts. There can be no possible doubt that the Pandara Sannadhis are only trustees so far as those properties are concerned and bound to carry out the trusts. Some of them appear to be in their nature private, others public. In the case of public trusts,

section 539 of the Code of Civil Procedure would apply; and in cases of private trusts, the representatives of the founders or any other persons interested may take the necessary steps when occasion arises to see that the trusts are carried out.

Let us then consider the case of the other properties. I leave out of consideration the relation between the Pandara Sannadhi and the other Thambirans. When Gurupara, the founder of the Benares mutt, collected the funds with which the mutt was built and the properties purchased, there was apparently no intention then of building a mutt, as that was done only later at the instance of the Dharmapuram head. It is quite clear that it was his own learning and piety that secured the funds. The donors doubtless considered they were doing a meritorious act by giving him these funds. None of the donors ever intended that his gift should be applied to any particular purpose. They knew that the gifts would be used for some laudable purpose. The donor may have intended it as a gift to Gurupara, as gifts to Sanniyasis and holy Brahmins are believed to be conducive to spiritual welfare, or he may have thought that with his contribution and others Gurupara might educate the other Sanniyasis, dig tanks, build chatrams or temples, or go about preaching dharmam or to persuade men to lead worthy lives. In the circumstances, therefore, an intention to create a trust cannot be implied, nor can any Court ascertain the subject or object of the trust, unless we are to assume a collective intention on the part of all the donors nor is there any reason to presume that when he constructed a mutt he divested himself of all his property. Next we find almost all the Pandara Sannadhis purchasing properties in their own names to be enjoyed by them and their successors in the line of disciples. It cannot be contended with any show of reason that a Pandara Sannadhi can own only trust property. It does not appear to me therefore reasonable to assume that all this is trust property in the absence of anything in the documents themselves to support the contention. The fact that when the properties were intended for any trust the deeds in express terms indicated the object, confirms me in this view. *Primâ facie*, therefore, in the absence of any evidence to the contrary, the properties, consisting of the gifts, purchases, etc., are not held as trust property. It may of course be proved that any land, or any certain or ascertainable sum of money has

been devoted to any specified charity in which case that would be trust property. But it will be for the plaintiff, as in an ordinary case, to prove it. In the absence of any such proof, the uncertainty and indefiniteness of the intentions of the so-called settler, of the subject and object compel the conclusion that there is no trust, so far at any rate as the public or any portion of the public is concerned.

I shall now consider the relation subsisting between the Pandara Sannadhi and the other Thambirans or members of the Brotherhood. The respect for elders which generally characterises the relations between the senior and junior members of an Indian family seem to be carried to an excessive degree in this case where, as I have pointed out, a person on initiation makes a gift of his body, soul and wealth to the Pandara Sannadhi and thereafter styles himself a 'slave' of the latter. In the same judgment it is however stated that in another mutt equally well known, Tiruvaduthorai, the surrender of self and wealth is not to the Pandara Sannadhi but to God. It is possible therefore that the relation of the head to the other members might vary in different mutts. In the case of *Giyana Sambandha Pandara Sannadi* v. *Kandasami Thambiran*(1), it was found that "the founders of the mutts at Tiruppanandal and Benares intended that the institutions should exist for ever" and "the rule of decision necessary to give effect to that intention" was then indicated. (See page 505.) From the very nature of the case and the reason of the thing, this must be so with every mutt. And this necessarily implies that each head of the mutt must pass on to his successors, the immovable properties which he received from his predecessor, unencumbered and unalienated.

Next as to the income. The learned Judges consider all the Thambirans initiated by the Pandara Sannadhis of Dharmapuram to form a spiritual family and the Thambirans of Tiruppanandal to form associates or brethren in holiness; and they say that when the usage in reference to succession "is considered in connection with the ordinary rules of succession applicable to spiritual brothers in regard to the property of an ascetic, it is consistent with a well-known principle recognized in spiritual families." (See pages 420, 493, 499 and 504 of the Judgment.) And one of the reasons for

(1) (1887) I.L.R., 10 Mad., 375 at p. 505.

holding that section 539 of the Code of Civil Procedure was not applicable was that the Pandara Sannadhi of Dharmapuram had a vested right, as being the member of a particular brotherhood, to see that the religious and charitable endowments of Tiruppanandal were managed by one entitled to manage them. It seems clear, therefore, that treating them as a spiritual family all the members are entitled to be maintained out of the income; and as such membership is sought for and obtained to attain religious merit, the members are also entitled to receive religious education. All the ceremonies which have been usually performed and may be carried on out of the income, have also to be performed We are not concerned here with the difficulties arising from the insufficiency of the income to meet the needs of a naturally increasing family as the admission of members may be limited with reference to the income or made on the understanding that those members who cannot be provided for out of the income have to seek their livelihood and perform their duties elsewhere. A Sanniyasi is not supposed to possess property for the sake of personal enjoyment but to attain religious merit. Any surplus therefore that remains in the hands of Pandara Sannadhi, he is expected to utilize for the spiritual advancement of himself, his disciples or of the people. But his discretion in this matter is unfettered. He is not accountable to any one and he is not bound to utlize the surplus. He may leave it to accumulate. From the nature of the case he cannot be controlled by the Courts. In such cases there is no trust. Where the trust is clear the Courts will of course enforce it. But the embarrassment and difficulty that would be caused may be taken into consideration in deciding where there is a trust. Though the other members may not be entitled to demand that the surplus funds should be applied to any particular purpose, it may be that they have the power to check any expenditure for purposes entirely repugnant to the character of the institution, if it would diminish the fund out of which they have to be maintained and educated and the necessary expenses, payment of Government revenue, etc., have to be incurred. However it is unnecessary to decide that question.

It was argued that as a Pandara Sannadhi cannot alienate the land and spend the income as he likes, he holds the property on trust. This does not follow. He cannot alienate the land,

not because he holds it for the benefit of the public or any portion of the public or any other persons, but because the mutt is a permanent institution of which he is the head, and he has to pass the property to his successor. As to the income, after the outlay necessary for the purposes above set forth, he cannot be compelled by law to appropriate the surplus for any specific purpose, nor can he be required to spend anything out of it. He may accumulate the entire surplus and leave it to his successor.

Another argument was addressed to us based on the origin of these mattams as set out in *Giyana Sambandha Pandara Sannadhi* v. *Kandasami Thambiran*(1). It is there pointed out that Sankarachariyar and later Madhavachariar and others established mutts to establish and maintain the doctrine and systems of religious philosophy they respectively thought. And the Hindu princes and noblemen made *large presents* to the ascetics who presided over them and were held in great reverence on account of their piety and learning and *endowed the mutts* under their control with grants of land. "Thus" it was there pointed out "a class of endowed mutts came into existence . . . . ." "Thus the ascetic came to own the mattam under his charge and its endowment in trust for the maintenance of the mutt, for his support, that of his disciples and for the performance of the religious and other charities in connection with it according to usage." This is strictly true of the properties given on trust as above pointed out. But if this is taken as an abstract theory of the origin and growth of the mattams applicable to all properties found in the possession of the head of a mutt, then it cannot be accepted as a ground of judicial decision, as such theories may be useful to explain a practice or other proved facts but cannot take the place of evidence which must be adduced to prove any fact which would support any theory of trust. Moreover there is no reason why gifts to the person, gifts to the office, and grants of land for specified objects should stand on the same footing, and as I have pointed out the Pandara Sannadhi may well be a trustee as regards some and not as regards other properties. It is also true in my opinion that he is under a legal obligation to maintain the mutt, to support the disciples and to perform certain ceremonies which are indispensible. That

(1) (1887) I.L.R., 10 Mad., 375 at p. 386.

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will only be a charge on the income in his hands and does not show that the surplus is not at his disposal.

My reply to the reference is that, in the absence of any evidence to the contrary, the Pandara Sannadhi as such is not a trustee. He is also not a life-tenant for the reasons already given.

ORIGINAL CIVIL.

Before Mr. Justice Wallis.

1910. April 12.

A. H. POLLARD (PLAINTIFF),

v.

F. ROUSE (DEFENDANT).*

Minor—Determination of custody of—Contract of apprenticeship by minor, how far enforceable—Injunction against minor for breach of such contract—When Court will take minors from custody of parents or persons selected by them.

A minor may bind himself by a contract of apprenticeship if it be for his benefit; but such a contract cannot be specifically enforced against him either directly or by restraining him from taking service under others or by restraining others from employing him.

DeFrancesco v. *Barnum*, [(1889) 43 Ch.D., 165], referred to.

If the contract is for the benefit of the minor apprentice an action will lie for enticing away such apprentice and to recover his earnings.

Parents and guardians cannot divest themselves of their right of guardian ship by any contract. A delegation of such right is revocable at any time and the parent or guardian is bound to revoke it if it is used to the detriment of the children; and it is open to the Court within whose jurisdiction the children are found to exercise the same power, if cause is shown for such interference.

The jurisdiction of the Courts to take away children from parents or from persons selected by them is a parental one and the Courts must do what a wise parent under the circumstances would or ought to do.

The Queen v. *Gyngull*, [(1893) 2 Q.B.D., 232 at p. 248], referred to.

The main consideration to be acted upon is the benefit or welfare of the child; the welfare of the child means not only its physical but also its moral and religious welfare.

A male child above the age of 14 and a female child above the age of 16 years will not ordinarily be compelled to remain in custody to which he or she objects; and in the case of younger children who are still old enough to form an intelligent preference, their wishes will form one of the elements for consideration.

The Court will remove children from the custody of one from whom cruelty or corruption is apprehended.

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* Civil Suit No. 99 of 1910.

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APPLICATION for interlocutory injunction. The facts of the case are fully set out in the following judgment.

D. M. C. Downing and *Nugent Grant* for defendant.

M. A. Tirunarayanachariar and *S. Gurusawmy Chetty* for plaintiff.

JUDGMENT.—This is an application for an interlocutory injunction in a suit filed by Mr. A. H. Pollard, the Proprietor and Manager of the Lilliputian Opera Company, against Mr. F. H. Rouse, Consulting Engineer residing at Bangalore. The plaintiff's troupe consists of minors under articles of apprenticeship to him, and the suit is brought against the defendant for procuring these apprentices to break their contracts with the plaintiff and removing them from his custody and giving performances by their aid and depriving the plaintiff of their guardianship; and the plaint prays that the minors may be delivered up to the plaintiff and the defendant restrained from giving performances by their aid, and for an account of the defendant's profits, and damages and costs. The interlocutory motion which was supported by affidavits asked for an injunction restraining the defendant from giving any further performances with the aid of the minors and from removing them from this jurisdiction or sending them back to Australia pending the disposal of this suit.

In his counter-affidavit Mr. Rouse deposed that while the plaintiff's troupe was performing at Bangalore he had satisfied himself that there has been cases of gross ill-treatment of the children but gave no specific instances, that he was in Madras on business when the plaintiff came here with his company and that the children then refused to go any further with the plaintiff and the plaintiff consented to abandon the tour and hand them over to the defendant on the defendant undertaking to have their passage money paid back to Australia.

When the case came on on notice and an application was made for leave to file reply affidavits, I pointed out that the affidavits filed by the defendant did not disclose any answer to the motion, as, assuming the plaintiff had consented to the removal of the minors by the defendant, he could not by such consent disentitle himself to their custody, and that good cause must be shown for depriving him of it. On this, the defendant filed further affidavits which contain specific allegations tending to show that the plaintiff was not a fit and proper person to be entrusted with the

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custody of the children and the plaintiff filed counter-affidavits denying the allegations against him. In view of the seriousness of the allegations and the necessity of deciding promptly as to the custody of the minors, I allowed the various deponents to be cross-examined on their affidavits and further evidence to be given; and I have now to give my decision on this evidence and the legal contentions which have been raised before me.

Before coming to the facts it will be convenient to deal with the legal considerations that arise. On the present motion, the questions appear to me to be one between the plaintiff on the one hand, and the children and those responsible for them on the other, as the defendant has no personal interest in the children or their services and no right to their custody, and in whatever he has done has been acting on their behalf and in what he conceived to be their interests, and his object is to send the children back as speedily as possible to their parents and natural guardians in Australia. This was admitted at the hearing, and it was agreed that the proceedings should be treated as on *habeas corpus* under section 491, Criminal Procedure Code, for the purpose of determining the custody of the children, but no formal proceedings have been taken under that section, and it is not clear that the matter cannot be disposed of satisfactorily on the motion as it stands.

In the first place I propose to deal with the plaintiff's right in respect of the children considered as his apprentices. It is well settled that a minor may bind himself by a contract of apprenticeship if it be for his benefit, but it is also settled that no action will lie against him for failing to serve as such, and that if such a remedy is desired, it is necessary to get a covenant from the guardian on which the guardian himself can be made liable. It is also settled that the contract of apprenticeship is one which cannot be specifically enforced against the apprentice either directly or by restraining him from taking service under others, or others from employing him *DeFrancesco* v. *Barnum*(1). In that case the plaintiff, a dancing master, had entered into a seven years' contract with two minors to instruct them "in the higher branches of the chorographic art," and the minors in breach of their contract had accepted engagements under *Barnum*, the well-known showman and another to appear as dancers at *Olympia* in

(1) (1889) 43 Ch.D., 165.

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London. It was then held that no interlocutory injunction could be granted either against the apprentices or against *Barnum* and subsequently at the trial of the action all claim for an injunction was abandoned, and it was contended that on the authorities a master was entitled to maintain an action for enticing away his apprentices and also to recover their earnings *DeFrancesco* v. *Barnum*(1). This was not denied, provided the contract was beneficial to the minors but the Court held that it was not beneficial and dismissed the suit. Mr. Grant has argued that these contracts should be held void for similar reasons. Both contracts no doubt enable the master to take the apprentices out of the jurisdiction in which they were made and all over the world, but there are material differences, and I am not prepared at present to hold at any rate at this stage and in the absence of further evidence that these contracts are void as not beneficial to the minors. It is in evidence that it is more than thirty years since Mr. Pollard's father first started a touring company of Australian children and toured with them in the East, and members of the family have been conducting such tours ever since almost continuously both in the East and in America. In these circumstances, I am not prepared at this stage in the absence of further evidence to say that such tours must necessarily be injurious to the children engaged in them and that these contracts are therefore void. I am anxious however not to be understood as expressing any opinion in favour of theatrical companies of Australian children touring in the East. On the contrary, I think it would be much better for them to get their theatrical training elsewhere.

The result of the authorities would appear to be Mr. Pollard as master has no legal right to the injunction prayed for either as against his apprentices or against Mr. Rouse. At the same time the fact that Mr. Pollard has lawful contracts of apprenticeship with the children is, I think, a factor of which the Court is bound to take account in considering his further claim based on the fact, that under the contracts which are signed by their parents and natural guardians, the children have been placed exclusively "under the care and parental control" of the plaintiff. It is hardly necessary to say that parents and guardians cannot divest

(1) (1889) 43 Ch.D., 430.

themselves of their rights as such by any contract. This delegation of parental authority to the plaintiff is revocable at any time, and it is the duty of the parents and guardians to revoke it if used to the detriment of the children. And it is also open to the Court within whose jurisdiction the children are found to revoke it at any time, if sufficient cause be shown for interference. Ordinarily, no doubt, the Court will be very slow to interfere with parents or the arrangements made by parents for the custody and education of their children, but it will deprive them of such custody if it be absolutely necessary in the interests of the children, and, *a fortiori*, it will for similar reasons take the children out of the custody of persons selected by the parents, especially when the parents have put it out of their power to interfere themselves for the protection of their children by sending them touring round the world in the custody of strangers As observed by Kay, L.J., in *The Queen* v. *Gyngull*(1), one of the most recent and authoritative cases, the jurisdiction of the Court in cases like this "is essentially a parental jurisdiction and that description of it involves that the main consideration to be acted upon in its exercise is the benefit or welfare of the child. Again, the term 'welfare' in this connection must be read in the largest possible sense, that is to say, as meaning that every circumstance must be taken into consideration and the Court must do what under the circumstances a wise parent acting for the true interests of the child would or ought to do. It is impossible to give a closer definition of the duty of the Court in the exercise of this jurisdiction." The term 'welfare' is also explained by Lindlay, L.J. in *In re McGrath*(2), where he says, "The welfare of the child is not to be measured by money only, or by physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded." Long before this in *The King* v. *Greenhill*(3), it was laid down that if, in the language of Coleridge, J., "it be shown that cruelty or corruption is to be apprehended from the father," the Court would deprive him of the custody of his children. See also *In re G.*(4), where a mother was held unfit to have the custody of her children on the ground

(1) (1893) 2 Q.B.D., 232 at p. 248.
(2) (1893) 1 Ch., 143 at p. 148.
(3) (1836) 4 A.& E., 624 at p. 643.
(4) (1899) 1 Ch., 719.

that she was living in open adultery with a married man in the home in which she was bringing up the children. Lastly, it is well established that the Court will not ordinarily force a minor of more than 14 if a boy, and of more than 16, if a girl, to remain in a custody to which he or she objects, and that before deciding as to the custody of younger children who are still old enough to form an intelligent preference, it will take account of their wishes as one element in the case. The provisions of the Guardian and Wards Act (see sections 11 and 17) show that the same principles are applicable in India.

Coming now to the acts of cruelty and misconduct imputed to Mr. Pollard in the course of the tour from the time when the company left Melbourne in July 1909 until it broke up in Madras on February the 18th owing to the refusal of the children, with the support of the defendant and other sympathisers, to proceed any further, I may say at the outset that I attach great weight to the evidence, so far as it goes, of Miss Thom, who was in charge of the girls on this as on previous trips and of Mr. Counsell who was also on the previous trip and among his varied functions had a good deal to do with looking after the boys. Both speak to acts which are said to amount to cruelty, and Miss Thom also speaks to facts showing the existence of an improper intimacy between Mr. Pollard and the girl Irene Finlay, a member of the troupe now eighteen years of age, who has been in the Company since 1900. The manner in which these witnesses gave their evidence impressed me favourably. There does not appear to be any ground for suggesting that they are prejudiced and their evidence appears to be opposed to their own interests, as the breaking up of the Company means to them the loss of well paid employment. Here I may say, I am unable to accept the evidence of Mr. Shrouts, Mr. Pollard's advance agent, that Miss Thom and Mr. Counsell made previous statements to him or in his presence inconsistent with their present evidence. No such suggestion was made to Miss Thom whilst under examination. Mr. Counsell on the other hand denied the suggested statement when put to him and I see no reason to disbelieve him. Taking the alleged acts of cruelty in the order of date, the first is said to have occurred at D'Jockshe in Java about the beginning of August, when the plaintiff, after finding fault with some of the girls for playing in the afternoon during lying down hours, is said to have overheard the girl Millie

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McGorlick a girl of 17 say "Does he think we are pigs?" and to have got into a passion, and hit her with his fist and knocked her down and kicked her when on the ground. The evidence of Millie McGorlick to this effect is corroborated by Dora Isaacs, a girl of about the same age. Mr. Pollard's story is that he was obliged to take the punishment of this girl into his own hands as she was too much for Miss Thom and had once kicked her in the stomach, and that he only boxed her ears. The girl admits having kicked Miss Thom but says it was accidental. Making every allowance for exaggeration, I think it is shown that Mr. Pollard lost his temper and used excessive violence on this occasion. It is significant that at Penang, one of the next places they stopped at, the girl made an unsuccessful effort to escape and get back to Australia, and that ill-treatment at the hands of the plaintiff was the reason she gave for running away. The next incident happened at Kuaralampa in the Federated States, when Mr. Pollard had occasion to find fault with one of the girls for taking the younger girls out without leave into the jungle and afterwards going for a ride in the motor-car with a stranger. According to Miss Thom, the girl did not answer when taxed with this, and the plaintiff then struck her on the forehead with a walking stick inflicting a wound over the eye which bled freely and also several times about the body and broke the stick. Mr. Counsell, who examined the girl on the same night, says that the bruise was a very severe one and bled freely; and they both state that the scar was visible for four or five weeks until she went back to Australia, and that it was not likely to go away for three or four months. Mr. Counsell also speaks to treating John Heintz, a boy of 14, at Penang for a cut over the eye which the boy said had been caused by a blow with the buckle end of a strap inflicted by Mr. Pollard, and says that he mentioned this at the time to Mr. Pollard who did not then deny it. Mr. Pollard says he does not remember beating the boy with a strap and his case is that the boy was treated for a boil. I am unable to accept his version.

Then at Calcutta, Mr. Counsell says that he found Ivy Fergurson one afternoon suffering from fever with a temperature of 102° to 103° and that in the evening she was still feverish and he told Mr. Pollard that she was unfit to go on and might collapse at any time if she did so, but that the plaintiff insisted on her going on, with the result that at the end of the performance she

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was in a state of collapse and unable to walk. He is corroborated by the girl who says that after the performance Miss Thom took her home in a gharry. Mr. Pollard on the other hand says that both Mr. Counsell and the girl herself said she was fit to go on as her part (that of *La Poupee* in the opera of that name) was a light one. There is no doubt that in general Mr. Pollard treated this little girl whom he described as the cleverest of his troupe but very delicate, with care and kindness, but I see no reason to disbelieve Mr. Counsell's account of what happened. The next incident occurred outside Watson's Hotel at Bombay one evening on the way to the theatre, when Mr. Pollard hit Violet Jones, a girl of nearly sixteen, on the calf of the leg with his stick for answering back when he found fault with her for speaking to a jockey and his wife at the hotel against the rules. Mr. Counsell says she screamed and Miss Thom says the blow was a severe one; both say it left a big bruise four inches long which lasted for a week. Mr. Pollard says he merely tapped her with his stick, but I am unable to believe him; and I need hardly remark on the gross impropriety of beating a girl of this age in the open street until she screamed. Violet Jones also states in her affidavit that at Bangaloro the plaintiff found her in bed at 9-30 A.M. and made her get up and followed her into the bath-room where he hit her on the head and "bashed" her head several times against the wall raising a big lump on the side of her head. She is not corroborated as to this, and by some oversight was not cross-examined about it.

This is denied by Mr. Pollard who asserts that the limit of chastisement was, "spanking" in the case of boys and boxing the ears in the case of girls, and that he was driven to undertake the correction of the bigger girls himself because Miss Thom was unable to cope with them. Violet Jones also gave a statement to Mr. Bewes, the attorney, on behalf of the S.P.C.C. on February 15th at the Castle Hotel and Mr. Pollard admits that on finding this out he told her he had spared her in the past but would not do so in the future, and that he would cut her hair off, but he denies having told her that he would make her life a hell upon earth in consequence.

On this part of the case, speaking generally, I find that on several occasions Mr. Pollard lost control over himself and subjected the children to cruel and unjustifiable violence and I think the children will occasionally be exposed to similar treatment in future,

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if they are restored to his care. I also find that in Calcutta he insisted on Ivy Fergurson going on when she was not in a fit state to do so.

Next, as to the improper intimacy between the plaintiff and the girl Irene, a member of his troupe, I find that it is fully proved apart altogether from the evidence of the children to which I shall refer later. Miss Thom deposes that she constantly saw the girl in his bed-room in her night dress both at night and in the day time—from the other evidence, I gather that she generally wore a kimono as well—and that she constantly used to sleep in the afternoons in the plaintiff's bed-room with the plaintiff. The girl's own sister Mrs. Queely who was also employed with her husband on the tour and appears to be a truthful witness and gave her evidence with great pain and reluctance, says she discovered these relations in the flat they were staying in at Melbourne before they started, and the plaintiff then admitted them and said that they had been going on for 12 months, which points to his having seduced the girl on the previous trip, and that he would have nothing to do with her on this trip and that he would divorce his wife and marry her when they got to America. Miss Thom says she observed what was going on as soon as they left Australia on the "*Grachus*" and that she spoke to Mrs. Queely who said she could do nothing. In Madras Mr. Frost, the proprietor of the Castle Hotel, speaks to an act of familiarity which indicated the relations between the parties; and Mr. Sinclair who occupied the room between the plaintiff's and the room occupied by the girl Irene, and who slept on the verandah in view of the door of Mr. Pollard's room, tells us that supper used to be brought to them in the plaintiff's room every night, after the rest of the Company had retired, that the door was shut and that Irene remained with the plaintiff for 20 minutes to an hour. There is also evidence as to what passed there on the night of the 15th February to which I do not advert, because on that night it appears capable of an innocent explanation. I may observe further that the girl Irene admits that she was in the habit of going to Mr. Pollard's room every night after the theatre, though she says the boy Leslie Donaghy was always there, and some of the children also speak to her presence there. Mr. Pollard on the other hand said that boy always went, but said nothing about her being there too. Lastly, there is the fact that after the 16th February the girl Irene left

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the rest of the troupe and went to live with the plaintiff at the Elphinstone Hotel under conditions which are in evidence and accompanied only by the boy Donaghy whose presence cannot be a sufficient protection to her.

To come now to the evidence of the girls. Ruby Ford and Millie Mc.Gorlick, both seventeen, corroborate Miss Thom generally as to the girl's spending the afternoon in Mr. Pollard's room and both speak to seeing her lying down with him. Miss Thom's statement that the plaintiff always travelled in India in the same railway carriage as Irene, Violet Jones and other girls is admitted to be true, and Violet Jones tells us what she constantly observed on those journeys. Her statement is uncorroborated but seeing the relations which existed, I fear it is only too likely to be true. We have also the evidence of three smaller girls aged 14, 13 and 12, who at different times, occupied the same room as Irene in the hotels where they stayed. Experience shows that evidence such as this coming from young girls of this age requires to be carefully sifted and must be accepted with great caution. The first of these girls speaks to an incident which happened at Surabia at the beginning of the trip, but as she admits that she did not mention it to any one until after the breaking up of the company on the 16th February, it is not, I think, a statement on which I ought to act. The other two speak to incidents at Bombay, Poona and Bangalore. The incidents at Bombay and Poona are such as may well have happened, but the story they tell is not devoid of improbabilities in some respects and I hesitate to accept their allegations as satisfactorily proved. At Bangalore, they speak of impropriety to one of themselves while the plaintiff appeared to be under the influence of drink, but their stories are not at all consistent. It appears exceedingly improbable that anything of the sort should have taken place in the girl Irene's presence, and I am quite clear that their evidence as to this cannot safely be acted on.

It is further charged against the plaintiff that he has broken his contract to educate the children and give them such teachings at such convenient times as the conduct of the business would permit. The evidence is that he directed Ruby Ford, one of the elder girls to call herself school mistress and advertised her as such, and stated to the press that she was a salaried officer of the Australian Government, but it is clearly proved that she was merely

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one of the girls, and that the children received no education whatever, except in the parts they had to play. Then as to the wishes of the children the revolt against the plaintiff's authority seems to have come to a head at Bangalore, as shown by the fact that a petition was signed and sent to the Chief Presidency Magistrate of Madras. It does not appear that this was brought about by the exercise of any sinister influence by Mr. Rouse or any one else, and I think the facts which I have already found, sufficiently explain it. Further, apart for the question of demoralization which I shall come to, there can be no doubt that the plaintiff's relations with the girl Irene impaired the respect and authority in which the plaintiff was held by the other members of the troupe, and that the exceptional position accorded to her as to which there is abundance of evidence, caused much heart burning especially among the elder girls. As regards the girls over 16 and boys over 14, it is now conceded, in accordance with the principles I have explained, that the Court cannot in the present case force them to return to the plaintiff against their will. Then as to the other children, is the Court to restore them to the plaintiff against their wishes, or is it justified in depriving him of their control and send them back to their parents and guardians in Australia as it is in a position to do, owing to the exertions of the defendant, Mr. Rouse, and the gentlemen who have acted with him? Now, as already observed, the Court will deprive even a father of the control of his children if, in the language of Coleridge, J., already quoted "there be a danger of cruelty or corruption to the children." As regards cruelty, I am of opinion in the light of evidence, that there would be some danger of cruelty to the children in the event of their being restored to the plaintiff. As regards corruption the case is even stronger. The plaintiff, a married man, has seduced a minor belonging to the troupe and during the whole of the trips while she was under his care and parental control has lived with her in clandestine adultery though leaving her nominally on the same footing as the other girls. The example to the other children was as bad as if he had been living openly with her as his mistress, as the true nature of their relations can hardly have been a secret from any one, and the risk of contamination was in my opinion considerably greater. That this risk is no imaginary one, appears from the evidence on this point of the children themselves, which it is no doubt

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difficult to sift, but which I by no means dismiss as altogether unfounded.

In these circumstances it seems to me that it would be not only the right, but the duty of a wise parent acting for the true interests of the children to withdraw them from the plaintiff's custody. This is also the standard to which, as already pointed out, the Court is bound to conform as far as it can, and subject of course to the possibility of making suitable provision for the future custody of the children. On the facts which have been proved, I have no hesitation in holding that the plaintiff by his conduct has disentitled himself to the custody of these children, and that the present motion must be dismissed with taxed costs, the defendant Mr. Rouse undertaking to send them back to Australia before the 23rd instant in the charge of Mr. Counsell and Miss Thom.

Messrs. *Short & Bews*—attorneys for defendant.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Abdur Rahim.

1909. August 16. September 29.

THE OFFICIAL ASSIGNEE OF MADRAS AND AS SUCH THE ASSIGNEE OF THE PROPERTY AND CREDITS OF ARBUTHNOT AND COMPANY, INSOLVENT DEBTORS (APPELLANT),

v.

D. RAJAM AIYAR (RESPONDENT).*

Banker, payment to, with instructions as to disposal, effect of.

When *A* paid money into a bank with instructions to pay over the same to *B* who had no account with the bank and the bank wrote to *B* stating that they had received the money and held the same in suspense account pending instructions from *B*, held:—

Per MUNRO, J.—That the bank became the debtor of *B* in respect of such money.

Per ABDUR RAHIM, J.—That the relationship between the bank and *B* was not that of debtor and creditor and that the bank held the money in a fiduciary capacity as bailee or agent.

Official Assignee of Madras v. *Smith*, [(1909) I.L.R., 32 Mad., 68], dissented from.

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* Original Side Appeal No. 26 of 1908.

MUNRO AND ABDUR RAHIM, JJ.

OFFICIAL ASSIGNEE OF MADRAS v. RAJAM AIYAR.

APPEAL from the order and judgment of Sir Arnold White, Chief Justice, in the exercise of the jurisdiction of this Court for the Relief of Insolvent Debtors at Madras in Petition No. 181 of 1906.

The facts are stated in the judgment.

D. M. C. Downing for appellant.

The respondent was not represented.

JUDGMENT (MUNRO, J.).—This case cannot be distinguished on the facts from *Official Assignee of Madras* v. *Smith*(1). I would therefore set aside the order of the learned Commissioner and dismiss the application with taxed costs throughout.

As my learned brother takes the opposite view the appeal is dismissed.

ABDUR RAHIM, J.—The facts of the case are that the cashier of the Madras Railway Company paid into Arbuthnot and Company's bank a sum of Rs. 461-3-5 to be paid to Mr. D. Rajam Aiyar who had no account with the bank. Arbuthnot and Company thereupon wrote to Rajam Aiyar the following letter :—

"Dear Sir, We have the pleasure to advise you of our having received the sum of Rs. 461-3-5 on your account from the cashier, Madras Railway Company, which we hold in suspense pending receipt of your instructions as to disposal of the same. Should you wish to open an account with us, please fill in, sign and return to us the slip attached to the enclosed memo. of our banking terms.

We are, Dear Sir, etc., etc."

Before D. Rajam Aiyar gave any instructions in reply to their letter, Arbuthnot and Company became bankrupt. Upon these facts I would, having regard to what I have already said, hold that Arbuthnot and Company held the money from Rajam Aiyar as trustees. They could not open an account with respect to this money until they received instructions to that effect from Rajam Aiyar and so they held it "in suspense" till then. No evidence has been taken in this case as to what the phrase holding money "in suspense" means as used among bankers. But apparently the parties did not think that the meaning of the expression which is an expression in common use in banking business in this country admitted of any dispute. As admitted at the bar the person whose money is held in suspense is entitled to withdraw it any moment he likes; he neither gets a pass book nor is entitled

(1) (1909) I.L.R., 32 Mad., 68.

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to draw any cheques or to be paid interest in respect of the amount. In short that money is not held either in current or deposit account. The inference therefore clearly is that a banker holding money of a person "in suspense" does not treat it like an ordinary customer's money and the general rule that a banker is entitled to use his customer's money because it is money really advanced to him cannot apply to such money. In *Great Western Railway* v. *London and County Banking Company*(1). Lord Davy lays down that "there must be some sort of account, either a deposit or a current account or some similar relation, to make a man a customer of a bank." That shows that if a person who does not stand in the relation of a customer pays money to a banker he does not become by that fact alone without anything more a customer of the bank. A banker as is well known often acts as bailee or factor and why should it be presumed that money paid to or held by a banker pending instructions was intended to be appropriated by the banker as his own money when there is no previous course of dealings between the parties to raise such a presumption. In such a case there is no reason why the law should treat the banker on a different footing from any other person into whose custody property belonging to another person has come in a lawful way but without his having acquired a right to it. In those circumstances the law regards the custodian of the property as a quasi-trustee standing in fiduciary relations towards the owner of the property and is there any authority for saying that bankers are exempted from the application of such a well-established doctrine of equity? I think not. I am however confronted with a recent decision of this Court in Smith's case arising out of this very insolvency where a contrary view has been taken (see *Official Assignee of Madras* v. *Smith*(2).

In that case, the facts of which, it must be admitted, were very similar to those of the present, Benson and Wallis, JJ., lay down broadly that money placed with a banker whether by a customer or by a person who has had no previous dealings with the banker, without any specific instructions as to its application at once becomes money of the banker. The learned Judges rely in support of that proposition on *Foley* v. *Hill*(3) and on certain passages

(1) (1901) A.C., 414. (2) (1909) I.L.R., 32 Mad., 68.
(3) (1848) 2 H.L., 28.

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which they cite from the judgments in *Slechi's case*(1) and *Burdick* v. *Gavrick*(2). But the rule laid down in these cases is with express reference to money paid into a bank by a customer and the general observations are clearly not intended to extend to payments by persons who are not customers. The foundation of the common law rule relating to dealings between a banker and his customers is, as I understand it, a contract which the law implies to the effect that the banker shall be entitled to treat money lodged with him in account as a loan made to him so that he may use it in any way he chooses for purposes of profit because this is essential to all banking business and were it otherwise no banking business could be carried on in the way it ordinarily is. And this, a person who becomes a customer of a bank is supposed by the law to know and to agree to. But the basis of the rule is gone if the customer paying in a sum of money directs it to be applied in a particular manner. In that case if the banker accepts the money he must hold it as agent or bailee just as if he was not a banker at all. In the case of a stranger who places money in the hands of a banker there being no reason for inferring that he made the payment by way of a loan to the banker, there seems to be no reason why in the absence of any instructions as to how it is to be applied it must be taken that he authorized the banker to treat the money as his own and not that he was to hold it as trustee, or as *quasi*-trustee for the use of the payer or as agent or bailee for some purpose to be named by him. The proper enquiry with respect to money paid to a banker by a person who is not a customer for the purpose of ascertaining whether the banker held the money in a fiduciary capacity or not, is not whether the payer gave any specific instructions as to the manner in which the money is to be disposed of, but whether there is anything to show what the understanding between the parties was, whether the banker was to treat the money in the same way as his ordinary customers' money or hold it either as bailee or agent or as trustee for the payer's use. I may observe that the case must be rare in which a banker should receive a stranger's money without something to indicate how he was to treat the money. However that may be, as in this case and also in Smith's case it appears that Arbuthnot and Company held the money in

(1) 1 Merivale, 530.

(2) (1870) 5 Ch. App., 233.

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suspense pending further instructions, in expectation that the person for whom they so held the money would either become their customer or instruct them as to how else they were to dispose of the money, the intention of the parties was perfectly clear that Arbuthnot and Company were not to acquire a right to the money turning themselves into mere debtors of the payer. Then the only other alternative, as I have already pointed out, is that they held the money in a fiduciary character for the person entitled to it and the money must be regarded as kept apart from the general funds of the bank. It may be that in common practice such moneys are mixed up by the banker with his own funds just in the same way as he customarily mixes up moneys received by him as an Agent for a specific purpose as pointed out by Cave, J., in *In re Brown Ex parte Plitt*(1). Such mixing may be technically a breach of trust as pointed out by Branwell, L.J., in *Ex parte Kelly & Co.*(2) or it may not be a breach of trust at all so long as there are sufficient funds in the bank to cover the amount as suggested by Cave, J., in the above case. But the real test of the right to follow is not whether the sum in question has been rightfully or wrongfully mixed with other moneys, but whether the banker was authorized or not to use the sum in question for his own purposes. If he was not, then all his drawings from the mixed fund will be attributed to moneys which he was entitled to use and not to moneys which he was not entitled to use. With the utmost deference therefore to the learned Judges who decided Smith's case I am unable to take the same view of the law on this point and in my opinion D. Rajam Aiyar is entitled to recover his money as held by the learned Commissioner and I would dismiss the Official Assignee's appeal.

Messrs. *King* & *Josselyn*—attorneys for appellant.

A Letters Patent Appeal No. 143 of 1909 against the above judgment was preferred with the result that the judgment of the learned Commissioner was affirmed. ED.

(1) 60 L.J.N.S., 397.

(2) (1879) 11 Ch.D., 306.

APPELLATE CIVIL.

Before Sir R. S. Benson, Officiating Chief Justice and Mr. Justice Krishnaswami Ayyar.

1909. October 20, 21.

RAJAMMAL (PLAINTIFF), APPELLANT,

v.

AUTHIAMMAL *alias* AUTHI LAKSHMIAMMAL AND OTHERS (DEFENDANTS), RESPONDENTS.*

Construction of document—Test to determine whether document is testamentary—No will when there is no power to revoke.

One of the invariable tests in coming to a conclusion as to the testamentary character of a paper is whether the paper is revocable. If it is not revocable, the document is not a will.

The fact that the paper is drawn in the form of an agreement and that it is registered, are circumstances to be taken into consideration, though they do not *per se* amount to much.

Where the document contains provisions which are not of an ambulatory character, the presumption will be against the testamentary nature of the document and the fact that such provisions are expressed to operate in the future will not affect the nature of the document.

The intention of the party will be given effect to, though it is expressed in inappropriate language.

The reservation of a life interest does not of itself suffice to make the document testamentary.

In the matter of "Reference by the Collector and Superintendent of Stamps, Bombay," [(1896) I.L.R., 20, Bom., 210 at p. 214], referred to.

In the goods of Robinson, [(1867) L.R.I.P. & D., 384], referred to.

SECOND APPEAL against the decree of V. Venugopaul Chetti, District Judge of Chingleput, in Appeal Suit No. 10 of 1906, presented against the decree of E. J. S. White, District Munsif of Poonamallee, in Original Suit No. 144 of 1905.

The material facts are thus stated in the judgment of the lower Appellate Court which is as follows :—

JUDGMENT.—This was a suit on a document purporting to be a maintenance deed. The District Munsif held it to be a will and dismissed the suit as no probate was produced.

The sole question for consideration is whether the document (exhibit A) is a will or a deed of settlement.

* Second Appeal No. 171 of 1907.

BENSON, OFFG. C.J., AND KRISHNASWAMI AYYAR, J.

RAJAMMAL *v.* AUTHIAMMAL.

It has been written on a 15-rupee stamp paper and is styled a deed of settlement. It was also registered as such. But the form of the document is immaterial in determining the main issue.

The document recites that the executant will transfer the pattas nominally to the plaintiff and the first defendant, that he will give them Rs. 5 each during his life-time and will enjoy the lands himself. After his death, the document adds, the plaintiff and the first defendant will have full right to the property.

Taking the document as a whole, I have no doubt it is a will. It does not vest the property in question in the plaintiff and the first defendant at once. It distinctly says that the transfer of the patta is only nominal and that during the executant's life-time he has the sole ownership thereof. He does not constitute himself a trustee or manager of the property nor does he say that he has only a life-interest. It is true that he says that he executes the document to see that harmonious relations exist between himself and the other parties during the closing years of his life. This was the motive for his executing the document, but it does not show that he intended that it should begin to operate till after his death.

The case is clearly distinguishable from that reported in 20 Bombay, page 210, when the vesting of property took place at once. My attention has also been drawn to 21 Madras, 422, and 12 Madras, 491 and 10 Calcutta, 792.

In my opinion the document was of a testamentary character. The promised payment of Rs. 5 and the fact that it was executed to secure harmony of feeling at once do not make it a deed of settlement as the executants specifically laid down that ownership should vest in the persons in whose favour it was executed (plaintiff and first defendant) only after his death.

The Munsif's view is correct and the appeal is dismissed with costs.

The material portion of exhibit A the construction of which was in question was as follows :—

"I shall transfer the patta of the lands and the salt-pan hereunder described in the name of you both nominally and give you Rs. 5 each every month till I die, and after my death you shall not only have the rights I have in the said lands and salt-pan, but also the profits accruing therefrom in proportionate shares after paying the Sirkar kists in moieties, and I shall dispose of the dwelling

house which stands nominally in the name of my wife, and after paying out of the sale-proceeds the money due to Vasa Baliah Chetti, I shall pay the balance towards the debt of Rs. 1,650, and I shall clear the remaining debt out of the pension I get every month, and these properties are not liable to the debt which I may hereafter incur, and I shall take back from Rajammal the jewel *Vairumani* I have given her and give it to my wife Authilatchmi Ammal after giving Rajammal jewels worth Rs. 400. I execute this document so that there may be amicability among ourselves at the close of my days. I shall enjoy the lands and the salt-pan though the pattas for them are made in the name of you both. The salt-pan will be sold."

Plaintiff appealed to the High Court.

A. Krishnaswami Ayyar for *P. R. Sundara Aiyar* for appellant.

The respondent was not represented.

JUDGMENT.—The question in this case is whether the instrument (exhibit A) is a settlement or a will. In form it purports to be an agreement executed by Nilakanta Pillai to his wife and his son's widow. This is a circumstance to be taken into account although as observed in *Rambhat* v. *Lakshman Chintaman Mayalay*(1), "this, *per se*, is not much." It has been registered as a settlement. In *Marjoribanks* v. *Hovenden*(2), as observed by Jarman "the fact of registration as a deed appears to have been deemed almost conclusive against its testamentary character." (See Jarman on "Wills," 5th Edn., Vol. 1, page 22.) Without giving the same effect to registration in this country, it is at least permissible to hold that that is also a circumstance to be taken into account. Going to the provisions of the instrument it is to be observed that there is no reservation of a power of revocation. It may be doubted whether the same importance should be attached here to the absence of a power of revocation as in England where testamentary instruments are generally drawn by solicitors. (See, however, *Jeffries* v. *Alexander*(3).) The author of the instrument promises to transfer the patta for the lands and the license for the salt-pans to the names of his wife and his son's widow. He provides for the kist of the lands

(1) (1881) I.L.R., 5 Bom., 630 at p. 636. (2) (1843) 1 Dru., 11.
(3) 11 E.R., 562 at p. 581.

being paid and the materials for the salt pans being supplied by both. He makes a gift of jewels to his wife and his son's widow or promises to do so. Above all he declares that his future debts shall not be binding on the properties. None of these can be said to be provisions of an ambulatory character. The fact that some of these are expressed to operate in the future cannot affect the character of the instrument as a settlement. As observed by Kekewich, J., in *Johnston* v. *Mappin*(1), "There is no magic in the use of the future tense which is frequently employed to express a present contract, and if on the construction of the whole instrument the true conclusion is that a present complete settlement was intended, ... then I take it the intention must prevail, notwithstanding it be expressed in inappropriate language." The only problem is whether the instrument partakes of a testamentary character by reason of the following clause, "after my life-time, both of you shall not only get the right due to me in the said lands and the said salt pans, but shall also divide and enjoy in equal shares the income derived therefrom." As observed by Sargent, C.J., in the case referred by the Collector and Superintendent of Stamps(2), "Even the reservation of a life estate by the settlement does not render the instrument less a settlement." It is provided in Exhibit A that Rs. 5 a head shall be paid during the period of the settler's life-time, apparently out of the profits of the property. It was observed by Sir J. R. Wilde in "*In the goods of Robinson*"(3). "The first difficulty that arises is, that the Court is asked to deal with a portion only of a document, and declare it to be testamentary. I have met with no case where that has been done, although I by no means say that it could not be done." These remarks appear to us to be applicable to the present case in which there are clear provisions having an immediate operation. One of the invariable tests in coming to a conclusion as to the testamentary character of a paper is whether the paper is revocable. We are satisfied that Exhibit A is not. The decision in *Lakshmi* v. *Subramanya*(4) has no application. There the governing words with which the instrument begins are "what should be done by my adopted son and my wife after my life-time." In *Thakur Ishri*

(1) (1841) 64 L. Tis., 49 at p. 51. (2) (1896) I.L.R., 20 Bom., 210 at p. 214.
(3) (1867) L.R., 1 P. & Di., 384 at p. 386. (4) (1889) I.L.R., 12 Mad., 490.

BENSON, OFFG. C.J., KRISHNA-SWAMI AYYAR, J.

RAJAMMAL v. AUTHIAMMAL.

Singh v. *Thakur Baldes Singh*(1), their Lordships of the Judicial Committee set out at page 800 the indicia of a will in that case. This case does not apply either. We must reverse the decrees of the Courts below and remand the case to the District Munsif for disposal according to law. Costs will be provided for in the revised decree.

APPELLATE CIVIL.

Before Sir Ralph S. Benson, Officiating Chief Justice, and Mr. Justice Krishnaswami Ayyar.

1909. October 18, 27.

SUBRAMANIA AIYAR (PLAINTIFF), APPELLANT,

v.

GOPALA AIYAR AND OTHERS (DEFENDANTS), RESPONDENTS.*

Hindu Law—Son not liable for father's debt when barred—Indian Contract Act, ss. 134, 151—Surety not discharged if claim against principal debtor allowed to become barred—Limitation Act, sch. II, art. 98.

Undivided family property devolving on the son by survivorship is not 'the general estate' of the father within the meaning of article 98 of schedule II, Indian Limitation Act, and a suit to recover from the son out of such estate the loss occasioned by his father's breach of trust is not governed by article 98.

A son is not, under the Hindu Law, liable to pay a debt of the father which was barred against him.

A debt, the recovery of which is barred by limitation, is not extinguished and the debtor is not, by reason of the bar of limitation, discharged therefrom.

The omission of the creditor to sue the debtor within the period of limitation is not an act, the legal consequence of which is the discharge of the debtor and such omission has not the effect of discharging the surety under sections 134 and 137 of the Indian Contract Act.

Carter v. *White*, [(1883) 25 Ch. D., 666], referred to.

Ranjit Singh v. *Naubat*, [(1902) I.L.R., 24 All., 504], dissented from.

SECOND APPEAL against the decree of V. Subramaniyam Pantulu, Subordinate Judge of Tanjore, in Appeal Suit No. 1234 of 1905, presented against the decree of J. Sundaranana Rao, District Munsif of Tiruturaipundi, in Original Suit No. 136 of 1904.

(1) (1884) I.L.R., 10 Calc., 702.

* Second Appeal No. 581 of 1906.

BENSON, OFFG. C.J., AND KRISHNA-SWAMI AYYAR, J.

SUBRAMANIA AIYAR v. GOPALA AIYAR.

The facts of this case are sufficiently set out in the judgment.

G. S. Ramachandra Ayyar for *T. R. Ramachandra Ayyar* and *T. R. Krishnaswami Ayyar* for appellant.

T. R. Venkatarama Sastri for The Hon. the Advocate-General for Nos. 1, 3 to 11 respondents.

JUDGMENT.—The suit was instituted by the plaintiff as trustee of a temple for recovery of a certain sum of money which represented the rents due to the temple uncollected by the father of the defendants Nos. 1, 2 and 3, who was the preceding trustee.

The father having died in August-September 1901, the sons were impleaded as liable as well as the representatives of certain sureties for the proper management of the temple affairs by the father. The suit has been dismissed as barred by limitation. As regards the sons, article 98 of the Indian Limitation Act, XV of 1877, is sought to be made applicable. It runs as follows:—"To make good out of the general estate of a deceased trustee the loss occasioned by a breach of trust." The property that is sought to be made liable being the joint family property of the father and sons which passes by survivorship to the sons on the death of the father we do not think it forms "the general estate" of the deceased trustee within the meaning of the article. The sons are sued on the ground of the peculiar liability of the sons under the Hindu Law to pay the father's debts. It is unnecessary to determine which article applies in the case of a suit to enforce the liability of the sons to pay the debts of the father. (See however *Periyasami Mudaliar* v. *Seetharama Chettiar* (1).) For, the sons are clearly not liable to pay a debt of the father which was barred against him. The suit is based on the ground that the rents were lost to the temple because the father had allowed them to become barred. Otherwise there would be no liability at all of the father or his sons. The suit against the father being barred under article 36 of the Limitation Act, XV of 1877 (see *Srinivasa Aiyangar* v. *Municipal Council of Karur*(2)), no suit can lie against the sons.

The next question is—are the sureties liable? The determination of this question depends upon the construction of sections 134 and 137 of the Indian Contract Act, IX of 1872, section 134

(1) (1904) I.L.R., 27 Mad., 243, at p. 252. (2) (1899) I.L.R., 22 Mad., 342.

says "the surety is discharged . . . . by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor."

Does the omission of the creditor to sue the principal debtor within the statutory period discharge the debtor? We think not, says, Lindley, L.J., in *Carter* v. *White*(1). "Is it the law that a creditor who neglects to sue his debtor till the statute has run will thereby discharge his surety? There is no decision to that effect. On the contrary the true principle is that mere omission to sue does not discharge the surety, because the surety can himself set the law in operation against the debtor." Cotton, L.J., expressed himself to the same effect, and Fry, L.J., concurred. This statement of the law has been accepted without question. See "Chitty on Contracts," 14th edition, p. 465, and "Darby and Bosanquet on Limitation," 2nd edition, p. 17. Does the law in India make any difference on this question? Does the running of the statutory period of time extinguish the debt as well as bar the remedy? Mr. Mitra in his "Tagore Lectures on Limitation," 4th edition, says, at page 14, "as to rights *in personam*, it has been held that a right to receive payment of a debt does subsist even after the remedy by action has been barred." The decisions in *Mohesh Lal* v. *Busunt Kumaree*(2) and *Anando Kishore Dass Bakshi* v. *Anando Kishore Bose*(3) are clear authority in favour of this view. (See also the learned discussion of the question by Mr. Justice Holloway in *Valia Tamburatti* v. *Vira Rayan*(4).)

There is hardly any room for doubt in the face of the express language of section 28 of the Indian Limitation Act, XV of 1877, which merely extinguishes the right to property when the period is determined for suits for recovery of such property. Whenever personal actions are barred, the rights themselves are not extinguished. That the principal debtor is not discharged by lapse of time may also be gathered from section 25, clause 3, and section 60 of the Indian Contract Act, IX of 1872. A barred debt is a good foundation for a written promise to pay signed by the party liable to be charged therewith. It is impossible to regard a debt as discharged by limitation when section 60 of the Indian

(1) (1883) 25 Ch.D., 666 at p. 672.
(2) (1881) I.L.R., 6 Calc., 340.
(3) (1887) I.L.R., 14 Calc., 50.
(4) (1876) I.L.R., 1 Mad., 228.

Contract Act, speaks of a barred debt as a lawful debt, *actually due and payable* to the creditor. Unless a law of limitation operates as well as a law of extinctive prescription, omission to sue cannot discharge the debtor. Limitation which merely bars the remedy is never spoken of in works on Jurisprudence as a mode of discharging an obligation. Holland, enumerating the modes of termination of rights *in personam*, does not refer to limitation as one of them. (See Holland's "Jurisprudence," 10th edition, pages 306 to 311.) Anson in his work on "Contracts" treating of the "discharge" of contracts says "at common law lapse of time does not affect *contractual rights*. Such rights are of a permanent and indestructible character unless either from the nature of the contract, or from its terms, it be limited in point of duration. But though the rights possess this permanent character, the remedies arising from their violation are, by various statutory provisions, withdrawn after a certain lapse of time. The remedies are barred, though the rights are not extinguished." (See Anson's "Law of Contract," 11th edition, page 343.) It would therefore seem to follow that, as mere omission to sue does not discharge the principal debtor, the surety is not discharged under section 134 of the Indian Contract Act. It has been argued that the surety will be prejudiced if he is liable to be sued when he cannot have any remedies against the debtor after a suit against him has become barred. The answer is he is himself to blame. He can easily avoid the risk and clothe himself with all the creditor's rights by payment or performance as soon as the debtor becomes liable—Section 140 of the Indian Contract Act.

To make the position clear, section 137 of the Indian Contract Act, expressly says that mere forbearance to sue does not discharge the surety, we may add, whatever the length of the period of forbearance. The fact that the illustration to the section mentions one year as the period of forbearance cannot involve the implication that if the period is three years the surety will then be discharged. We are unable therefore to agree with the decision in *Ranjit Singh* v. *Naubat*(1) the ground of the decision in *Hajarimal* v. *Krishnarav*(2) followed in *Sankana Kalana* v.

(1) (1902) I.L.R., 24 All., 504.
(2) (1881) I.L.R., 5 Bom., 647.

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SUBRAMANIA AIYAR v. GOPALA AIYAR.

Virupakshapa Ganeshapa(1), *Krishto Kishori Chowdrain* v. *Radha Roman Munshi*(2) commends itself to us. The decision in *Jambu Ramaswami Bhagavathar* v. *Sundaraja Chetti*(3) proceeds on a different ground, namely, that a suit against the drawer maintainable at the date of institution does not cease to be so because it is barred as against the acceptor when he is subsequently added as a party defendant. We must therefore dismiss the appeal against the defendants Nos. 1 to 3, but, as regards the other defendants, the decrees of the Courts below must be reversed and the suit remanded to the Court of First Instance for disposal according to law. There is no question of personal liability. The liability of the property given as security has alone to be determined. With reference to the issues raised the appellants will pay the costs of the defendants Nos. 1 to 3 throughout. The costs of the other parties will be provided for in the revised decree.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Krishnaswami Ayyar.

1909. October 21. November 16.

NAVAKOTTI NARAYANA CHETTY AND ANOTHER (DEFENDANTS NOS. 1 AND 3), APPELLANTS,

v.

LOGALINGA CHETTY (PLAINTIFF), RESPONDENT.*

Minor, sale in favour of, void.

A sale in favour of a minor is void.

Mohori Bibee v. *Dharmodas Ghose*, [(1903) I.L.R., 30 Calc., 539], followed.

SECOND APPEAL against the decree of F. H. Hamnett, District Judge of South Arcot, in Appeal Suit No. 72 of 1906, presented against the decree of S. A. Swaminatha Sastri, District Munsif of Tindivanam, in Original Suit No. 422 of 1904.

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

A. Ramachandra Ayyar for appellants.

P. Sambanda Mudaliyar for respondent.

(1) (1883) I.L.R., 7 Bom., 146. (2) (1886) I.L.R., 12 Calc., 330.
(3) (1903) I.L.R., 26 Mad., 239 at p. 242. * Second Appeal No. 225 of 1907.

BENSON AND KRISHNASWAMI AYYAR, JJ.

NAVAKOTTI NARAYANA CHETTY v. LOGALINGA CHETTY.

JUDGMENTS—BENSON, J.—The question for decision in this second appeal is whether the sale evidenced by exhibit A is void. The District Judge has held that as the sale was made to a minor (the first defendant) it is void under the ruling of the Privy Council in the case of *Mohori Bibee* v. *Dharmodas Ghose*(1). I think that the decision of the District Judge is right. A sale is a transfer of ownership in exchange for a price paid or promised or part paid and part promised (section 54, Indian Contract Act), and it is, in my opinion, impossible to conceive of a price being settled except as the result of an agreement between the parties. In other words a sale necessarily involves the idea of a contract as its foundation and the Privy Council has held that a contract by a minor is not merely voidable at the option of a minor but is void.

The second appeal therefore fails and is dismissed with costs.

KRISHNASWAMI AYYAR, J.—The question raised in this case is one of considerable importance. The Privy Council has decided that a contract by a minor is void. It does not follow from this that a promise made to a minor in return for a past consideration and not for a reciprocal promise is necessarily void. It is not stated that the acceptance of a promise made by an adult requires competency to contract on the part of the acceptor. Suppose an adult person promises to pay a boy a sum of Rs. 10 for an errand that the boy has executed for him. Can it be said that the promise is not enforceable? Section 2 of the Indian Contract Act defining consideration says "when at the desire of the promisor the promisee or any other person has done or abstained from doing or does or abstains from doing or promises to do or abstain from doing something, such act or abstinence or promise is called a consideration for the promise." This no doubt is at variance with the English Law. See the notes to *Lamphegh* v. *Brathwait*(2). But whatever limitations may be imposed upon the language of the Act, they cannot invalidate a promise made in return for a past consideration which has moved from the promisee at the request of the promisor, though it did not originate with a view to the subsequent promise, see *Sindha Shriganpatsingji* v. *Abraham* alias *Vajir*(3). This being so, how does the matter stand in the

(1) (1903) I.L.R., 30 Calc., 539. (2) Smith's 'Leading Cases,' Vol. I, page 151.
(3) (1898) I.L.R., 20 Bom., 755.

case of a promise to a minor? It is difficult to see any distinction when the consideration is not a reciprocal promise. However this may be, the question arises what the effect of the Privy Council decision is upon a sale of property to a minor. Section 7 of the Transfer of Property Act nullifies a transfer of property by the minor. There is no general provision in the Act as regards the validity of a transfer to a minor. Clause (*h*) of section 6 of the Act requires for the validity of a transfer that it should be made to a person legally not disqualified to be a transferee. It is nowhere stated that a minor is so disqualified. The fact that he can be a donee under section 127 of the Transfer of Property Act is sufficient to refute the notion that a minor cannot be a transferee. It remains however a question to be solved whether a minor can purchase property. A sale is defined by section 54 of the Transfer of Property Act as "a transfer of ownership in exchange for a price paid or promised or part paid and part promised." In order to complete a transaction of sale there must be two things: a transfer of ownership and a price paid or promised in exchange. The mere fact that some money was already due to the minor will not make it a price unless the minor agrees to treat it so. If, on the other hand, there is a promise to pay a price that would be invalid as a minor's contract and there can be no sale at all without a price. In the case either of money already due to a minor or of a promise to pay by him, the minor's contract to make it a price is essential to convert the mere transfer of ownership into a sale. There can be no sale therefore unless there are mutual agreements in its inception. A sale is often spoken of as a contract of sale with reference to the mutuality of obligations. It must invariably be preceded by a contract for the sale of the property which as defined by section 54 is a contract that the sale of such property shall take place on terms *settled between the parties*. Section 55 again imposes liabilities on the buyer in the absence of a contract to the contrary. The imposition of these liabilities involves the notion of competency to contract which the opening words of the section also suggest. It being therefore impossible to conceive of a sale without a reciprocal promise past or concurrent, I must come to the conclusion that there is no legal sale in this case.

In Sheppard and Brown's 'Commentaries on the Transfer of Property Act' the following sentence occurs: "It is apprehended

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a mortgage may validly be made in his (minor's) favour" and reliance is placed on *Behari Lal* v. *Beni Lal*(1). No opinion however is expressed with reference to a sale. Whether the observation is correct with reference to a mortgage and the case is good law after the Privy Council decision it is not necessary to express any opinion. It may be that the execution of a mortgage does not always require a reciprocal promise past or present on the part of the mortgagee. When there is no such promise, it may well be that a mortgage by a person competent to contract in favour of a minor is valid. The decisions in *Amirthathammal* v. *Periasami Pillai*(2) and *Baijnath Singh* v. *Pallu*(3) presuppose a valid sale and confirm the vendor to the remedy of recovering the purchase-money on default by the purchaser. The case of *Meghan Dube* v. *Pran Singh*(4) does not touch the present question. All that is decided was that a sale in the name of a minor but to the family of which he was a member was valid.

Reference was made at the bar to the English Law and the decision in *Thurston* v. *Nottingham Permanent Benefit Building Society*(5) was relied on; with reference to the latter it is enough to quote the words of Cozens Hardy, L.J., at page 13 to refute the appellant's argument. He says "The first was a contract for the purchase of the land. This was voidable only and not void and has been adopted and confirmed by the plaintiff since she attained 21 under this contract and as a legal consequence of it there arose a vendor's lien for unpaid purchase-money." These observations clearly distinguish the case from the law in India. Pollock on Contracts, seventh edition, page 64, was also referred to. The learned author there says: "It seems to follow that no property will pass to the infant by the attempted contract of sale and that if he pays the price or any part of it before delivery of the goods he may recover it back, as indeed he might have done before the Act (Infant's Relief Act). For the contract was voidable and he was free to rescind it within reasonable time. But it does not follow that if the goods are delivered no property passes, or that if they are paid for the money may be recovered back. At all events an infant who has paid for goods and received

(1) (1881) I.L.R., 3 All., 408.
(2) (1909) I.L.R., 32 Mad., 325.
(3) (1908) I.L.R., 30 All., 125.
(4) (1908) I.L.R., 30 All. 63.
(5) (1902) 1 Ch., 1.

and used them cannot recover the money back." The above passage based upon the construction of the Infant's Relief Act and the history of that legislation cannot afford any guide to the ascertainment of the law in India. Indeed the judgment of Lord Coleridge, C.J., in *Valentini* v. *Canali*(1) puts the matter on grounds of natural justice which section 1 of the Infant's Relief Act could not be deemed to violate, says His Lordship "No doubt the words of section 1 of the Infant's Relief Act are strong and general. But a reasonable construction should be put upon them. The construction which has been contended for on behalf of the plaintiff would involve a violation of natural justice. When an infant has paid for something and has consumed or used it, it is contrary to natural justice that he should recover back money which he has paid." And again "The object of the statute would seem to have been to restore the law for the protection of infants upon which judicial decisions were considered to have imposed qualifications." Before the Infant's Relief Act the position was thus with reference to infants' contracts in England. Simpson on the Law of Infants says at page 4: "The acts of an infant fall under three heads according as they are (1) void, (2) voidable at the election of the infant or those claiming under him, (3) binding on him as fully as if he had attained 21." The last class which related to transactions beneficial to the minor was left untouched by the Act. It did not affect class 1 either. And to state it shortly it rendered the acts falling under class 2 void. Before the Act the law with reference to an infant's purchase is stated thus in Dart's 'Vendors and Purchasers,' Volume 1, page 32. "An infant can purchase but on his attaining 21 he may at his option adopt or abandon the contract" and again an infant after attaining majority must, if he intend to abandon his contract, do so within a reasonable time to be determined on the circumstances in each case. If his election be to avoid the purchase, he ought to disclaim. What the effect of section 2 of the Infant's Relief Act will be upon the foregoing statement of the law, it is not easy to say. But the author of the well known work above referred to gives the wholesome advice that the only safe rule of practice is to have an entirely new contract, not one which is in terms or according to its fair contraction merely a confirmation of the

(1) (1889) L.R., 24 Q.B.D., 166.

previous voidable contract, but see *Edwards* v. *Carter*(1). The English Law therefore does not help us to a decision of the question of the validity of a sale in India.

The conclusion already expressed as to the invalidity of the sale in question remains unaffected. The second appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Krishnaswami Ayyar.

1909. October 27, 28. November 18.

RAMANJULU NAIDU, RECEIVER AND MANAGER, PALACE ESTATE, TANJORE (PLAINTIFF), APPELLANT.

v.

ARAVAMUDU AIYANGAR AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code, Act XIV of 1882, *s.* 43—*Indian Contract Act IX of* 1872, *s.* 43—*Omission of part of cause of action in a suit against a joint promisor—Effect of such omission in subsequent suit against other promisors.*

The omission in a previous suit against one of several joint promisors of a part of the cause of action is no bar under section 43 of the Civil Procedure Code to a subsequent suit against another joint promisor for the portion so omitted.

The subsequent suit will not be barred by the rule laid down in *King* v. *Hoare* (13 M. & W., 494), as that rule is based on the merger of the cause of action in the judgment. There can be no such merger when the cause of action has not been sued upon.

The effect of section 43 of the Indian Contract Act on the rule laid down in *King* v. *Hoare*, that a judgment against one of several joint promisors is a bar to a suit against the others, considered.

SECOND APPEAL against the decree of T. T. Rangachariar, Subordinate Judge of Kumbakónam in Appeal Suit No. 97 of 1908, presented against the decree of N. Sundara Ayyar, District Munsif of Tiruvadi, in Original Suit No. 19 of 1907.

The facts for the purpose of this case are fully set out in the judgment.

T. R. Venkatarama Sastri for appellant.

T. V. Muthukrishna Ayyar for respondents.

(1) (1893) A.C., 360.

* Second Appeal No. 1746 of 1908.

JUDGMENT (KRISHNASWAMI AYYAR, J.).—The plaintiff is the receiver of the Tanjore Palace estate. Ramu Aiyangar and Srinivasaranga Aiyangar executed muchilikas each for a separate moiety of certain lands in favour of the previous receiver promising to pay rent. The first and second defendants purchased the interests of the said two persons in respect of each moiety under a separate sale-deed executed by each. The present suit is instituted for the recovery of rent for six faslis from 1310 to 1315. The District Munsif dismissed the suit. The Subordinate Judge, on appeal, has passed a decree for a moiety of the rent due for fasli 1311, holding the claim as regards faslis 1310 and 1311 in relation to the s are which had belonged originally to Srinivasaranga Aiyangar and likewise the claim for rent up to the 15th of December 1901 as regards the moiety that was originally owned by Ramu Aiyangar barred under section 43 of the Civil Procedure Code, Act XIV of 1882. The plaintiff had instituted two Small Cause Suits Nos. 15 of 1902 and 598 of 1903, in respect of each moiety against the first defendant and recovered judgment. At the time of the institution of Small Cause Suit No. 598 of 1903, the claim for rent for faslis 1310 and 1311 as to Srinivasaranga Aiyangar's moiety had accrued but was not included in the suit. At the time of the institution of Small Cause Suit No. 15 of 1902 the claim for rent up to the 15th December 1901 as to Ramu Aiyangar's moiety had also accrued, but was omitted to be included in the suit. There can be no doubt that, under Section 43 of the Civil Procedure Code, the liability of the first defendant for the rent omitted to be claimed in the former suits must be deemed to be at an end, for that section provides that the plaintiff shall not afterwards sue in respect of the portion omitted. The decree therefore as against the first defendant is right. But the question is raised that the second defendant ought to have been made liable for the rent of faslis 1310 and 1311 in respect of both the moieties.

It is true that section 43 of the Civil Procedure Code does not bar the claim against the second defendant. It was assumed in the argument addressed to us on both sides that the second defendant was a member of a joint family along with the first defendant and liable with him to pay the rent. It was however argued firstly, that the rule in *King* v. *Hoare*(1), according to which a

(1) (1844) 13 M. & W., 494.

joint promisor is not liable in a subsequent suit when judgment had been previously recovered against the co-promisor is not applicable to the moffusil in India; secondly, that, even if it is, the liability of the first and second defendants was joint and several and therefore the rule itself had no bearing; thirdly, that the Small Cause Suits not having had any reference to the rents of the faslis 1310 and 1311, the cause of action for those rents had not merged into the judgments so as to operate as a bar to the present suit against the second defendant.

As regards the first and second contentions, the argument is based on section 43 of the Indian Contract Act, IX of 1872, which makes the liability of joint promisors joint and several. Although an action upon a joint promise against one only of the joint promisors was met by a plea in abatement before the judicature acts and that plea has been abolished by order XXI, rule 20, the rule of non-liability of the joint promisor in the second suit is still retained as a rule of substantive law and not as a rule of procedure (see *Kendall* v. *Hamilton*(1), *In re Hodgson Beckett* v. *Ramsdale*(2), *Hammond* v. *Schofield*(3), *Hoare* v. *Niblett*(4)). But it is clear law in England that the foundation of the rule is that the liability of the joint promisors is joint and that the cause of action, which is one and indivisible, *transit in rem judicatam* and is therefore not available for a subsequent suit against a co-promisor. The question arises whether section 43 of the Indian Contract Act lays down a mere rule of procedure or makes the liability of each co-promisor joint and several. Sir Frederick Pollock observes in his notes to section 43 of the Indian Contract Act "as far as the liability under a contract is concerned it appears to make all joint contracts joint and several" (see Pollock and Mulla on the "Indian Contract Act, 1905," page 185). And after referring to the difference of opinion among the Indian High Courts as to the effect of the judgment against one of the joint promisors, as regards the others he adds "We think it the better opinion that the enactment should be carried out to its natural consequences, and that, notwithstanding the English authorities founded on a different substantive rule, such a judgment, remaining unsatisfied, ought not in British India, to be

(1) (1879) 4 A.C., 504.
(2) (1885) 31 Ch.D., 177.
(3) (1891) 1 Q.B., 453.
(4) (1891) 1 Q.B., 781.

held a bar to a subsequent action against the other promisor or promisors" (page 186).

In *Muhammad Askari* v. *Radhe Ramsingh*(1), upon a full review of all the Indian cases, Chief Justice Strachey and Banerji, J., have taken the same view. Also section 44 of the Indian Contract Act departing from the English law lays down an analogous principle that the release of a joint debtor does not operate as a discharge of the co-promisors. It must however be admitted as pointed out by Strachey, C.J., himself in *Muhammad Askari* v. *Radhe Ramsingh*(1), that the contrary opinion has been expressed in many cases and often assumed in others. So far as this Presidency is concerned we may refer to the following cases *Gurusami* v. *Chinna Mannar* and *Gurusami* v. *Sadasiva*(2), *Chockalinga* v. *Subbaraya*(3), *Umamaheswara* v. *Singaperumal*(4), *Narayana Chetti* v. *Lakshmana Chetti*(5), and *Chinnappa Rowthan* v. *Robert Fischer*(6). The first of these cases came up from the Original Side of the Court to which rules of the English law were deemed applicable. The second case was a decision with reference to the moffusil but has itself been overruled in *Ramakrishna* v. *Namasivaya*(7) on the ground that the liability of the sons was not joint with that of the father under the Hindu law but several. The other cases simply refer to the rule in *King* v. *Hoare*(8) with apparent assent and do not involve a decision of the question whether it applies to the moffusil in India in the face of section 43 of the Indian Contract Act. It must also be pointed out that Mr. Justice Muthusami Aiyar gave his assent to the applicability of the rule in a hesitating manner (see *Gurusami* v. *Chinna Mannar* and *Gurusami* v. *Sadasiva*(2), and that Mr. Justice Markby in *Hemendro Coomar Mullick* v. *Rajendrolall Moonshee*(9) which was followed in *Gurusami* v. *Chinna Mannar* and *Gurusami* v. *Sadasiva*(2) expressed himself in somewhat doubtful language as regards the extension of *King* v. *Hoare*(8) to India. The rule itself has been modified in England to some extent by the statutes 19 and 20 Vict., chapter 97, section 11, which enacts that a

(1) (1900) I.L.R., 22 All., 307 at p. 310.
(2) (1882) I.L.R., 5 Mad., 37 at pp. 45, 46.
(3) (1882) I.L.R., 5 Mad., 133.
(4) (1885) I.L.R., 8 Mad., 376.
(5) (1898) I.L.R., 21 Mad., 259.
(6) (1907) I.L.R., 30 Mad., 495.
(7) (1884) I.L.R., 7 Mad., 295.
(8) (1844) 13 M. & W., 494.
(9) (1878) I.L.R., 3 Calc., 353 at pp. 361, 362.

creditor shall not be barred in a subsequent suit against certain of the joint promisors who were beyond the seas at the time of the former suit against the co-promisors (see Hukum Chand's 'Civil Procedure Code,' page 554). Again, a plaintiff who obtains judgment under order XIV or enters judgment in default of appearance against one of two joint defendants does not abandon his right to proceed to judgment against the other defendant (*McLeod* v. *Power*(1)). It was also pointed out by Mr. Justice Muthusami Aiyar and by Mr. Justice Markby in the cases already referred to that a rule similar to that in *King* v. *Hoare*(2) which obtained originally under the Roman law was afterwards abolished (see Sandars' 'Institutes of Justinian,' 11th edition, page 338). Says Hunter, in his 'Roman Law, 2nd Edition, page 560: "The liability "of a correal or joint obligation to be extinguished by *litis contestatio* "is, like *acceptilatio*, an incident of *stipulatio*, and not of correality. Even in the case of *stipulatio*, the contract might be so "framed as to avoid that inconvenient result. Finally Justinian "enacted that even in the case of *stipulatio*, a *litis contestatio* "should have no effect upon the obligation" (see also page 562, Hunter's 'Roman Law,' 2nd edition). It is true there is a general consensus of opinion in favour of the rule in *King* v. *Hoare*(2) in the States of America. But the various devices adopted by means of special statutes and otherwise, to relax the severity of the rule, are a clear indication of the inconvenience felt in a strict adherence to it. See Black on 'Judgments,' sections 770 to 772. Although, therefore, there is much to be said against the extension of the rule in *King* v. *Hoare*(2) to India, I do not feel justified in rejecting it without a reference to the Full Bench. And it is not necessary to express a final opinion on the question in this case.

It was argued that the rents for faslis 1310 and 1311 were not the subject of the former actions, and, therefore, the cause of action with respect to them had not merged into the judgments in the small cause suits so as to open the door for the rule in *King* v. *Hoare*(2). This involves the consideration of the question of the foundation of that rule. Baron Parke in *King* v. *Hoare*(2) and the majority of the Lords in *Kendall* v. *Hamilton*(3) state

(1) (1898) 2 Ch., 295 at p. 300.
(2) (1844) 13 M. & W., 494.
(3) (1879) 4 A.C., 504.

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it to be the merger of the cause of action in the judgment. There can be no such merger where the rents had not been sued for at all. Although, under section 43 of the Civil Procedure Code, a subsequent suit against the same defendant is barred for rents which had accrued due, it is by the force of a special rule that relief not claimed in respect of a cause of action shall not be claimed in a subsequent action and not on the principle of merger in a judgment recovered. Section 43 of the Civil Procedure Code operates to bar the second suit even where the first was dismissed and not decreed, for its applicability depends upon the frame of the suit instituted and not upon the result. See Hukum Chand's 'Civil Procedure Code,' page 557, and the observations of Shepherd, J., in *Ittappan* v. *Manavikrama*(1). It seems therefore to follow, there being no merger of the claim for the rents of faslis 1310 and 1311 in the judgments in the small cause suits and the bar under section 43 of the Civil Procedure Code only applying to the present claim against the first defendant, the action in so far as it relates to the recovery of the rents of those faslis from the second defendant is not open to exception.

In modification of the decree of the lower Appellate Court, I would direct the second defendant to pay to the plaintiff the sum of Rs. 314-7-6, being the amount claimed for faslis 1310 and 1311 with further interest at 6 per cent. per annum from the date of this decree.

BENSON, J.—I concur in the conclusion of my learned brother and in the modification of the Subordinate Judge's decree which he proposes.

(1) (1898) I.L.R., 21 Mad., 153 at p. 157.

APPELLATE CIVIL—FULL BENCH.

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

KOLLIPARA SEETAPATHY (PETITIONER IN CIVIL REVISION PETITION No. 444 OF 1907), APPELLANT,

v.

KANKIPATI SUBBAYYA (RESPONDENT IN CIVIL REVISION PETITION No. 444 OF 1907), RESPONDENT.*

1908. September 1. 1909. March 5. October 14.

Jurisdiction—Appellate decree passed without jurisdiction—High Court bound to set aside such decree.

Where a small cause suit is tried by a Munsif on the original side and his decision is reversed on appeal, the High Court is bound to set aside the appellate decree as having been passed without jurisdiction.

Parameshwaran Nambudri v. *Vishnu Embrandiri* [(1904) I.L.R., 27 Mad., 478], dissented from,

Ramasamy Chettiar v. *Orr*, [(1903) I.L.R., 26 Mad., 176], approved.

Shankarbhai v. *Somabhai*, [(1901) I.L.R., 25 Bom., 417], approved.

APPEAL under section 15 of the Letters Patent against the judgment of Wallis, J., in Civil Revision Petition No. 444 of 1907, presented under section 622 of the Code of Civil Procedure to revise the decree of the Subordinate Judge of Kistna at Ellore in Appeal Suit No. 7 of 1906.

The appeal first came on for hearing before (Sankaran-Nair and Abdur Rahim, JJ.) when their Lordships made the following Order of Reference to the Full Bench :—

ORDER OF REFERENCE TO A FULL BENCH (SANKARAN-NAIR, J.).—The plaintiff in Original Suit No. 385 of 1904 on the file of the Court of the District Munsif of Ellore sued to recover Rs. 45 under an award made by an arbitrator under a muchilika executed by the parties. The defendant denied the reference, and raised various other objections which were overruled by the District Munsif who passed a decree in favour of the plaintiff. This decree was reversed on appeal by the Subordinate Judge of Ellore who held that the reference was vague and the arbitrator, therefore, might have decided questions not referred to him for arbitration. The plaintiff applied to this Court under

* Letters Patent Appeal No. 6 of 1908.

section 622, Civil Procedure Code, to set aside the decree of the Subordinate Judge on the ground that, as the suit was one cognizable by a Small Cause Court, no appeal lay to the Subordinate Judge and his decision was passed without any jurisdiction.

The learned Judge, who heard the Revision Petition following the case of *Parameshwaran Nambudiri* v. *Vishnu Embrandiri*(1), declined to interfere for the reason that the plaintiff himself instituted the suit on the original side and could not therefore be heard to complain that the defendant filed an appeal against the decree in the original suit.

This is an appeal against his order. It is conceded on both sides that the suit ought to have been tried as a small cause suit. Section 16 of the Provincial Small Cause Courts Act is in these terms: "Save as expressly provided by this Act or by any other enactment for the time being in force, a suit cognizable by a Court of Small Causes shall not be tried by any other Court having jurisdiction within the local limits of the jurisdiction of the Court of Small Causes by which the suit is triable." This section apparently only regulates the procedure and does not deprive the District Munsif of the jurisdiction vested in him by the Madras Civil Courts Act. However that may be, this has to be read with section 646 (B) which gives power to the District Court to submit to the High Court for revision, the records in a suit erroneously decided by a subordinate Court under a mistake as to its jurisdiction. I agree with the decision of the Allahabad High Court in *Ram Lal* v. *Kabul Singh*(2) that the words "by reason of erroneously holding" in that section implies that it is only when the question of jurisdiction is raised before the first Court that the parties are entitled under that section to request the District Judge to make a reference to the High Court. Before judgment, the Court may make the reference under section 646 (A) if it entertains any doubt as to the jurisdiction: after judgment the District Judge may refer, if he considers the decision of the first Court on the point of jurisdiction erroneous, and, on reference by the District Judge, the High Court "may pass such order as it thinks fit." It is clear, therefore, that the decision of the Court of First Instance is not to be set aside on the sole question of jurisdiction.

(1) (1904) I.L.R., 27 Mad., 478 at p. 479. (2) (1903) I.L.R., 25 All., 135.

I agree, therefore, with the learned Judges in *Parameshwaran Nambudiri* v. *Vishnu Embrandiri*(1), that the principle of the express provision in 646 (B) should be followed in the exercise of the discretion allowed by section 622 and that we should not interfere solely on this ground with the decision of a Court of First Instance even when the question was raised and *a fortiori* when the question was not raised.

Does the same principle apply in favour of the decision of an Appellate Court? In the case in *Parameshwaran Numbudiri* v. *Vishnu Embrandiri*(1), it was perhaps unnecessary to decide the point, as the decision of the Appellate Court confirmed the decree of the first Court and, unless that decree was set aside, the petitioner before the High Court could not derive any benefit.

In the case of *Suresh Chunder Maitra* v. *Kristo Rangini Dasi*(2) the Calcutta High Court have decided that we are to apply the same principle to the Appellate Courts. The learned Judges say, "If no objection to jurisdiction is raised, the District Court is left to act in exercise of its own discretion either to decide the appeal or to submit the case to the High Court." They further add that, if the parties require it, the District Judge is bound to submit the case for the orders of the High Court. In the case before us the appeal was heard by the Subordinate Judge who has apparently no power to act under section 646 (B). The learned Judges, it appears to me, have ignored the fact that the District Court under section 646 (B) does not act as a Court of Appeal; that even in cases where no appeal lay or where no appeal is filed, the Court may or shall act under that section, and that section 646 (B) does not enable the High Court to deal with the decision of the Appellate Judge on the merits of the case. For these reasons, I am of opinion that, in considering whether we ought to interfere with the decree of an Appellate Court, no inference is to be drawn from section 646 (B). It stands to reason that a suit tried by the Munsif on the original side should not be sent to the same Munsif to be tried as a small cause suit. But the same reasons do not obviously apply to a decision in appeal.

Disregarding section 646 (B) I am of opinion that in this respect, the decisions in *Shankarbhai* v. *Somabhai*(3) and

(1) (1904) I.L.R., 27 Mad., 478 at p. 479. (2) (1894) I.L.R., 21 Calc., 249.
(3) (1901) I.L.R., 25 Bom., 417.

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Ramasamy Chettiar v. *Orr*(1), so far as the appellate decision is concerned should be followed and that the decree of the lower Appellate Court should be set aside and that of the Munsif be restored with costs throughout. I need hardly add that consent cannot give jurisdiction to the District Court. *Ledgard* v. *Bull*(2), *Minakshi* v. *Subramanya*(3).

But, as the case *Suresh Chunder Maitra* v. *Kristo Rangini Dasi*(4) has received the approval of this Court in *Parameshwaran Nambudiri* v. *Vishnu Embrandiri*(5), I would refer to the Full Bench the following question :—

"Where a small cause suit is tried by the Munsif on the original side and his decision in appeal is reversed by the subordinate Court, is the High Court bound to set aside the decree in appeal as having been passed without jurisdiction ?"

ABDUR RAHIM, J.—I agree.

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

P. Nagabushanam for appellant.

P. Narayanamurthi for respondent.

The Court expressed the following

OPINION.—We are unable to agree with the view taken by the learned Judges in *Parameshwaran Nambudiri* v. *Vishnu Embrandiri*(5), as regards the appellate decision in that case. As the decision of the Appellate Court in the case before us was made without jurisdiction, we think this Court is bound to set it aside. As regards the decision of the Appellate Court, we think the cases *Ramasamy Chettiar* v. *R. G. Orr*(1), and *Shankarbhai* v. *Somabhai*(6) were rightly decided. We would answer the question which has been referred to us in the affirmative.

The appeal again came on for final hearing before (Sankaran-Nair and Abdur Rahim, JJ.) who delivered the following judgment :—

JUDGMENT.—Following the opinion of the Full Bench, we reverse the order of the learned Judge and of the lower Appellate Court and restore that of the Munsif with costs throughout.

(1) (1903) I.L.R., 26 Mad., 176.
(2) (1887) I.L.R., 9 All., 191 (P.C.).
(3) (1888) I.L.R., 11 Mad., 26 (P.C.).
(4) (1894) I.L.R., 21 Calc., 249.
(5) (1904) I.L.R., 27 Mad., 478 at p. 479.
(6) (1901) I.L.R., 25 Bom., 417.

APPELLATE CIVIL.

Before Sir Ralph Sillary Benson, Officiating Chief Justice, and Mr. Justice Krishnaswami Ayyar.

ESA ABBAS SAIT (PLAINTIFF), APPELLANT,

v.

JACOB HAROON SAIT AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1909. October 27. November 5.

Easements Act V of 1882, ss. 13, 28, 33—Right of way not apparent and continuous easement—Air and light, extent of prescriptive right acquired in—When action for compensation for obstruction will lie—What relief appropriate to be granted.

A right of way is not an apparent and continuous easement within the meaning of section 13 of the Indian Easements Act.

The extent of prescriptive right to the passage of light or air to a certain window is the quantity of light or air which has been accustomed to enter that opening during the prescriptive period under section 28 of the Easements Act ; no invasion of such right will give a right to compensation unless substantial damage is caused within the meaning of section 33 of the Act.

Where the injury caused by the invasion of the right is not small and a mandatory injunction will not cause serious loss or damage to the defendant, an injunction and not merely compensation will be the appropriate relief to be granted.

The fact that the owner of the dominant tenement has acquired light from other sources will not justify an interference with the prescriptive right acquired by him.

Dyers Company v. *King*, [(1870) L.R., 9 Eq., 438 at p. 442], referred to.

APPEAL against the decree of C. V. Kumarasami Sastriar, City Civil Judge, Madras, in Original Suit No. 107 of 1908.

The facts are thus stated in the judgment of the Court below :

"The plaintiff is the owner of house No. 34, Anderson Street, Georgetown, and the defendants are the owners of house No. 1-11 A and B, Stringer's Street, Georgetown. The plaintiff states that to the east of his house and to the west of the defendants' house there is a lane running from north to south and measuring 29 feet in length and about 3 feet in breadth, that the lane was enjoyed in common by the plaintiff and the defendants and their predecessors in title, that it was not only used as a passage for the scavenger to go to the plaintiff's house, but that the plaintiff and his predecessors in title had a free

* City Civil Court Appeal No. 28 of 1908.

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access and use of light and air to the said house passing through the said lane and over the defendants' house, and that the said rights have been enjoyed by them peaceably, openly and as of right and without interruption for over 30 years. He also states that there was a window existing for over 30 years in the kitchen room of his house opening out into the said lane and through which window also light and air used to pass to his kitchen room, and that the defendants about the end of February 1908, with a view to annoy and harass him, began to erect over the said lane, and are rapidly erecting a wall which, if completed, would block the passage through the lane and also close up the window of plaintiff's kitchen room and obstruct the free access and use of light and air to the plaintiff's house. It is further alleged that the defendants are intending to put up an upstair building immediately to the east of the said lane and that the said building, if put up, would completely shut out light and air coming from the east to the plaintiff's house. The plaintiff, therefore, sues for a declaration of his rights of easement both as regards the passage through the said lane for the scavenger of his house and as well as the free access and use of light and air to his house passing through the said lane and over defendants' house, and for a perpetual injunction restraining the defendants from erecting any wall in the said lane so as to obstruct the said passage and also the light and air flowing into his kitchen or from putting up a first floor to the east of the said lane so as to obstruct the free passage of light and air flowing into his house from the east; and also for a mandatory injunction directing the demolition of the wall erected by the defendants."

The defendants denied the existence of the window for the prescribed period. The lower Court found the existence of the window proved but dismissed the suit on the ground that it was not a case for injunction and there was no prayer for damages.

Plaintiff appealed.

P. R. Sundara Ayyar for *T. R. Ramachandra Ayyar* and *P. V. Doraiswami Mudaliyar* for appellant.

C. E. Odgers for respondents.

JUDGMENT.—The plantiff in this case became the owner of the western house through exhibits B and B-1. The defendants on the other hand became entitled to the eastern house through exhibits C and D. Both houses originally belonged to one

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Lazaro. The dispute relates to a lane 3 feet broad between the two houses, and certain rights claimed by the plaintiff therein. The defendants denied the existence of the lane. This plea has been negatived by the City Civil Judge and we think his conclusion is perfectly right on the evidence. The plaintiff claimed common ownership in the lane and this question formed the subject of issue I. In his plaint the plaintiff restricted his claim to common enjoyment. It is admitted on the plaintiff's behalf that Lazaro did not convey any interest in the lane to the plaintiff. We must therefore uphold the Judge's finding as regards the claim to common ownership. The plaintiff's claim to a right of passage through the lane for his scavenger cannot also be sustained. The plaintiff has not had 20 years' enjoyment of such a right of way since the severance of the tenements. For it is admitted the lane was blocked up ten years ago. A right of way is not a continuous easement (see illustration (*b*) to section 5 of the Indian Easements Act, V of 1882). And therefore even assuming that it was used as a passage for scavengers at the time when Lazaro owned both the premises there would be no apparent and continuous easement within the meaning of section 13 of the Indian Easements Act.

It remains to consider whether the rest of the plaintiff's claim is well founded. The plaintiff claims an easement of light and air through a window in the eastern wall of his house opening into the lane in question. The defendants dispute the presence of the window. That it has existed for more than 20 years is established by the evidence of the plaintiff's first and second witnesses. And we adopt the conclusion arrived at by the City Civil Judge that the evidence on the plaintiff's side largely preponderates over the defence evidence as regards the period of its existence. The finding of the court below as regards the dimensions of this window has not been seriously questioned. We have no reason to doubt its correctness. The plaintiff has rebuilt the room to which the window was the means of access for light and air. The new window is placed in the site of the old one, though it exceeds the old dimensions of $1\frac{1}{2}$ feet × 1 foot. It is clear that the plaintiff is not entitled in respect of that excess. But his right to light and air through the window to the extent of the old dimensions cannot be affected. The defendants have built a wall along the western edge of the lane so as to completely close up the window and debar all access of light and air from the side of the lane.

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Are the defendants entitled to do this? Several cases have been cited in the course of the argument on both sides. But, before referring to any of them, we may draw attention to section 28, clause (*c*) of the Indian Easements Act, which is decisive of the law in this Presidency. It runs as follows: "The extent of a prescriptive right to the passage of light or air to a certain window, door or other opening is that quantity of light or air which has been accustomed to enter that opening during the whole of the prescriptive period irrespectively of the purposes for which it has been used." This is not in accordance with the view taken by the House of Lords in *Colls* v. *Home and Colonial Stores, Limited*(1). The rule there stated was that "to constitute an actionable obstruction of ancient lights, there must be a substantial privation of light, enough to render the occupation of the house uncomfortable according to the ordinary notions of mankind." Any diminution of light is insufficient. Even a substantial diminution of light that the premises have been accustomed to receive is not also sufficient to found a cause of action. But it must be such a diminution as to render the light remaining "insufficient according to the ordinary notions of mankind for the comfortable use and enjoyment of the house as a dwelling house." As pointed out by Lord Macnaughten, this was not the view taken in *Calcraft* v. *Thompson*(2), and *Scott* v. *Pape*(3). What Lord Macnaughten characterises as the extreme view taken in those cases was "that the right which was acquired by the so-called statutory prescription was a right to a continuance of the whole or substantially the whole quantity of the light which had come to the window during a period of 20 years." At the time of the passing of the Indian Easements Act, this was apparently the prevailing view based upon the third section of the Prescription Act, notwithstanding *Clarke* v. *Clark*(4), and *Kelk* v. *Pearson*(5). But whether this was so or not, there is no doubt the Indian Legislature chose to adopt the view enunciated by Lord Chelmsford in *Calcraft* v. *Thompson*(2). And to remove any doubts there might be if the language of section 3 of the English Prescription Act was adopted, the Indian Legislature made its

(1) (1904) A.C., 179.
(2) (1867) 15 W.R., 387.
(3) (1886) L.R., 31 Ch. D. 554.
(4) (1865) L.R., 1 Ch. 16.
(5) (1871) L.R., 6 Ch. 809.

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meaning clear by stating that "the extent of the right is the quantity of light or air which has been accustomed to enter that opening during the prescriptive period." Whatever difficulty there may be in applying the law in England to the circumstances of a particular case, as to which see *Jolly* v. *Kine*(1) there can be none so far as section 28 of the Indian Easements Act is concerned. The case with which we are dealing is not one of mere diminution of the light and air passing through the window, but of total obstruction. And therefore even if the English law were applicable, it would fall within the rule that the obstruction would be actionable if it rendered the room unfit for comfortable enjoyment. The window is the only source of access for fresh air. It is the only passage for the light from the open sky.

It was attempted to be argued that in the reconstruction of the room, door-ways have been opened on the western and southern sides, which, though not directly communicating with any open space but only into another room or verandah, would be the means of ingress for other light. It does not appear that this arrangement makes the place fit for comfortable enjoyment in respect of light and air, notwithstanding the defendants' obstruction. Indeed the fact that the plaintiff had found it necessary to enlarge the window negatives such a possibility. But we do not think that there is any warrant for the defendant justifying his action on the ground of possible light and air in consequence of changes made by the plaintiff which might be a source of additional light to the room in question. In *Dyers' Company* v. *King*(2), it was said by Vice-Chancellor James "the right is a right as between the owner of the dominant tenement and the owner of every servient tenement; he has a right to as much light to and for the use of his house over his neighbour's land as he enjoyed 20 years ago; and the neighbour has no right to deprive him of the light which has so come to and for the use of the house over the neighbour's land because the owner of the dominant tenement has * * * obtained other light." The circumstances do not justify the supposition of a release by the dominant owner by implication. Nor is the access of light and air by means of the new arrangement so material as, to use the language of James, V. C., "to be much in excess of anything

(1) (1907) A.C. 1.
(2) (1870) L.R., 9 Eq. 438, at page 442.

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required by the dominant owner for the reasonably comfortable enjoyment of the premises as he enjoyed them." The above case is quoted with approval by Lord Lindley in *Colls* v. *Home and Colonial Stores, Limited*(1). See also Gale on 'Easements' VIII edition, page 335.

Though the extent of the right is determined under the Indian Easements Act by the quantity of light and air that has been enjoyed through the opening in question for the prescriptive period, the Act does not make every infringement of that right the basis of an action for compensation. The proviso to section 33 of the Indian Easements Act, enacts that the disturbance of the easement should have actually caused substantial damage to the plaintiff. What amounts to substantial damage is stated in three explanations added to the section. Explanation 2 relates to the free passage of light; and explanation 3 to that of air. In the first case the damage is not substantial unless, firstly, it is likely to injure the plaintiff by affecting the evidence of the easement or by materially diminishing the value of the dominant heritage; or, secondly, it interferes materially with the physical comfort of the plaintiff, etc. There can be no doubt that in the present case the act done by the defendants is likely to injure the plaintiff by affecting the evidence of the easement. It is unnecessary to consider whether there is evidence to show that it will materially diminish the value of the dominant heritage. It may be said with equal confidence that the obstruction caused will materially interfere with the physical comfort of the plaintiff. It may perhaps be that by introducing substantial damage, as defined, as the pre-requisite of an action for compensation, the Indian Legislature has tried to reconcile the conflicting views propounded in England in the cases already referred to. Although the extent of the right acquired is apparently larger under the Indian Act, interference with it is not made actionable in every case, at least as regards the claim to compensation or injunction. By bringing in "material interference with the physical comfort of the plaintiff" as one of the alternative cases of substantial damage, a result is arrived at similar to that reached in *Colls's Case*. As regards the easement to the free passage of air, substantial damage is caused only if the act done interferes materially with the physical comfort of the

(1) (1904) A.C., 179 at p. 211.

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plaintiff though it is not injurious to his health. The closing of the only aperture which could admit fresh air in this case must be regarded as a material interference with the physical comfort of the plaintiff. Our notions as regards the relative importance of the easements as to light and air must differ in a tropical country from those in England. As pointed out by Mr. Justice Markby in *Modhoosoodun Dey* v. *Bissonauth Dey*(1) "In England an aperture is made chiefly for light: the sun being less bright, and the air colder there, we desire to obtain all the light we can, and only to admit just so much air as is necessary for wholesome ventilation; for which reason we always use glass in our windows. In this country the object is precisely the reverse—to get as much air as possible, and to exclude the superfluous light." We do not attach any importance to the evidence of Mr. Pogson which cannot outweigh the circumstance that the only passage for the ingress of fresh air has been closed by the action of the defendants. We think such an obstruction must materially interfere with the physical comfort of the occupants of the room. The plaintiff therefore is entitled to relief.

It has been argued for the respondents that compensation in money is an adequate remedy. Reliance is placed on the observations of A. L. Smith, L.J., in *Sheller* v. *City of London Electric Lighting Co.*(2) and also on those of some of the learned Lords on *Colls* v. *Home and Colonial Stores, Limited*(3). The decision in *Kine* v. *Jolly*(4) confirmed by the House of Lords in *Jolly* v. *Kine*(5) has also been referred to in support of the defendants' argument. We do not think that these cases lay down any hard and fast rule. The injury in the present case no doubt cannot be regarded as merely threatened or intended. The easement has been actually disturbed by the building up of the wall so as to close the aperture. But the defendants have not completed their construction, so that a mandatory injunction might lead to serious damage and loss to them. The case falls under clause (*a*) of section 35 of the Indian Easements Act; and section 54 of the Specific Relief Act, I of 1877, warrants the order we propose to make. We do not think that the injury to the plaintiff's legal

(1) (1875) 15 B.L.R., 361 at p. 367.
(2) (1895) 1 Ch., 287, at pp. 321, 322.
(3) (1904) A.C., 179.
(4) (1905) 1 Ch., 480.
(5) (1907) A.C., 1.

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rights is small, in which case damages might be the more appropriate relief. In *Higgins* v. *Betts*(1), Farwell, J., held it to be a proper case for injunction notwithstanding the decision in *Colls's Case*. And in *Chotalal Mohanlal* v. *Lallubhai Surchand*(2), Jenkins, C.J., granted an injunction even after hearing *Colls's Case* cited. The facts of *Anath Nath Deb* v. *Galastaun*(3) were very different. We think it will be sufficient to give the plaintiff a decree in the following terms, that the defendants be directed to remove so much of the wall already raised by them as interferes with the free passage of light and air through the plaintiff's window to the extent of the old dimensions, $1\frac{1}{4} \times 1$ ft., and that the defendants be further directed not to build any wall so as to obstruct the passage of light and air through the said window to the extent of its old dimensions. The rest of the plaintiff's claim will stand dismissed. Each party will bear his costs throughout.

Messrs. Branson and Branson—attorneys for respondents.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Miller.

1909. September 22, 29, 30. December 1.

PALAMALAI MUDALIYAR *alias* PALAMALAI PILLAI (DEFENDANT), APPELLANT,

v.

THE SOUTH INDIAN EXPORT COMPANY, LIMITED (PLAINTIFFS), RESPONDENTS.*

Fraudulent conveyance—Transfer of Property Act, s. 53 - Conveyance void if intended to convert land into cash and place it beyond reach of creditors- Equity on setting aside transfer—Transferee entitled to a charge for amount spent in discharging valid prior mortgage.

A transferee for value, who takes the transfer with the intention of helping the transferor to convert his immoveable property into cash which can be easily concealed and thus to defeat or delay his creditors cannot be treated as a transferee in good faith within the meaning of section 53 of the transfer of Property Act.

Ishan Chunder Das Sarkar v. *Bishu Sirdar*, [(1897) I.L.R., 24 Calc., 825], followed.

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(1) (1905) 2 Ch., 210.
(2) (1905) I.L.R., 29 Bom., 157.
(3) (1908) I.L.R., 35 Calc., 661.
* Appeal No. 45 of 1907.

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In such cases it lies on the transferee to prove good faith and valuable consideration; and where the latter is proved the Court will be slow in ordinary circumstances to hold that there was an absence of good faith.

Amarchand v. *Gokul*, [(1903) 5 Bom. L.R., 142], referred to.

Where the transferee has discharged a valid prior mortgage on the property sold, the transfer will be set aside only on his being given a charge for the amount spent by him in discharging such mortgage.

Chithambaram Chettiar v. *Sami Iyar*, [(1907) I.L.R., 30 Mad., 6], distinguished.

APPEAL against the decree of M. Visvanatha Aiyar, Subordinate Judge of Negapatam, in Original Suit No. 25 of 1905.

The facts are sufficiently stated in judgment.

P. R. Sundara Ayyar and *K. Srinivasa Ayyangar* for appellant.

The Hon. The Advocate-General and *S. Varadachariar* for respondents.

JUDGMENTS (WALLIS, J.)—The question whether the sale in favour of the defendant (exhibit II) is voidable at the instance of the vendor's creditors depends on the inference to be drawn from a number of circumstances attending the sale. The plaintiffs had obtained a decree in the High Court against Madarsa Rowthar and Sheik Davood on the 21st October 1902. On the 22nd January 1903 a petition was put in for transfer of the decree to the Subordinate Judge's Court of Negapatam for execution, and on the 25th March 1903 and the 26th March 1903 two execution petitions were put in in the Subordinate Judge's Court for execution (exhibits B and B1) praying for the arrest of the defendants in the suit and for the attachment of their properties including the property which is the subject of the present suit. In support of these petitions an affidavit (exhibit B2) was sworn by the plaintiff's agent on the 20th March 1903 and filed on the 28th March 1903 in which it was alleged that some of the properties were mortgaged and that the defendants in the suit were trying to sell the scheduled properties, to discharge only the mortgage debt and to appropriate the balance. The Court ordered the attachment of certain houses but not of the lands, as the Revenue registers had not been filed; and on the 2nd April the plaintiff's agent swore another affidavit (exhibit B4) stating that the defendants having come to know of the execution proceedings were, with a view of defrauding the decree-holders, selling the lands in Ottathattai village to the present defendant, that the stamp paper had been purchased, and that the sale-deed

was being written. The affidavit was filed on the 3rd April 1903. As to the fact of the sale the deponent's information was correct. The sale-deed (exhibit II) was executed on the 2nd April at Negapatam and presented for registration at Tirupundi, ten miles off, next day by Madarsa Rowthar, the senior vendor, and execution was admitted by the other vendors on the 5th April.

Now the defendant's story is that he had been in treaty for the purchase of these lands as far back as October 1902 before the date of the plaintiffs' decree.

The question before the Court is, was the sale under exhibit II on the 2nd April intended to defeat and delay creditors, and, if so, is it voidable against the defendant? Now if, as found by the Subordinate Judge, the intention of the vendors was to put their property beyond the reach of the creditors by converting it from land into cash, that would, I think, bring the case within section 53 of the Transfer of Property Act. In this country at any rate that is the most obvious and effective method of defeating and delaying creditors. We have of course been referred to *Wood* v. *Dixie*(1) which, as observed in Smith's Leading Cases, Volume I, page 18 (11th edition), has been followed as good law in *Hale* v. *Saloon Omnibus Company*(2), and *Darvill* v. *Terry*(3). The first two cases were cited in *Ishan Chunder Das Sarkar* v. *Bishu Sirdar*(4) but none the less the learned Judges observed, and I agree with them, that "It would be almost a contradiction in terms to say that a transferee for value, who takes the transfer with the intention of helping the transferor to convert his immoveable property into money which can easily be concealed, and thus to defeat or delay his creditors, should nevertheless be treated as a transferee in good faith, and the transfer to him should be upheld, though section 53 says that a transfer made with such intention is voidable at the option of creditors." The same view has been taken in *Hukim Lal* v. *Mooshahar Sahu*(5) in the exhaustive judgment of Mookerjee and Holmwood, JJ., in which it is shown to be supported by the great authority of Lord Mansfield and by decisions of the Irish and American Courts.

The question therefore is, was the sale under exhibit II effected for the purpose of defeating and delaying creditors by enabling

(1) (1845) 7 Q.B., 892.
(2) (1859) 4 Drew, 492.
(3) (1861) 6 H. & N., 807.
(4) (1897) I.L.R., 24 Calc., 825.
(5) (1907) I.L.R., 34 Calc., 999.

the judgment-debtors to convert their land into cash? Now if the sale was, what it purports to be on the face of the document, a sale for Rs. 15,000, of which Rs. 7,500 was paid to Annamalai in discharge of his mortgage decree and the balance Rs. 7,500 to the vendors, then I think the embarrassed circumstances of the vendors, the fact that the sale was hurried on after their houses had been attached and when the attachment of their lands was imminent, the hurried registration, the sale of other lands the same day to Annamalai for a suspicious consideration, all these things go to show that it was effected for the purpose of defeating and delaying creditors, and that is the finding of the lower Court. It is said, however, that the sale was effected with the intention of paying the balance to two secured creditors of the vendors Rs. 3,500 to Annamalai himself on account of a mortgage (exhibit XVI) for Rs. 5,000 effected in 1893 and Rs. 3,000 to another mortgagee, one Ramachendra Naidu, under a mortgage (exhibit IX) for Rs. 18,000 effected in 1898. Now if the sale was effected with the object of preferring these two creditors to the plaintiffs and the other creditors, it is clear and is admitted that the sale would not be voidable under section 53 of the Transfer of Property Act, but the burden of proving this where the sale appears otherwise to be voidable is on the defendant (*Narayana Pattar* v. *Viraraghavan Pattar*(1)) and should be established by satisfactory evidence. The finding of the lower Court is that the judgment-debtors apprehending that they could not conceal the intention with which they had sold the property to the defendant and escape from liability for arrest without accounting for the Rs. 7,500 in question subsequently gave Rs. 3,000 to Ramachendra Naik and Rs. 3,500 to Annamalai Chetty. Unless we can say that this finding is wrong, the defence fails. Now the evidence put forward by the defence as to the dates and circumstances in which these two payments were made is of a most unsatisfactory character and fails in my opinion to show that there was any idea of making these payments when exhibit II was executed.

I am unable to differ from the conclusion arrived at by the Subordinate Judge that it was intended by the judgment-debtors to defeat and delay their creditors.

(1) (1900) I.L.R., 23 Mad., 184.

The next question is, is the sale voidable against the defendant as transferee? In these cases it has been held by Jenkins, C.J., and Aston, J., in *Amarchand* v. *Gokul*(1), that it lies on the transferee to prove good faith on his part and consideraton: "If, however, it be proved that there was a valuable consideration adequate to the occasion, the Court will be slow in ordinary circumstances to hold that there was no good faith." Bearing this last consideration in mind, I am still unable to hold that there was good faith in Annamalai who advanced part at least of the purchase money and acquired a preponderating interest under the mortgage (exhibit XV) in the lands conveyed by exhibit II. As regards the defendant also, I am unable, on the best consideration I can give to the case, to hold that he has shown himself to be a transferee in good faith. For reasons already given I cannot regard him as a purchaser in the ordinary course of business, and I am even constrained to question whether the real nature of the transaction as between him and Annamalai is before the Court. If not, this is a strong indicium of fraud. The hasty manner in which the price was fixed without any valuation of the arrears, ploughing cattle and other things he was taking over in addition to the land, and the hurried registration also indicate that he knew all the facts and prevent me from differing from the Subordinate Judge on this point.

The Subordinate Judge has held that the properties conveyed by exhibit II were the exclusive property of Madarsa, but he gives no reasons for his finding. The contentions of the parties are set out in paragraphs 93 to 95 of the judgment, and the conclusion I have come to is that both the suit properties belonged to the family and not to Madarsa Rowthar alone as did the business in which they were engaged. The decree which the plaintiffs were seeking to execute was only against Mahomed Rowthar and Sheik Davood but the present plaint states that the business was being carried on by them on behalf of the family, and the family were heavily indebted to the plaintiffs as well under other bonds in respect of which debts, decrees have been obtained, and this is borne out by Sheik Davood's evidence, as defence witness No. 5. In these circumstances, I have come to the conclusion that exhibit II was executed by the other parties also for the purpose

(1) (1903) 5 Bom. L.R., 142.

of defeating and delaying their creditors including the plaintiffs though not of course in respect of the pending execution on which they were not liable.

The next question is as to whether the defendant is entitled to a charge upon the property for the amount of Rs. 7,500 which he paid in discharge of Annamalai's mortgage decree. In *Chidambaram Chettiar* v. *Sami Aiyar*(1) it was held that a transfer of a decree intended to defeat and delay creditors was wholly void and that the transferee was not entitled to execute it jointly with the transferor on the ground that the consideration for the transfer was the discharge by the transferee of some debts actually due by the transferor. In that case the transferee had merely paid off certain debts due by the transferor. Here he has discharged a valid mortgage previously binding on the property and I do not think it would be equitable to give the plaintiffs the relief they ask for except upon the terms of giving the defendant a charge for the Rs. 7,500 which he has expended in discharging the mortgage decree against the suit property, but this again must be conditional on the payment of Rs. 7,500 being certified by Annamalai if he has not already done so within one month of the receipt of this decree by the Subordinate Court. The decree of the lower Court must also admittedly be modified with regard to the defendant's purchase under exhibit VI which has, by mistake, been included in the decree. The parties will pay and receive proportionate costs throughout.

MILLER, J.—I agree that, if it be found that the vendee assisted the vendors to convert their land into cash to enable them to keep it out of the hands of their creditors, the sale will be voidable under section 53 of the Transfer of Property Act: and I agree also that in the present case the vendee ought to be allowed a charge on the land sold to the amount of Rs. 7,500, and as to the terms on which the charge should be allowed.

I have had greater difficulty in accepting the evidence as sufficient to establish a case under section 53 of the Transfer of Property Act, but I am not prepared to dissent from my learned brother's conclusion. I therefore agree in the modification of the decree proposed by him.

(1) (1907) I.L.R., 30 Mad., 6.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Munro.

1909. November 26. December 1.

KSHETRABARO BISSOYI OF NAMANAGARAM (PLAINTIFF), APPELLANT,

v.

SOBHANAPURAM HARIKRISTNA NAIDU AND OTHERS (DEFENDANTS), RESPONDENTS.*

Hereditary Village Officer's Act—(Madras) III of 1895, s. 5—Permanent lease not a transfer within the meaning of s. 5.

Section 5 of Madras Act III of 1895 only prohibits the transfer of ownership.

A permanent lease of lands forming the emoluments of an office does not amount to a transfer of ownership within the meaning of section 5 and is not prohibited by its provisions.

Vencataswara Yettiapah Naicker v. *Alagoo Moothoo Servagaran* [(1861) 8 M.I.A., 327)], referred to.

APPEALS against the decrees of J. G. D. Partridge, Agent to the Governor in Ganjám, in Original Suits Nos. 2 and 3 of 1904.

Suits by the plaintiff the Bissoyi of Namanagram in the Parlákimedi Agency to set aside permanent leases of wet and dry lands as set forth in the schedule to the plaints.

Plaintiff's case was that the lands were service inam; that the plaintiff gave leases of them, at certain rents, that he gave notice to the defendants in 1902 cancelling the leases, that the Special Assistant Agent, Chicacole, issued proceedings stating that the leases were invalid and that the defendants refused to relinquish possession.

The Agent held that the permanent lease was not prohibited by section 5 of Madras Act III of 1895 and dismissed the suit.

Plaintiff appealed.

T. V. Narayaniah for appellant.

P. R. Sundara Ayyar, H. Sitaramaswami and *N. Rajagopalachariar* for first respondent.

JUDGMENT.—The plaintiff in both the suits out of which these appeals arise is the Bissoyi of Namanagram. He in 1891 and 1899 granted two leases of certain land at rates of rent ordinary and reasonable in amount but permanently fixed. In 1904 he

* Appeal Nos. 134 and 135 of 1905.

MILLER AND MUNRO, JJ.

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sued to set the leases aside and to recover possession of the lands on the ground that the leases were invalid inasmuch as the lands were service inam lands. The suits were dismissed and the plaintiff appeals. Under section 5 of Madras Act III of 1895 the emoluments attached by the State to certain offices "shall not be liable to be transferred or encumbered." The contention on behalf of the appellant is that the lands in suit are such emoluments and that the grant of a permanent lease amounts to a transfer within the meaning of the section. We shall assume for the sake of argument that the section applies to the lands in suit. The question then is what is the nature of the disposition which is prohibited by the words "shall not be liable to be transferred." It is contended that it is lawful for the plaintiff to lease out the lands in the ordinary way. Further it is clear from the use of the words "or encumbered" after "transferred" that the latter word does not include the transfer of an interest such as is acquired by a mortgage and which leaves the ownership in the transferor. The reasonable inference therefore is that, when it is said the emoluments shall not be liable to be transferred, what is prohibited is transfer of ownership. The question then remains whether the grant of a permanent lease is a transfer of ownership. Under Regulation XXV of 1802 proprietors of land may, subject to certain restrictions, transfer by gift, sale or otherwise their proprietory right in the whole or any part of their zamindaris. In *Vencataswara Yettiapah Naicker* v. *Alagoo Moottoo Servagaran*(1) their Lordships of the Privy Council held that a permanent lease of a portion of a zamindari is not an alienation, and cannot be considered as a transfer within the words of the Regulation. It is clear from this that the grant of a permanent lease is not a transfer of proprietory right or ownership. We therefore dismiss the appeals with costs.

(1) (1861) 8 M.I.A., 327.

APPELLATE CIVIL.

Before Mr. Justice Sankaran-Nair and Mr. Justice Abdur Rahim.

1909. April 6. October 14, 15. December 1.

MUTHUSAMI MUDALIAR AND ANOTHER (DEFENDANTS NOS. 2 AND 3), APPELLANTS,

v.

MASILAMANI *alias* SUBRAMANIA MUDALIAR (DEAD) AND OTHERS (PLAINTIFF), DEFENDANTS NOS. 1, 4 AND 5 AND PLAINTIFF'S LEGAL REPRESENTATIVES.*

Civil Courts Act (Madras), III of 1873, s. 16—Hindu Law—Marriage—Validity of marriage of Hindu with Christian woman converted to Hindu religion—Such marriage valid if recognised by the usage of the particular caste, though opposed to orthodox Hindu tenets—Suit, abatement of—Suit by reversioner for declaration on behalf of all reversioners does not abate on death of plaintiff.

A marriage contracted according to Hindu rites by a Hindu with a Christian woman who, before marriage, is converted to Hinduism, is valid when such marriages are common among and recognised as valid by the custom of the caste to which the man belongs, although such marriage may not be in strict accordance with the orthodox Hindu religion.

Under the Hindu system of Law, clear proof of usage will outweigh the written text of the Law. Under section 16 of Madras Act III of 1873 any proved custom concerning marriage must be upheld.

Apart from custom, such a marriage between parties who do not belong to the twice-born classes, is valid under Hindu Law. It is only persons who belong to the twice-born classes that are enjoined to marry in their own class. All other persons must be treated as Sudras and marriages between members of different classes of Sudras are valid.

Where a caste accepts a marriage as valid and treats the parties thereto as members of the caste, the Court will not declare such a marriage null and void.

A declaratory suit by a reversioner brought not only on his own behalf but on behalf of the body of reversioners does not abate on the death of the plaintiff.

SECOND APPEAL against the decree of T. V. Anantan Nair, Subordinate Judge of Tinnevelly, in Appeal Suit No. 364 of 1905, presented against the decree of Syed Tujuddin Sahib, District Munsif of Tinnevelly, in Original Suit No. 290 of 1904.

The facts for the purpose of this report are sufficiently stated in the judgment.

T. R. Ramachandra Aiyar for appellants.

* Second Appeal No. 820 of 1906.

K. Srinivasa Ayyangar and *S. Srinivasa Ayyar* for fifth and sixth respondents.

N. Rajagopalachariar for second respondent.

JUDGMENT (SANKARAN-NAIR, J.).—The plaintiff sues to recover possession of certain properties claiming to be the reversioner of Avudanayaga Mudaliar, the last male owner thereof from the alienees of the first defendant who claims to be, but according to the plaintiff is not according to Hindu Law, his widow, as at the time of her marriage and till her husband's death she was a Christian, or in the event of the first defendant's title as widow to the property being established, for a declaration that the alienations by her are not binding on the reversioners. The lower Appellate Court has found that the plaintiff has established the relationship alleged by him and that the alienation by the first defendant was not made for purposes which would justify a widow under Hindu Law from alienating the property. The only question therefore for decision is whether the first defendant is the widow of the deceased entitled to his property under the Hindu Law. In that case the plaintiff would not now be entitled to possession. The first defendant was a Christian before her marriage to the deceased Avudanayaga. The Subordinate Judge accepts the defence evidence that the marriage between her and Avudanayagam, a Hindu belonging to the Kaikolar class, was performed according to the formalities prescribed by the Hindu Law; a Brahman priest officiated at the marriage, the homum was performed, and the tali was tied round the neck of the bride. They lived together as husband and wife for about 30 or 40 years from the date of marriage to the death of Avudanayagam in 1901. They were living with his parents as members of one family. She lived as a Sivite Hindu like her husband. They were not treated as outcastes or put out of caste. The members of the Kaikolar community including the plaintiff associated with them as Hindus and members of their community. The plaintiff and the other members of the caste took meals cooked by the first defendant. They were also worshipping at the temples. They had a boy who was treated as a Hindu. When Avudanayagam died his funeral ceremonies were performed by the plaintiff's son.

facts are mainly proved by the plaintiff's witnesses them-

The common purohit of the deceased and the plaintiff, a Brahman and also the purohit of the Tinnevelly Kaikolar

community proves that the first defendant took part in the religious ceremonies performed by her husband at which he was the officiating priest.

The validity of this marriage is assailed on various grounds.

It is first contended that the first defendant was a Christian at the time of her marriage, which is therefore null and void under the Christian Marriage Acts of 1872 and 1865. This question was not raised in the Court of First Instance. If therefore the first defendant was a Christian when she was married without further enquiry it cannot be decided whether the marriage took place while the Act of 1865 or 1872 was in force. But it is unnecessary to consider that question as there is no doubt that the first defendant became a Hindu when she married her husband. She was a Roman Catholic Christian before her marriage. She removed the cross from her neck. Her forehead was smeared with holy ashes. The Brahman priest made homum and had the tali tied round her neck, or in other words with her husband she accepted his religion also. The question then is whether a marriage of a Hindu with a convert from Christianity is valid. It is contended by Mr. Ramachandra Aiyar that it is valid both by custom and the general law of the land. The Subordinate Judge holds that no custom has been proved to validate the marriage and even if proved, the custom cannot be upheld as repugnant to Hindu Law. The District Munsif recorded his finding in these terms. "The evidence let in in the case shows the prevalence of the practice of Hindus marrying Christian girls according to Hindu rites and such girls after their marriage following the Hindu religion." The Subordinate Judge in appeal holds that "the worthless evidence of a couple of witnesses who have no clear conception of what they are talking about is altogether insufficient to establish a custom." It is difficult to understand the Subordinate Judge. If he is referring to the evidence of the four defence witnesses as worthless, he has entirely ignored the evidence given by the plaintiff's witnesses themselves and the facts admitted by the plaintiff which go very far to, if they do not, prove the custom. The plaintiff, as his own first witness, admitted in cross-examination that "among Mudalies, Christian girls used to be married, if no other girls would be available"; and in re-examination said "If marriages of Christian girls be made according to Hindu religion, Hindus will go and

take meals." He proves that one Ponnammal, daughter of Antony, a Christian, married a Hindu, Pichakannu Mudaliar, and succeeded to the property of her husband who died without any issue. Her sister was married to another Hindu Sivite. One Chinna Muttoo married a wife who was a Christian. His son who predeceased him was a Sivite and she succeeded to his property. He refers also to one Myvelo Mudaliar whose mother was a Christian woman. The plaintiff's son and daughter were married by members of these families. Another witness, plaintiff's fifth witness, proves that one Arumazi, daughter of a Christian father Samuel, was married to a Hindu according to Hindu rites. He says "she went to Christian Church before marriage, after marriage she would smear ashes to her forehead." Her daughter was married by the witness's son, a Hindu. He refers also to another intermarriage where both parties remained Hindus after marriage. He states that according to usage "if a Christian girl be married by a Hindu, she would follow her husband's religion." The plaintiff's sixth witness admits that his brother-in-law, a Hindu, married a Christian wife. This evidence given by he plaintiff's witness strongly supports the defence evidence which proves the usage. The evidence establishes beyond all doubt that according to usage the members of the Kaikolar community in that locality used to marry girls who were Christians, who lived as Hindus after their marriage, were accepted as members of the community to which their husbands belonged and were allowed rights of inheritance under the Hindu law. The learned pleader for the respondents did not dispute these facts which prove the custom. The practice is not shown or alleged to be recent. Considering that the Catholic Christian community is an ancient community and their converts did not always give up caste on conversion, there is nothing improbable in the plaintiff's evidence that it is an ancient custom. The pleader for the respondents contended that the custom is so utterly repugnant to the Hindu law as declared by the Courts and in the Dharmasastras that it should not be recognized. The Judicial committee has held "under the Hindu system of law clear proof of usage will outweigh the written text of the law" and under the Madras Civil Courts Act, section 16 of Act III of 1873 any proved custom about marriage must be upheld.

Apart however from its validity as being in accordance with custom, I am also of opinion that the marriage is valid under Hindu law. It has been settled by a uniform course of decisions in this Presidency that marriages between members belonging to different divisions of the Sudra caste are valid. See *Pandaiya Telaver* v. *Puli Telaver*(1), *Inderun Valungypooly Taver* v. *Ramasawmy Pandia Telaver*(2), where the husband was a Marava and the wife was of Parcevara, an inferior class, and *Ramamani Ammal* v. *Kulanthai Natchear*(3), where the wife was a Vellala, a superior class, and the husband was of an inferior class. These decisions have since been followed. In Calcutta, Bombay and Punjab, the same view is now accepted. See *Upoma Kuchain* v. *Bholaram Dhubi*(4), *Fakirgauda* v. *Gangi*(5), *Haria* v. *Kanhya*(6). In the Punjab case which had reference to a marriage between members of sub-divisions of Kshatriyas the question is fully discussed by Chatterjee, J. But it is argued that as the first defendant was a convert from Christianity she must be treated either as an outcaste or a person who does not belong to any caste, and a marriage between her and a Sudra is invalid, though marriages between different divisions of Sudras might be valid. In my opinion the contention cannot be accepted. It is difficult to find any principle on which any such distinction can be supported. The decision in *Pandaiya Telaver* v. *Puli Telaver*(1) was based by Holloway, J., on the ground that the classes spoken of are the four main castes and not the sub-divisions of these castes; and as the twice-born man is instructed to marry in his own class the fair inference is that on one not twice-born the precept is not binding. All those who are not twice-born are thus treated as Sudras. Neither the first defendant nor her husband belonged to the twice-born castes. The learned Chief Justice in the same case was prepared to go further and hold that the restrictions on marriage between the castes were only directory. In the Calcutta case the wife was the daughter of an *outcaste* and in the Bombay case the parties were Lingayets, who in theory recognize no caste, as all who wear lingams are equal; and as they are not twice-born were treated as of the same caste for this purpose. It

(1) (1863) I.M. H.C.R., 478.
(2) (1869) 13 M.I.A., p. 141 at 158 and 159.
(3) (1871) 14 M.I.A., p. 346 at 352.
(4) (1888) I.L.R., 15 Calc., 708.
(5) (1898) I.L.R., 22 Bom., 277.
(6) Punjab Record, Vol. 43, p. 326.

is clear therefore that by "Sudras" it was intended to include all Hindus who are not dwijas or twice-born classes. This is strictly in accordance with Manu, Chapter X, clause 4, that a boy taken in adoption need not belong to any caste, also supports this view. *Shamsing* v. *Santabai*(1) and *Kusum Kumari Roy* v. *Satya Ranjan Das*(2). Further in *Mayna Bai* v. *Uttaram*(3) the children of a Brahman woman by a European father were treated as Sudras. It is clear therefore that the first defendant must be treated as a Sudra under these decisions and the marriage is therefore valid under Hindu law.

It was further contended by Mr. Ramachandra Aiyar that a marriage accepted as valid and binding by the community, sect or caste to which the parties belong cannot be held to be invalid on the ground that it is opposed to the ordinary Hindu law and the marriage in question is therefore valid even if it is opposed to the Dharmasastras. A caste for this purpose may be taken to be a combination of a number of persons governed by a body of usages which differentiate them from others. These usages may refer to social or religious observances, to drink, food, ceremonial pollution, occupation and marriage. Some of these usages may be common to others also. The caste is, so far as I know, invariably known by a distinctive name for identification, it has its own rules for internal management and has also got power of expulsion. The plaintiff and the deceased are *Kaikolars* and they undoubtedly form a separate caste—the Tinnevelly *Kaikolars* form a sub division of that caste and for our present purpose may be treated as a distinct caste by itself.

Though it is a rule of law that a person cannot alter the law of succession applicable to himself, it is now settled in India that he may change it by conversion to another religion, when *primâ facie* he will be governed by the laws of inheritance prescribed by that religion: a Hindu convert to Muhammadanism will *primâ facie* be governed by the Muhammadan laws of inheritance (*Jowala Buksh* v. *Dharumsingh*(4)). A Hindu convert to Christianity could before the Indian Succession Act retain his Hindu law or accept the law of the Christain community to which he has attached himself. *Charlotte Abraham* v. *Francis Abraham*(5).

(1) (1901) I.L.R., 25 Bom., 551.
(2) (1903) I.L.R., 30 Cal., 999.
(3) (1864) 2 M.H.C.R., 196.
(4) (1866) 10 M.I.A., 511.
(5) (1863) 9 M.I.A., 199.

This was so decided on the ground that though it is not competent to parties to create as to property any new law to regulate the succession to it *ab intestato*, yet when there are different laws as to property applying to different classes, parties are to be considered to have adopted the law as to property of the class to which they belong. This reasoning of course applies to a family which has changed its status without changing its religion. Thus in the case of Christians, it was held that though by origin and in his youth a person might have been a Native Christian following the Hindu law and customs as to property it was open to him to attach himself to the East Indian class who were governed by different laws relating to property, *Charlote Abraham* v. *Francis Abraham*(1). *A fortiori*—for these reasons apply to them with greater force—it is open to a Hindu who is governed by one law of inheritance to accept another law of inheritance recognized by Hindu law. Thus it has been held that a Hindu governed by the Mitakshara law may retain it or accept the Dayabhaga law prevalent in the locality to which he had migrated, *Soorendronath Roy* v. *Mussamut Heeramonee Burmoneah*(2), *Chundro Seekhur Roy* v. *Nobin Soondur Roy*(3), *Ram Bromo Pandah* v. *Kaminee Soondaree Dosee*(4) and Mayne's "Hindu law", section 48.

When such is the case with the law of inheritance prescribed or allowed by the State, it may be easily imagined that greater latitude was allowed in cases of marriage. In fact, in the cases from the *Weekly Reporter* above referred to, in deciding whether the family had accepted a different law relating to property, the Courts laid stress on the adoption of different marriage rites. The Hindu lawyers prescribe various ceremonies to constitute a valid marriage—see Mandlik, on "Hindu Law", page 401. But those ceremonies in their entirety are seldom if ever performed. According to them Vivaha Homam and Sapthapathi are essential. But it is notorious that marriages are performed in many castes without them and it is now settled that if by caste usage any other form is considered as constituting a marriage then the adoption of that form under those conditions prescribed by the caste with the intention of thereby completing the marriage union is sufficient.

(1) (1863) 9 M.I.A., 199.
(2) (1868) 12 M.I.A., 81.
(3) (1865) 2 Suth. W.R., 197.
(4) 1868) 6 Suth. W.R., 295.

No other conclusion is possible if due regard is had to conditions in India. They show that in all questions regarding marriage including restraints upon marriages between persons of different castes, each sect is governed by its own usage, which often vary from the accepted authorities on Hindu law. For instance it was and is an ordinary process for a class or tribe outside the pale of castes to enter the pale and also for the lower castes to claim recognition as belonging to a higher class. If the other communities recognise the claim they are treated as of that class or caste. This process of adoption into the Hindu hierarchy through castes is common both in Northern and Southern India. If their claim is refused then they form a new sect. Sometimes classes belonging to higher castes are denied religious communion by other classes of the same caste and if not sufficiently powerful to enforce their claims become of lower caste. Amongst such classes we often find the several usages of the two castes or classes. Contact with Buddhism, Mahomedanism and Christianity has evolved various sects which have discarded many characteristics of popular orthodox Hinduism and assimilated many ideas and practise rites which are popularly supposed to appertain to the other religious systems. Conversions to and from, orthodox Hinduism, Buddhism, Jainism, and in rare instances to and from Christianity and Mahomedanism, have not always or even generally been accompanied with changes in the laws of marriage and inheritance. These facts make it impossible to apply the rules of present orthodox Hinduism to such sects when any usage inconsistent with such rules is proved or to treat such usages as deviations from the ordinary law requiring for their validity the requisites of antiquity and continuity necessary to uphold a custom in English law. A reference to Mr. Bhattacharya on "Hindu Castes and Sects", the appendix in Mandlik's Hindu Law, relating to marriages (pages 394 to 459) and to Sir H. Risley's "People of India" will illustrate this position. As to some of these sects it may be not easy to affirm that they are governed by Hindu Law. Thus the Hosainis are a class of Brahmins in Western India who are said to have adopted to some extent the Mahomedan faith and its observances. The Kuvachandas in Sind are said to resemble the Mahomedans in their habits (Bhattacharya, page 118). The Jaiswars of Northern India (page 258) and the Kurmies of Behar (page 272)

are said to worship Mahomedan saints, according to Mahomedan ritual. Of course a Mahomedan priest officiates. The Hindu Law has to be applied to those only who are Hindus by religion and it is very doubtful whether some of these communities can be treated as Hindus or Mahomedans. In the absence of any statutory law they will be governed as to their marriages and inheritance by the rules of justice, equity and good conscience (See *Raj Bahadur* v. *Bishen Dayal*(1)) or in other words as laid down by the Judicial Committee in *Charlotte Abraham* v. *Francis Abraham*(2) according to the usages of the class or community. About the laws applicable to them I entirely agree with Sir James Stephen in his opinion thus recorded: "My own opinion is that if a considerable body of men, bound "together by common opinions and known by a common name "appeared to be in the habit of celebrating marriages according "to forms and on terms unobjectionable in themselves, the Courts "ought to recognise such marriages as valid, though in any "particular case, there might be circumstances which do not "suggest themselves to my mind and which could invalidate the "marriage. The fixity of the sect, the propriety of its forms, "and the propriety of its terms, would all have to be considered "by the Court. I think, in short, that, though it cannot be "affirmed with confidence, on the one hand, that all persons "who are not Hindus, &c., can marry in any way which sufficiently expresses their intentions, and on whatever terms they "think proper, it may also be affirmed that a marriage between "persons so situated would be valid, unless circumstances existed "which led the Courts to treat it as invalid; but if pressed to "say what those circumstances are, I should be unable to answer "the question, unless I had the facts of some particular case "brought fully before me."—Proceedings of the Legislative Council, pages 77, 78, *Gazette of India* Supplement, January 27, 1872.

Between these classes who occupy the border land between Islam and Hinduism and those castes who confirm strictly to the rigorous tenets of extreme Brahminism, lie various classes or castes whose sole common bond or union is that they are all classed as Hindus, and are governed by Hindu Law.

(1) (1882) I.L.R., 4 All., p. 348. (2) (1863) 9 M.I.A., 199.

Though Hindus they are widely divergent in their religious belief and conduct and their usages are in many respects utterly repugnant to orthodox Brahminism. Sir H. Risley's "People of India" and Mr. Bhattacharya's "Hindu Castes and Sects" may be usefully consulted for information about sects which originated in religious differences. Sir H. Risley's "People of India" shows how sects are formed, based not only on community of religion but also on community of function. Intertribal marriages have been responsible for the formation of many castes. So also migration and changes of custom. I shall refer to some of these cases which have a bearing on the question before us. The sects of Lingayets (Bhattacharya, page 396), Ram Sanehi (page 448), Dadupanthi (page 446), Chaitanya (page 464), Swami Narayan (page 474), Balahari (page 493), Jains (page 550), Kabir (page 496) and Sikhs (page 505) recognise no caste, no Brahman supremacy, and many of them receive converts from all castes. The Khuinhar Brahmans of Behar (page 109) and the Oriya poojari Brahmans (page 62), are believed to have been of low caste. Certain classes in Assam are supposed to have been made Brahmans by royal edicts with the result that when their ladies marry pure Brahmans they do not interdine with their maternal kindred (page 58). Similar promotions to the Kshatriya and other castes were made within the memory of men still living (Risley, App. cxxxi).

Emigrants often form castes with their status lowered but emigration also enables men of a lower caste to attain caste promotion. See Risley, page 90. Similarly the offspring of the union between Brahmans and lower castes are in some places treated as Kshatriyas—Risley, page cxxxi and page 83. For other instances see page 81. Clans who were Jats a few years ago are now Rajputs on account of changes in their customs and the converse practice also is said to be no less common, page cxxxi.

There are classes of Jats who claim to be Kshatriyas though they wear no holy thread (Bhattacharya, page 145). Among the Agarwals the wearing of the sacred thread depends upon their occupation (page 206). A Kolita in Assam wears a sacred thread when he becomes "a big man" (p. 196). Instances of Brahmins ceasing to belong to that caste when they take to

agriculture are given by Sir D. Ibbetson, p. cxxx, Risley. So also it is noted that a Kshatriya in that locality becomes a Kayastha when he becomes a clerk. This divergence from the Shastras is observable in a greater degree in Southern India. This is only natural, for as rightly pointed out in the census report of 1901, Madras, Volume 15, part 1, the essential difference between the castes of this Presidency and those of Upper India is that the ideas of the Aryans and the rules of Manu have affected the people of this Presidency less deeply than those north of the Vindhyas, page 128. See the very instructive observations of Mr. Mayne on this point, section 47, page 53, 6th edition.

In Southern India many castes numbering over a million deny the superiority or the sacerdotal authority of the Brahmins. See Madras Census Report, page 139. Many others, over five millions, follow practices which according to the Shastras place them beyond the pale of Hinduism (Groups 9 and 10, page 139). We also find that many castes claim a position far higher than that which the Hindu Society in general is inclined to accord to them. A few caste claim to be classed as Brahmins. The Pallis or Vanniyas, the Shanars and some of the Balijas claim to be Kshatriyas; the Komaties, the Muttans and some of few Vellalas state they are Vaisyas (page 130), Madras Census report, 1901. Sometimes, as in the case of Jatapus entirely new castes are formed, page 131. As in Northern India a change in the occupation sometimes creates a new caste. A common occupation sometimes combines members of different castes into a distinct body which becomes a new caste. Migration to another place makes sometimes a new caste. For instances, see page 132. This tendency to divide into sects or divisions, to form new sects with their own religious and social observances is a characteristic feature of "Hinduism" and in my opinion it is not for the Courts to interfere with it. If a community have consciously accepted different religious ideas and rites, it is not for the Court to insist upon their adherence to their abandoned ideas and practices.

Most of these sects arose within a recent date, some of them only within the last century. The Brahmo Samaj became a definite sect only about 1830. The Balahari sect "the most important of whose cult was the hatred that he taught his followers to entertain towards Brahmins" [page 493 (Bhattacharya)],

became a recognised sect only later and the Arya Samaj only within the last few years. The process is still going on. Sir H. Risley says (page 75) that "it is a matter of observation at the present day . . . . that the adoption of new occupations or of changes in the original occupation may give rise to sub-divisions of the caste which ultimately develop into entirely distinct castes."

The offspring of the sexual unions between members of higher and lower castes becoming members of a different caste is also said to be going on at the present time (pages 82, 84, also page 81). Sir D. Ibbetson states that in the Himalayas any one can observe caste growing before his eyes, the priest into a Brahmin, the peasant into a Jat and so on and he also says that the process was also more or less in course at a period not very remote from the present day in Kangra where the proudest and most ancient Rajput blood in the Punjab is to be found, Risley (Appendix page cxxxi). He also states that this process of forming separate castes "is going on daily around us, and it is certain that what is now taking place is only what has always taken place during the long ages of Indian History." I entirely agree. It is impossible to hold that marriages performed amongst such communities are invalid on account of non-conformity with the accepted tenets of orthodox Hinduism laid down by the Courts.

To these communities it is impossible to apply a marriage law which is based on the immutability of castes, and on ordinances which proscribe many of their most cherished practices. The castes referred to are only a few selected for illustration and their usages cannot be treated as exceptions to any general rule. It appears to me, therefore, that the Hindu Law to be administered by the Courts consists of the Shastras which claim divine sanction and are followed by the Brahmins generally and also of the usages or approved habitual practices, of these communities, whose caste status depends upon the degree of conformity of their usages to the Shastras and if according to the usage of the community a marriage is valid or the community recognize a marriage as valid then, in the absence of any statutory prohibition, I fail to see why it should not be recognized as valid, even without the requisites of a valid custom in derogation of what may be styled the ordinary Hindu Law unless it offends against rules which would render any other marriage invalid.

It is, of course, open to a community to admit any person and any marriage performed between him and any member would in my opinion, be valid, if it complied with their usage though it may be opposed to the Dharma Shastras.

Sir James Stephen's opinion on this question certainly seems reasonable. He said that, if it were not for English Courts and English Law, no difficulty would have risen. "Now sects which might have arisen would have adopted their own usages and would have lived or died according to the degree of vitality which they might contain. Their marriage and other customs would, if they lasted, have taken their place amongst the other customs of the country and would have been treated as equally valid with those which are in more general use. Why should we interfere with this state of things? Why should we determine at all what is, or is not, orthodox, according to Hindu notions? Why should we interfere with the natural course of events? There can, I imagine, be but one answer to these questions, namely, that no course can be more unwise, more opposed to our settled policy, more unpopular with the natives, or more unjust. All that can be said for it is, that it is more or less favoured by certain analogies which may be drawn from a part of English Law which has less in common with India than almost any other part of it. It is upon these grounds that I think it impossible to lay down, beforehand, with any approach to completeness, all the essentials to the formation of a new and valid custom as to marriage. It is possible to affirm, in general, that the mere fact that a Hindu sect is of recent origin, and the fact that it has adopted forms of celebrating marriage differing from those commonly in use, are not sufficient to prevent such marriages from being held valid by Hindu Law as interpreted and administered by our Courts." (*Gazette of India*, January 27, 1872, Supplement, page 81.)

This is in strict conformity with the spirit of Hindu Law. The legal rules put forward by the sacred writers are primarily intended only for those who accept in theory, the religious belief, the religious, social and moral obligations which form the foundation of that system. On the others, it is binding only by adoption and, though it will be presumed that as Hindus they are governed by that system of law, circumstances may exist to throw the burden of proof on the party asserting that they have adopted any specific rule of Hindu Law (See *Vanindra Deb Raikat* v. *Rajeswar Dass*

alias Jagindra Deb Raikat(1)), where the Judicial Committee held that where a family were shown to have become Hindus in part only recently, there is no presumption that they have adopted the law of adoption. Where, therefore, the religious and legal consciousness of a community recognizes the validity of a certain marriage, it follows that it cannot be discarded on account of its repugnance to that system of law.

Whether the marriage is valid or not, according to the caste rules, it is for the caste itself to decide. So far as ancient history and modern usages go, marriage questions have always been settled by the caste itself and the validity of a marriage between the members of a caste who recognize it as binding has not been questioned by outsiders though the caste itself may be lowered in their estimation when such marriages are repugnant to their notions of morality.

Where, therefore, a caste accept a marriage as valid and treat the parties as members of the caste it would be, it appears to me, an unjustifiable interference for the Courts to declare those marriages null and void.

It does not follow that a marriage opposed to the usages of the communities and not recognized by them would be invalid. A marriage whatever else it is, *i.e.*, a sacrament, an institution, is undoubtedly a contract entered into for consideration with correlative rights and duties. The Civil Courts Act only requires that so far as Hindus are concerned its validity must rest upon Hindu Law, *i.e.*, as explained above the law of the Dharma Shastras as distinguished from caste rules or the caste law. If it is not recognized by the caste or caste rules, the parties may cease to belong to the castes whose usages they have violated and who would, therefore, expel them. There is nothing to prevent a man from giving up his caste or community. He is bound by the caste rules only on account of his voluntary submission and therefore, if the marriage is valid under the ordinary Hindu Law, they will be legally married even if such marriage is opposed to the rules of the caste or community to which they belong.

In fact in the case before us there are sub-divisions of the Kaikolar community intermarriages between whom are not allowed: but it is not contended that such marriages would be

(1) (1884) 12 I.A., 72.

SANKARAN-NAIR AND ABDUR RAHIM, JJ.

MUTHUSAMI MUDALIAR v. MASILAMANI.

invalid in a Court of Law though they may entail expulsion from those sub-divisions.

I am, therefore, of opinion that this marriage is valid (1) on the ground of custom, (2) because it is in conformity with Hindu Law which does not prohibit marriages between any persons who are not dwijas or twice-born persons, (3) because when the caste of which the parties are accepted members, recognize a marriage as valid, then it is legal marriage under Hindu Law.

I would, therefore, reverse the decree of the Sub-Judge and dismiss the suit for possession and restore that of the Munsif.

As, however, the alienation has been found to be not binding on the reversioners, there must be a declaration to that effect. It was contended that on the death of the original plaintiff the suit abated so far as the declaration is concerned. But as the suit for declaration was brought by the plaintiff not on his behalf only but also on behalf of the reversioners, the right to sue survives and the suit does not abate. Each party will bear his own costs throughout.

ABDUR RAHIM, J.—I agree.

APPELLATE CIVIL.

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

1909. December 6, 7.

CHIDAMBARAM PILLAI (PLAINTIFF), APPELLANT,

v.

MUTHU PILLAI (DEFENDANT), RESPONDENT.*

Variance between pleading and proof—Where plaintiff sues in ejectment on the ground of exclusive title, he cannot be given a decree for partition when the claim set up is found to be barred.

Where a plaintiff sues the defendant in ejectment on the ground that he and defendant were separately enjoying properties, he cannot, when such claim is found to be barred by limitation, rely on a tenancy in common not alleged in the plaint and claim a decree for partition.

SECOND APPEAL against the decree of F. D. P. Oldfield, District Judge of Tanjore, in Appeal Suit No. 118 of 1907 presented

* Second Appeal No. 388 of 1908.

WHITE, C.J., AND KRISHNASWAMI AYYAR, J.

CHIDAMBARAM PILLAI v. MUTHU PILLAI.

against the decree of K. S. Lakshmi Narasaiyar, District Munsif of Valangiman, in Original Suit No. 390 of 1905.

The facts for the purpose of the report are sufficiently stated in the judgment.

N. R. K. Thathachariar for appellant.

K. V. Krishnaswami Aiyar for respondent.

JUDGMENT (SIR ARNOLD WHITE, C.J.).—The point which arises for consideration in this appeal is whether there is a finding by the lower Appellate Court which we can accept and act upon with regard to the status of the family since the separation. The family consisted of a father and five sons. In 1873 the father and one son separated from the other sons including Manikam and Seenu. Later on, there was another division and another son Venkatachalu separated. And the question which the lower Appellate Court put to itself is "What effect had the separation on the position of Manikam and Seenu?" "Did they," as the lower Court thinks, "become tenants in common, or did they remain joint or subsequently become joint after a temporary separation?" The learned Judge has answered his own question. We have to look to a later portion of the judgment, *i.e.*, paragraph 3, for the answer. There, he says: "In these circumstances I dissent from the lower Court's conclusion in favour of division and the tenancy in common which is necessary in order to support it." That is no doubt by implication a finding that the tenancy was joint.

In an earlier portion of that paragraph we find the learned Judge referring to the decision of the Privy Council which is reported in *Balabux* v. *Rukhmabai*(1). But I am not satisfied that the learned Judge appreciated the effect of that decision. For this is what he says at page 23, line 13, "In the present case, if the lower Court's finding is right, those concerned returned so far towards joint tenancy that they became tenants in common. That relation is abnormal as between persons, who have been and are competent again to be co-parceners and I think that proof of it would be sufficient to raise a presumption that the further incidents of survivorship, by which joint tenancy would be reached, were intended, until the contrary were proved." That passage, to my mind, rather suggests that the view of the

(1) (1903) I.L.R., 30 Calc., 725.

learned Judge was that there was, at any rate, in this case a presumption in favour of the joint tenancy and that seems to me to be inconsistent with the decision of the Privy Council to which I have referred. There they lay down that "there is no presumption when one co-parcener separates from the others that the latter remain united . . . . And an agreement amongst the remaining co-parceners to remain united or to reunite must be proved like any other fact."

However, I do not think it necessary to proceed with this point further, because it seems to me that the defendant is entitled to succeed on his plea of limitation.

The finding of the lower Appellate Court with regard to this question of limitation is "As regards enjoyment I concur in the lower Court's conclusion from the evidence." And the lower Court's conclusion is "My finding on this issue is that the properties of Manika and Seenu were enjoyed only by Manika and defendant after the death of the former. Seenu Pillai died 15 years ago, for plaintiff's first witness says it was three years after Kannamal's marriage which was eighteen years ago." It seems to me that, accepting that finding, the defendant has established his plea of limitation.

The plaint was originally to eject upon the ground that properties were enjoyed separately. Nothing can be clearer than the allegation in paragraph 8 of the plaint: "Defendant's father, Manika Pillai, the said Seenu Pillai and I are divided brothers. Each of us has been separately enjoying his respective properties." The Munsif treated the case on the footing that notwithstanding that the suit was one in ejectment, the plaintiff was entitled to be given a decree for partition and he gave him a decree for partition.

He originally set up in the plaint the right to evict and I do not think the plaintiff is entitled to rely upon tenancy in common which he does not allege in the plaint for the purpose of getting rid of the plea of limitation.

For these reasons and for the reason that the plea of limitation is made out I would affirm the decree of the lower Appellate Court and dismiss the second appeal with costs.

KRISHNASWAMI AYYAR, J.—I agree in the decision arrived at by the learned Chief Justice. It is argued for the appellant on the authority of *Ahmad Wali Khan* v. *Shamsh-ul-Jahan Begam*(1) that the plaint ought to be liberally construed and relief should be given him on the basis of a tenancy in common. I do not think we shall be justified in putting this liberal construction. For in the circumstances of this case where the plea of limitation has been raised by the defendant and made good by him, on the case set up by the plaintiff, the plaintiff's allegation of exclusive title to the suit properties is what he should be confined to.

In respect of the alternative case which the plaintiff wants us to accept I am not inclined to put the liberal interpretation which the plaintiff asks us to give to the plaint.

As regards the question which has been argued at considerable length as to the effect of a partition decree which gives the plaintiff a share in property for which it is necessary to determine the shares of the other members, namely, whether these other members are to be treated as tenants in common subsequent to the partition decree or as joint tenants, it is unnecessary for us to determine it in this case.

(1) (1906) I.L.R., 28 All., 482.

WHITE, C.J., AND KRISHNASWAMI AYYAR, J. — CHIDAMBARAM PILLAI v. MUTHU PILLAI.

APPELLATE CIVIL.

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

PORAKA SUBBARAMI REDDY (PLAINTIFF), APPELLANT,

v.

VADLAMUDI SESHACHALAM CHETTY AND OTHERS (DEFENDANTS), RESPONDENTS.*

1909. November 29, 30.

Specific Relief Act I of 1877, ss. 14, 15, 16, 17—Contract entered into by a person on his behalf and on behalf of minors—Form of decree in suit for specific performance of such contract, when contract found not to be binding on minors.

Where a contract of sale entered into by a person on his own behalf and on behalf of minors is found not be binding on the minors, no decree for specific performance can be passed against the interest of such minors in the properties.

Sections 14—16 of the Specific Relief Act do not enable such contract to be separated as regards the adult person who entered into the contract; and section 17 of the Act precludes the passing of a decree against the share of such party alone or a decree for the whole against such person.

* Second Appeal No. 1237 of 1907.

WHITE, C.J. AND KRISHNA-SWAMI AYYAR, J.

PORAKA SUBBARAMI REDDY v. VADLAMUDI SESHA-CHALAM CHETTY.

The purchaser in such a case will be entitled, on offering to pay the whole purchase money, to a decree directing the adult party to convey all his interest in the properties.

SECOND APPEAL against the decree of T. M. Rangachariar, District Judge of Nellore, in Appeal Suit No. 3 of 1907, presented against the decree of G. Kothunda Ramanujulu Nayudu, District Munsif of Nellore, in Original Suit No. 327 of 1905.

Suit to enforce specific performance of a contract for the sale of land.

The fourth defendant, and the first defendant for himself and as guardian of the minor defendants Nos. 2 and 3, agreed to sell the suit lands to the plaintiff for Rs. 1,400 on 14th July 1904 and gave a letter to that effect after receiving Rs. 4 from the plaintiff as earnest money. The defendants put plaintiff in immediate possession of the suit lands and agreed to execute the sale-deed within ten days from that date. The defendants, however, failed to execute the sale-deed and receive the balance of purchase money. Plaintiff called upon the defendants to execute a sale-deed, but defendants failed to do so

The District Munsif found that the contract was not binding on the minors and that the plaintiff was not entitled to a decree against the interests of the first and fourth defendants alone and he accordingly dismissed the suit. On appeal his decree was confirmed.

T. Narasimha Ayyangar for *S. Subramania Ayyar* for appellant.

T. V. Seshagiri Ayyar for first respondent.

T. V. Muthukrishna Ayyar for second and third respondents.

K. Narasimha Ayyar for fourth respondent.

JUDGMENT.—The defendants Nos. 1 to 4 entered into a contract with the plaintiff to sell him certain lands for Rs. 1,400. He brings the suit to enforce specific performance. The Courts below have dismissed the suit. Defendants Nos. 2 and 3 were minors and the contract was entered into on their behalf by the first defendant as their guardian. It is found that the contract was not for purposes binding on the minors and therefore no specific performance could be decreed against their interests in the properties. The contract being one and indivisible the Courts below have dismissed the suit even against defendants Nos. 1 and 4. In second appeal the plaintiff asks for a decree against the

WHITE, C.J., AND KRISHNA-SWAMI AYYAR, J.

PORAKA SUBBARAMI REDDY v. VADLAMUDI SESHA-CHALAM CHETTY.

shares of the first and fourth defendants at least. This we think he cannot have. Section 17 of the Specific Relief Act is against him. Sections 14, 15 and 16 of the Act do not enable the contract to be separated as regards the first and fourth defendants in this case. The plaintiff relies on the decision in *Gurusami* v. *Ganapathia*(1); the contract in that case was before the Specific Relief Act. The decree therefore which the Court felt itself competent to make at page 344 of the report would appear to be justifiable under the law as it stood before the Act (see *Burrow* v. *Scammell*(2)). Such a course does not appear to be warranted by the proviso to section 15. Collet remarks in his book on the Specific Relief Act "Probably the proviso in section 15 was framed to meet the difficulties which have thus arisen in English cases." If the contract is indivisible under section 17 of the Act what then is the relief to which the plaintiff is entitled? We are asked by the appellant to give him a decree for the whole against the first and fourth defendants on the authority of *Srinivasa Reddi* v. *Siva Rama Reddi*(3). This we are unable to do. That was a case in which the contract was entered into with the manager of a Hindu family. It was sought to be enforced against him and another member not a party to the contract. Although it was found that it was not binding on the person who was not a party to the contract, the Court passed a decree against the contracting party for specific performance, leaving the question open as regards the binding character of such conveyance as between the purchaser and the junior member who was no party to the contract. It is unnecessary for us to express an opinion as to the correctness of the observations in that case as regards the true interpretation of section 15 of the Specific Relief Act. It is enough for us to say that the present case is different because the contract is one entered into on behalf of minors as well and the suit is therefore properly brought for enforcement of the contract against them also. We cannot therefore treat the finding that the contract is not binding on defendants Nos. 2 and 3 as uncalled for. The decision in *Kosuri Ramaraju* v. *Ivalury Ramalingam*(4) recognizes this distinction. It follows that no decree can be passed compelling conveyance of the interests of the second and third defendants

(1) (1882) I.L.R., 5 Mad., 337.
(2) (1881) I.L.R., 19 Ch. D., 175.
(3) (1909) I.L.R., 32 Mad., 320.
(4) (1903) I.L.R., 26 Mad., 74.

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as well by the first and fourth defendants. The appellant however expresses his willingness to take a conveyance by the first and fourth defendants of all their interests in the suit properties for the purchase money agreed upon without abatement or compensation. We think he is entitled to this decree. In reversal therefore of the decrees of the Courts below, we direct that on payment within three months from this date of the balance of the purchase money by the plaintiff, the first and the fourth defendants do execute a conveyance of their interests in the suit properties in favour of the plaintiff. As the plaintiff did not agree to this course in the Courts below we direct him to pay the costs of the respondents.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Abdur Rahim.

1909. November 18, 19, 23, 30.

VENKATARAMA IYER AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, REPRESENTED BY THE COLLECTOR OF TANJORE AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Adverse possession, title by, against Crown—Burden of proof—What facts prove adverse possession—Entry as poramboke not sufficient to prove title of Crown.

In mirasi tracts, the gathering of wild flowers and fruits from poramboke lands and the gathering of fish from small tanks will not indicate ownership, as such acts are permitted by Government. It is otherwise where large sums are spent on tanks by mirasidars in clearing silt and in constructing masonry dams. Such acts are indicative of ownership; and when they are proved to have been done for 30 or 40 years, the presumption will be that they have been done for more than the statutory period, and the burden will be on the Crown to explain such acts and prove possession within the statutory period. Mere entry as poramboke in the pymash and settlement registers is insufficient to prove the title of Government without proof of acts of ownership.

SECOND APPEAL against the decree of V. Subramanya Pantulu, Subordinate Judge of Tanjore, in Appeal Suit No. 1382 of 1905, presented against the decree of J. S. Gnaniar Nadar, District Munsif of Tiruvalur, in Original Suit No. 347 of 1904.

* Second Appeal No. 7 of 1907.

BENSON AND ABDUR RAHIM, JJ.

VENKATARAMA IYER v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

The first defendant in this suit was the Secretary of State for India in Council. The second defendant had obtained from Government the lease of the thalai plants on the banks of the tank in the village of Karkathi. The plaintiffs who alleged that they were ekabogam mirasidars of the village, claimed the tank and the thalai plants on its banks as their own "under law and in virtue of the immemorial custom prevailing in the Tanjore district." They further alleged that they and their predecessors in title repaired the tank on various occasions and "enjoyed the profits accruing therefrom,"; that they exercised acts of ownership over the tank for upwards of seventy years and that the thalai plants were planted by them. The plaintiffs, therefore, prayed for a declaration of their right to the tank and the thalai plants on its bank and for recovery of possession of the same with mesne profits, and for an injunction restraining the defendants from interfering with their right.

The first defendant denied the plaintiffs' right to the tank and the trees on its banks and to the right of fishery in the tank either by custom or by law and stated that the tank and its banks have been classed as poramboke at the time of the pymash and at the settlement; that the plaintiffs and their predecessors in title have not been in adverse possession of the tank beyond the statutory period and that the amount of mesne profits claimed was excessive.

The District Munsif held that the plaintiffs had not proved the title set up, and that the evidence was not sufficient to prove title by adverse possession against the first defendant. He therefore dismissed the suit. The judgment was confirmed on appeal.

Plaintiffs appealed.

T. R. Ramachandra Ayyar, S. Srinivasa Ayyar and *M. Subrahmania Ayyar* for appellants.

The Government Pleader for first respondent.

JUDGMENT.—In this case the plaintiffs prayed for a declaration that they are the owners of the tank described in the plaint; and for recovery of its possession, and for damages against the Secretary of State for India because his agent the Collector had leased out the aloe flowers on the banks of the tank and thus invaded their rights. The Courts below have found against the plaintiffs' title, and they appeal. Their claim is founded on two grounds, viz.,(1) that as sole mirasidars of the village they have by immemorial custom an exclusive right to all the poramboke

lands of the village; and (2) that they have been in exclusive possession and enjoyment of the tank for over the statutory period adversely to the Government and that they have thus acquired a title to it by prescription. We think that the title of the plaintiffs by adverse possession is established by the evidence. No doubt their enjoyment of the aloe flowers and of the fishery in the tank for the past thirty-five or forty years if it stood alone would not indicate ownership, because, in fact, Government everywhere, and especially in mirasi villages, allows the villagers to take fuel, grass, wild fruit and flowers from the poramboke and other waste lands of the villages and allows them in many cases to enjoy also the fish in small tanks. The non-interference of Government with such enjoyment does not imply a denial of the ownership of Government or an abandonment by Government of its ownership (*The Secretary of State for India* v. *M. Krishnayya*(1)). But in the present case we have much more. It is proved by the evidence that the predecessor in interest of the plaintiff expended large sums in clearing silt out of the tank and constructed masonry sluices in it for regulating the inflow and outflow of its water. These are acts of a kind which raise a presumption of ownership in the person doing them and are sufficient to shift to the defendant the burden of explaining away the acts and the ordinary inferences arising from such acts, and showing a title in the Government. There is not however a shred of evidence, oral or documentary, adduced by Government in this case. There is merely the allegation in the written statement that the tank is entered in the pymash and settlement registers as Government poramboke. Such entry is, of course, insufficient to prove that the tank is, in fact, the property of Government. The Collector, examined on interrogatories, admits that the Government has never at any time executed any repairs to the tank. He does not say that they have ever exercised any act of ownership in regard to it, nor does he attempt to explain how it happens that the plaintiffs, if not owners of the tank, have cleared out its silt and have constructed masonry sluices in it. He does not say that these acts were done with the permission of the Revenue authorties or even that such acts are in that district often allowed by Government at the request of the villagers as the upkeep of the tank is

(1) (1905) I.L.R., 28 Mad., 257, at pp. 285-6.

to their advantage. The record gives no idea of the size or character of the tank, but the Government pleader and vakil for the plaintiffs state that it is a small village tank of about 1½ acres in extent, not used for irrigation, but used for drinking and bathing purposes. Such a tank may well be the property of the villagers in common, or of private persons.

We think that the evidence on the record points to the conclusion that the plaintiffs have been in possession and enjoyment of the tank adversely to Government for thirty or forty years, and this is sufficient to shift to Government the onus of showing that Government has been in possession at some time within sixty years prior to the suit. There is no evidence that Government was ever in possession of it. We must therefore hold that the plaintiffs' possession should be presumed to have continued for more than the statutory period and that they have established their title by prescription (*Anangamanjari Chowdhrani* v. *Tripura Sundari Chowdhrani*(1), *Raja Chelikani Rama Rau* v. *The Secretary of State for India*(2) and *Krishna Aiyar* v. *The Secretary of State for India*(3). In this view it is not necessary to go into the question of the plaintiffs' alleged right as mirasidar.

We declare the plaintiffs' right to the tank and its banks as against the defendants and give them a decree for its recovery and for mesne profits at the rate claimed Rs. 8 per annum from 1901 until delivery of possession or three years from this date whichever event first occurs, with costs throughout against the first defendant.

Three months' time is allowed to the first defendant to satisfy the decree.

(1) (1887) I.L.R., 14 Calc., 740, at p. 748. (2) (1910) I.L.R., 33 Mad., 1.
(3) (1910) I.L.R., 33 Mad., 173.

APPELLATE CIVIL.

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

1907. November 4. 1909. November 26, December 28.

ANNAYYAN (PLAINTIFF), APPELLANT,

v.

CHINNAN *alias* MUNI VENKATA CHETTI AND OTHERS (DEFENDANTS NOS. 1 AND 2, SUPPLEMENTAL DEFENDANT AND SECOND DEFENDANT'S LEGAL REPRESENTATIVE), RESPONDENTS.*

Hindu Law—Illegitimate son, by widow whose re-marriage is prohibited, has no right of succession—Adverse possession—Right of true owner to recover possession by inducing tenant to attorn.

An illegitimate son by a Sudra widow, whose re-marriage is forbidden, has no right of inheritance.

Venkatachela Chetty v. *Parvatham*, [(1875) 8 M.H.C.R., 134], referred to.

To entitle the illegitimate son to succeed, the connection must not be adulterous or forbidden by law.

Where persons, holding adversely to the true owner, enjoy the lands through a tenant who however has not been let into possession by them or their predecessors in title, the true owner is not estopped from recovering possession by inducing such tenant to attorn to him.

SECOND APPEAL against the decree of S. Gopalachariar, District Judge of Salem, in Appeal Suit No. 275 of 1903, presented against the decree of T. Rajaram Rao, District Munsiff of Krishnagiri, in Original Suit No. 235 of 1902.

The facts for the purpose of this case are sufficiently set out in the judgment.

K. Bhashyam Ayyangar for appellant.

V. Purushothama Ayyar for the Hon. the Advocate-General for third respondent.

On the first hearing of this appeal the Court ordered the District Judge of Salem to submit findings on the following issues, viz.:—

(1) Was Krishnappa dead at the time when the first defendant was begotten?

* Second Appeal No. 57 of 1905.

WHITE, C.J. AND BENSON, J.

ANNAYYAN v. CHINNAN.

(2) On what date did Venkatasami (the first witness for the plaintiff) attain majority?

(3) Did Venkatasami or the third defendant get possession of the plaint land and if so, when?

And, if the finding on issue No. (1) is in the affirmative, then,

(4) Is the re-marriage of widows allowed by the usage of the class of Sudras to which the mother of defendant No. 1 belongs?

In compliance with the above order, the District Judge submitted the following findings:

Issue 1.—Was Krishnappa dead at the time when the first defendant was begotten?

Both sides agree to a finding in the affirmative.

Issue 2.—On what date did Venkatasami (plaintiff's first witness) attain majority?

It is practically agreed that Venkatasami's father, Pillanan, died in June 1883. Witnesses are examined on both sides to speak to the age of Venkatasami at the time. Those for the third defendant agree that he was 2 or 3 years old at the time of his father's death. Plaintiff's witnesses are much less consistent. Three of them would represent him as 6 or 7 years old at the time but another (plaintiff's thirteenth witness) says he was 4 or 5 years old at the time of the great famine (1877). There is not much to choose between the credibility of the witnesses but of the two I prefer to believe those for third defendant. Their testimony agrees with plaintiff's first witness's own statement of age in his plaint Exhibit D. The statement at the head of his deposition in this suit would make him even younger; but loose approximations are general in recording the age of a witness in the box, and I attach little importance to it.

I find that Venkatasami was born in 1880, and attained majority in 1898.

Issue 3.—Did Venkatasami or third defendant get possession of the plaint land and if so, when?

Plaintiff's vakil has argued at some length as to what constitutes possession; but it seems unnecessary for me to follow him. In returning a finding on a question of fact, it should be sufficient to simply record what I find to be the facts, leaving legal inferences to be drawn by the Superior Court.

I find that up to the time of the institution of Original Suit No. 546 of 1900 (*i.e.*, 15th September 1900) second defendant was cultivating the suit lands as tenant, and paying rent to first defendant and his mother (*vide* paragraph 4 of Exhibit D). On September 29th, plaintiff's first witness after instituting the above suit sold his interest in the lands to third defendant. The latter, being a relation of the cultivating tenant as well as Village Munsiff, found it easy to persuade the former to attorn to him, and judged it an easier course than to pursue the litigation opened by Exhibit D. On the tenant consenting to attorn to him, the suit was withdrawn on 2nd November 1900 on the specious pretext that a new one would be brought with third defendant joined as a party. This consent on the part of second defendant to attorn to third defendant must have been given before the withdrawal and bore fruit when the harvest time arrived in February-March 1901. Second defendant then paid rent to third defendant instead of to his old landlord, first defendant (*vide* paragraph 8 of the present plaint); and he continued to do so thereafter. This agreement between second defendant and third defendant and plaintiff's first witness was probably come to 4 or 5 days after the sale deed (dated 29th September 1900); according to third defendant it was followed by a formal delivery of possession but this I disbelieve.

I find that early in October second defendant consented to attorn to third defendant; after which nothing more happened till February-March when the latter began to receive the rent from him and in that sense to hold possession of the land.

Issue 4.—Is the re-marriage of widows allowed by the usage of the class of Sudras to which the mother of first defendant belongs?

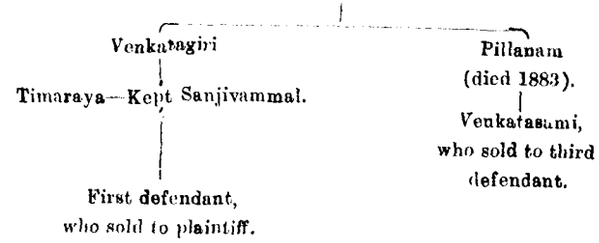
Three witnesses are cited by plaintiff to prove the custom of re-marriage among Gollars (plaintiff's witnesses 12, 13 and 14). Their evidence leaves it perfectly clear that re-marriage is not allowed, and I find accordingly.

This Second Appeal coming on for final hearing on Friday, the 26th November 1909, after the return of the findings of the Lower Appellate Court, and having stood over for consideration till this day, the Court delivered the following

JUDGMENT.—We think that the decree of the District Judge is right.

The facts necessary for the purposes of this appeal may be thus stated :—

The relationship of the principal parties is as follows :—



The lands in dispute originally belonged to Pillanan who died in 1883. His brother Venkatagiri unlawfully took possession of them in 1884, and on his death possession passed to his son Timaraya, who died in 1896, and the land then passed into the possession of the first defendant who was the illegitimate son of Timaraya by his kept woman, Sanjivammal. The possession by the first defendant, and his father and grandfather was adverse to Venkatasami from 1884 onwards. That possession was held through a tenant, the second defendant, who was the actual occupant of the land. On the 29th September 1900 Venkatasami sold his interest in the land to the third defendant who induced the second defendant, who was the tenant in actual possession to attorn to him. The attornment was in October 1900, and payment of rent by the second defendant to the third defendant was certainly made in February 1901 and afterwards. The third defendant thus obtained possession of the land in October 1900. In the same month the first defendant sold his interest to the plaintiff, and as the defendants Nos. 2 and 3 refused to give him rent or possession he brought this suit for possession and mesne profits.

The question is as to the respective rights of the first defendant and Venkatasami.

The District Judge found in favour of Venkatasami. The plaintiff, who claims under the first defendant, appeals. It is sought to support the claim of the first defendant by the fact that he and his predecessors were in adverse possession from 1884 until possession was lost in October 1900 or March 1901 by his tenant collusively attorning to the third defendant who had purchased Venkatasamy's interest. But it is found that Venkatasamy came of age only in 1898. He might therefore have sued to recover possession of the land on the strength of his

title at any time up to the end of 1900. In other words the first defendant's title by adverse possession had not been gained before Venkatasamy regained possession by the tenant the second defendant attorning to him in October 1900. It is argued that Venkatasamy could not regain legal possession by collusion with the first defendant's tenant, and reliance is placed on the case of *Pasupati* v. *Narayana*(1). No doubt that would be so if the tenant had been let into possession by the first defendant or his predecessor in interest, but there is no evidence that this was so. The second defendant would therefore not have been estopped from denying the first defendant's title. Venkatasamy, being the true owner, was not estopped from recovering possession by inducing the tenant in possession to attorn to him.

In these circumstances it must be held that the plaintiff's title by adverse possession has not been established and he has no right to eject the second and third defendants.

On another ground also he must be held to have no title. He claims through the first defendant, who is the illegitimate son of Timaraya by Sanjivammal. This Sanjivammal became a widow while still a child and it appears that Timaraya lived with her continuously as his concubine. It has been found that re-marriage of widows is forbidden among Sudras of the class to which the first defendant belongs, and the District Munsif points out that Timaraya and Sanjivammal were, in fact, outcasted by their community in consequence of their living together.

The first defendant was therefore the offspring of a connection forbidden by their customary law, and no authority has been cited to show that such an offspring has any rights of inheritance to the property of his father. No doubt the rule is well established in Madras that the illegitimate son of a Sudra by "an unmarried Sudra woman" is entitled to a share of the family property if the concubinage was continuous and if the connection was not incestuous or adulterous or in violation of or forbidden by law. (*Yettappa Naikar* v. *Vencatasubba Yettu*(2), *Datti Parisi Nayudu* v. *Datti Rangaru Nayudu*(3), *Venkatachella Chetty* v. *Parvatham*(4), *Krishnayyan* v. *Muttusami*(5).) It is argued by the appellant's

(1) (1890) I.L.R., 13 Mad., 335.
(2) (1865) 2 M.H.C.R., 293.
(3) (1869) 4 M.H.C.R., 204.
(4) (1875) 8 M.H.C.R., 134.
(5) (1884) I.L.R., 7 Mad., 407 at p. 411.

vakil that the words "unmarried Sudra woman" in the texts of the Hindu Law (Daya Bhaga, Chapter 9, verse 29) on which the rule is founded do not mean a woman who has never been married at all to any one, but mean "a woman who has not been married to the father of the child," and there is an *obiter dictum* in the case of *Vencatachella Chetty* v. *Parvatham*(1) that it is "at least doubtful" whether the words are not limited in the latter sense. It is also pointed out that in Bombay the condition that the woman should never have been married has in practice been disregarded. (*Rahi and others* v. *Govinda Valad Teja*(2).) But as Mr. Mayne points out in all the Bombay cases the connection with the married woman was not an adulterous one, but was sanctioned by usage having the force of law. No case has been cited in this Presidency where the offspring of such a concubinage as there was in the present case has been held entitled to inherit as an illegitimate son, and we are not disposed to extend the rights of illegitimate sons beyond the limits laid down by the authorities.

We must hold that the second appeal fails on his ground also.

We therefore dismiss it with costs.

ORIGINAL CRIMINAL.

Before Mr. Justice Abdur Rahim

EMPEROR

v.

ANTONY.*

1910. August 18.

Penal Code, s. 494—Bigamy—Remarriage of Hindu having Christian wife alive.

A Hindu convert to Christianity married a Christian woman according to the rites of the Roman Catholic religion. Subsequently, and during the lifetime of his Christian wife, he reverted to Hinduism and married a Hindu woman in accordance with the rites of the class to which the parties belonged:

Held, the offence of bigamy was not committed.

(1) (1875) 8 M.H.C.R., 134.
(2) (1875) I.L.R., 1 Bom., 113.

* Case No. 7 of 3rd Session, 1910.

ABDUR RAHIM, J.

EMPEROR v. ANTONY.

IN this case the accused was committed to the Sessions of the High Court on a charge of committing the offence of bigamy. The facts so far as they appear on the record of the committing Magistrate's Court were as follows:—

The accused was married to a Christian woman by a Roman Catholic Priest according to the rites of the Roman Catholic religion. Whether he was a Hindu or a Christian at the time of his marriage was doubtful but what evidence there was went to show that he was probably a Christian convert. He was subsequently married according to Hindu rites, his Christian wife then being alive. There was no evidence to show that he still professed Christianity at the time of the Hindu marriage.

The Crown Prosecutor for the Crown.

Mr. *V. Chakkrai Chetti* for the accused.

Before a jury was empanelled, his Lordship Abdur Rahim, J., directed the question of law to be argued with special reference to a case reported in 3 M.H.C.R., App. vii. He asked whether, in view of that decision, there was any case to go to a jury.

The Crown Prosecutor referred to the case of *Emperor* v. *Lazar*(1) which apparently overruled 3 M.H.C.R., App. vii, but admitted that the former decision was based on different facts and that that part of the judgment which referred to the remarriages of Native Christians who had renounced Christianity was *obiter*.

V. Chakkarai Chetti: 3 M.H.C.R., App. vii, is followed in 4 M.H.C.R., App. iii, and has always been held to be good law until the decision of *Emperor* v. *Lazar*(1). The decision in *Reg* v. *Allen*(2) and other English cases which is contrary to the principle laid down in 3 M.H.C.R., App. vii, has no application as in India a Hindu Christian reacquires his right to be a polygamist on ceasing to be a Christian and becoming a Hindu again. There being no evidence to show that the accused was a Christian at the time of the second marriage, a marriage according to Hindu rites, he cannot be presumed to be a Christian. In *Emperor* v. *Lazar*(1) the accused was unrepresented.

The Crown Prosecutor in reply to His Lordship stated that he had no positive evidence to adduce that the accused still professed Christianity at the time of the second marriage. He was aware of no ceremony for renouncing Christianity.

(1) (1907) I.L.R., 30 Mad., 550. (2) L.R.I.C.C.R., 367.

ABDUR RAHIM, J.

EMPEROR v. ANTONY.

Abdur Rahim, J., stating that he would follow the decision in 3 M.H.C.R., App. vii, ordered the jury to be impanelled.

The Crown Prosecutor stated the facts to the jury.

His Lordship then charged the jury that, the case of the Crown as stated by the Crown Prosecutor being that the accused had renounced Christianity at the time of or some time before the second marriage which was contracted not according to Christian rites but according to the rites prevalent among Hindus of the class to which the accused, a Pariah, belonged, the offence of bigamy could not in law be established on the evidence and directed them to return a verdict of not guilty.

The jury returned a verdict of not guilty in accordance with such direction and the accused was acquitted.

APPELLATE CIVIL.

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

1909. December 16.

IN THE MATTER OF ARTHUR GERALD NORTON KNIGHT,

PETITIONER—APPELLANT.*

Surety to administration bond—Right of Surety to apply for cancellation of bond on administration being completed.

A surety to an administration bond cannot, when the administration is complete and the bond becomes void and ineffective, apply to the Court to have the bond vacated and to be discharged from his suretyship.

There is nothing in the Indian Succession Act or in the Rules of Practice to authorise such an application.

APPEAL from the order of Wallis, J., dated 1st day of December 1908, passed in the exercise of the ordinary original testamentary jurisdiction of the High Court.

The facts for the purpose of this case are sufficiently set out in the judgment.

D. M. C. Downing for petitioner—appellant

JUDGMENTS (SIR ARNOLD WHITE, C.J.).—This is an appeal from an order by Mr. Justice Wallis refusing to direct the discharge of certain sureties and that the surety bond executed by them should be cancelled and held void.

* Original Side Appeal No. 71 of 1908.

WHITE, C.J., AND KRISHNASWAMI AYYAR, J. — ARTHUR GERALD NORTON KNIGHT.

The sureties were appointed under section 256 of the Succession Act. Their bond provides that on the fulfilment of the conditions specified in the bond, the bond shall be void and of no effect.

I have practically no doubt that in this particular case the administration is complete and that the conditions of the bond have been fulfilled, and that, consequently, under the condition of the bond, it has become void and of no effect. That being so, I should have been glad, if I could see my way to do so, to make the order we are asked to make. But so far as I am aware, there is no provision of law which enables us to make the order. The only rule which can be said to have any bearing on the question is rule 470 of the Original Side Rules: "An application by an administrator or surety to vacate a bond or surety's recognisance may be made by summons in Chambers." I think that rule applies to an application to vacate a bond during the pendency of the administration with a view to having another surety appointed in the place of the surety whose bond is vacated. With regard to the substitution of sureties, the English practice would appear to be that the Court will not discharge an Original Surety to the Administration bond and allow another to be substituted for him. That was what was held *In the goods of Stark*(1).

We have looked at the English Probate Rules, and so far as I can see, there is there no provision for making the order which we are asked to make in this case. I ought to refer to a case to which our attention has been called—a case in which an order was made by Mr. Justice Boddam on the 13th August 1907 on a similar application. We are told by Mr. Downing that Mr. Justice Kernan also made an order under similar circumstances. The only observation I have to make with regard to these orders is, that orders of this sort, if made at all, would be made as of course. In all probability, in the case of these orders, the point was not considered, and the learned Judges assumed that they had jurisdiction. I can only say with all respect, having considered the matter fully and having had the assistance of Mr. Downing's arguments, I cannot follow the decision of Mr. Justice Boddam. Mr. Justice Wallis did not see his way to make the order, and I do not see my way to say that Mr. Justice Wallis is wrong. The appeal is dismissed.

(1) (1866) L.R.I.P. & D., 76.

WHITE, C.J., AND KRISHNASWAMI AYYAR, J. — ARTHUR GERALD NORTON KNIGHT.

KRISHNASWAMI AYYAR, J.—I would like to add a few words as the question relates to a matter of practice. I am not aware of any provision in the Indian Succession Act enabling the sureties to make an application to the Court for their discharge. Mr. Downing has called our attention to none. Indeed I am not aware of any provision in the Act authorising the administrator to make an application to the Court for an order of discharge or for a declaration that the administration has become complete.

It seems to me that the principle of law is that as the bond becomes void on the happening of a condition it is allowed to work itself out on the happening of that condition and, if, as a matter of fact the administration has become complete in this case, the bond becomes void. If it is not, the bond is in force. There is no need for the Court being invited to make a declaration on the subject. I agree in the order of the learned Chief Justice.

Sir *H. C. King*—attorney for appellants.

APPELLATE CIVIL.

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

NATESA IYER AND ANOTHER (DEFENDANTS NOS. 1 AND 2), APPELLANTS,

v.

APPAVU PADAYACHI (PLAINTIFF), RESPONDENT.*

1909. August 6, 9. September 21.

Contract Act IX of 1872, *ss.* 55, 64, 73, 74—*Right of party to recover deposit, forfeited by terms of contract.*

A entered into a contract with B for the purchase of lands belonging to the latter for Rs. 41,000. Of this amount Rs. 4,000 was paid in advance, Rs. 20,000 was agreed to be paid by means of a mortgage and the balance before the 24th May when the conveyance was to be executed. The contract provided that the Rs. 4,000 was to be forfeited if there was any delay on the part of the vendee. It was also stipulated that the vendor was to execute the conveyance either in favor of the purchaser or those nominated by him. In part performance of this contract, a sale of a portion of the lands was effected in favor of *M* on the 28th March. Just before the day of payment, *B* gave notice to *A* that if the sale was not completed on or before the agreed date, the contract would be avoided. *A* failed to perform the contract before that date. Subsequently *B* sold the lands to third parties and realised Rs. 1,500 in excess of the price stipulated by *A*. *A* brought a suit for specific performance of the contract or, in the alternative to

* Appeal No. 131 of 1907.

WALLIS AND SANKARAN-NAIR, JJ.

NATESA IYER v. APPAVU PADAYACHI.

recover the Rs. 4,000 paid by him. The Subordinate Judge disallowed the claim for specific performance but decreed the return of the deposit of Rs. 4,000 to *A*. On appeal by *B* against this decree:

Held, per *Wallis, J.*, that *A* was not entitled to a return of the deposit.

Time was of the essence of the contract, and *B* was justified in avoiding it under section 55 of the Indian Contract Act. *A* was not therefore entitled to specific performance or to damages.

A deposit is primarily a security or guarantee for the performance of the contract. The provisions of section 64 of the Contract Act requiring a party who avoids a contract to restore any benefit derived thereunder do not extend to such deposits. Sections 73 and 74 of the Act do not apply to such cases.

The distinction drawn by Courts of Equity between stipulations for liquidated damages and those for penalty have no bearing on such cases.

A stipulation for forfeiture of deposit is not a stipulation for a penalty and it is not agreed upon as liquidated damages, though it goes in reduction of damages.

Manian Patter v. *The Madras Railway Co.*, [(1906) (I.L.R., 29 Mad., 118)] referred to.

Srinivasa v. *Rathnasabapathy* [(1893) (I.L.R., 16 Mad., 474)], referred to.

Per *Sankaran-Nair, J.*—*A* was entitled to a return of the deposit.

To entitle a vendor to retain the deposit, there must be acts by the purchaser which not only amount to delay sufficient to deprive him of the remedy by specific performance but which would make his conduct amount to a repudiation of the contract.

A purchaser may recover damages if he shows his readiness and willingness to complete the contract within a reasonable time after the stipulated date; and the vendor rescinding the contract before the lapse of such reasonable time, cannot retain the deposit, though his rescession may be lawful.

A contract does not go off merely by non-payment before the stipulated time. The vendor becomes entitled to damages under sections 73 and 74 of the Contract Act, but the contract itself is not at an end.

The stipulation as to forfeiture in this case must be treated as a penalty.

The rule that the distinction between penalty and liquidated damages do not apply to pecuniary deposits, holds good only when there is no means of accurately ascertaining the damages. Where they can be ascertained and are below the deposit amount, the presumption will be that the parties intended it as a penalty and the deposit will not be forfeited. Sections 73 and 74 of the Contract Act apply to pecuniary deposits, and "penalty" includes deposits.

Where a person at whose option a contract is voidable rescinds it under section 55 of the Contract Act, before the contract is determined by the default of the other party, he will be entitled to recover damages under sections 73 and 74 of the Act. He must however return the deposit as a "benefit" within the meaning of section 64 of the Act.

APPEAL against the decree of T. V. Anantan Nayar, Subordinate Judge of Kumbakonam, in Original Suit No. 19 of 1906.

Suit by purchaser for specific performance of a contract for the sale of immovable property or in the alternative for the return of the deposit of Rs. 4,000 paid by the plaintiff.

WALLIS AND SANKARAN-NAIR, JJ.

NATESA IYER v. APPAVU PADAYACHI.

The contract contained an agreement exhibit A, dated 24th February 1903 and was executed by the defendant in plaintiff's favour. The material terms of exhibit A were " . . . . I have settled to sell you absolutely the remaining nunjah, punjah and jari manai, etc., the two store room buildings . . . . for the price of Rs. 41,000, out of which the amount received as advance on this date is Rs. 4,000; and I have executed this agreement on the condition that out of the balance of Rs. 37,000 left after deducting the above you shall pay Rs. 20,000 by means of a hypothication bond executed on the said land and house with one year's time and with interest at ½ per cent. per mensem and bring and pay you (me) in ready cash the balance of Rs. 17,000 . . . . before 29th May next and obtain sale deed. If there be delay on your part in obtaining the sale deed on the said due date you shall forfeit the above said amount of advance and that if there be delay on my part in returning the sale deed Rs. 4,000 in addition to the amount of the advance shall be paid I shall execute the sale deed before the due date either in your favour or in favour of those pointed by you " . . . . ".

The plaintiff failed to pay the balance of the purchase money by the agreed date, notwithstanding an intimation from the defendant that he would avoid the contract in the event of such failure.

The Hon. Mr. *V. Krishnaswami Ayyar* and *T. S. Rajagopala Ayyar* for appellants.

T. Rangachariar for *T. R. Ramachandra Ayyar* and *T. R. Krishnaswamy Ayyar* for respondent.

JUDGMENT (WALLIS, J.).—This was a suit by the purchaser against the vendor for specific performance of a contract for the sale of immoveable property and in the alternative for the return of the deposit of Rs. 4,000 paid by the purchaser.

The purchaser failed to complete within the stipulated time and the lower Court, finding that time was of the essence of the contract and that the first defendant exercised his option of avoiding the contract under section 55 of the Indian Contract Act on the plaintiff's failure to complete, refused to give the plaintiff specific performance, but ordered the defendant to return the deposit of Rs. 4,000 paid by the plaintiff at the time of executing the contract of sale, exhibit A, although in such contract it

is expressly stipulated that the amount was to be forfeited by the plaintiff in the event of his delaying to complete the contract by the 24th May 1903, and he admittedly so delayed. This express provision is over-ridden in the opinion of the lower Court by the provisions of section 64 of the Indian Contract Act that, when a person at whose option a contract is voidable rescinds it, he must restore, so far as may be, any benefit he has received under the contract to the other party.

The question was argued before us at considerable length. In expressing my own opinion I propose to deal in the first place with the provisions of the Indian Contract Act. Several cases as to the right to recover deposits have been decided in India since the passing of that Act, but in none of them has it been suggested that this question was affected by the provisions of section 64 or any other section of the Act. As pointed out by the House of Lords in *Soper* v. *Arnold*(1), the deposit is primarily a security or guarantee for the performance of the contract, and, as observed by Fry, L.J., in *Howe* v. *Smith*(2), "creates by fear of its forfeiture a motive in the parties to perform the rest of the contract." If, however, the law will not allow the deposit to be forfeited, this motive ceases to operate and the deposit ceases to be a guarantee or security for the performance of the contract. The learned Lord Justice goes on to observe "that the practice of giving something to signify the conclusion of the contract, sometimes a sum of money, or sometimes a ring or other object, to be repaid or redelivered on the completion of the contract, appears to be one of great antiquity and very general prevalence"; and it would further appear from Colebrook's "Digest", volume 2, page 77, that India may be added to the list of countries in which it prevailed. It was certainly, therefore, not to be anticipated that section 64 should have the effect of enforcing the return of the deposit to the defaulting party, when, owing to his default, the other party puts an end to the contract, the very case the deposit was intended to meet. Section 64 provides that, where a person at whose option a contract is voidable rescinds it, the rescinding party shall, if he has received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was

(1) (1889) 14 App. Cas., 429.

(2) (1884) 27 Ch.D., 89 at p. 101.

received. Now a deposit regarded as a security or guarantee for the performance of a contract must be regarded as outside of and collateral to the main contract, although consisting of money. If the contract be performed it will go in part performance thereof, but it might equally be a ring or some other object which could not go in part performance and would have to be given back on completion of the contract.

Where we have a contract and a guarantee for its performance, although they are included in the same instrument, it does not seem to be necessary to hold that the provisions of section 64 of the Indian Contract Act requiring the party avoiding the contract to restore any benefit he has received thereunder, as far as may be, extend to a deposit regarded as a guarantee. Even if a section of this kind applied in terms, it would, I think, be open to the parties on the principle *Quilibet potest renunciare juri pro se introducts* to provide, as they have in this case provided, that the deposit should not be returned on the avoidance of the contract; but I prefer to base my judgment on the view that the section does not apply. The opposite construction contended for would involve a serious, not to say uncalled for, alteration in the law, and if the legislature had intended to make any such alteration, it would, I think, have made its intention clear by the use of express terms. I feel further strengthened in the view by the number of Indian cases as to deposit which have since been decided without reference to this section.

We have also been referred to sections 73 and 74 of the Indian Contract Act, but in my opinion these sections deal with the right to recover compensation for breach of contract, and do not deal with the right of the defaulting party to recover back a deposit he has paid or with the right of the other party to retain it.

The distinctions drawn by Courts of Equity between stipulations for liquidated damages and stipulations for penalties have not in my opinion any bearing in this case. Ordinarily a deposit of this kind is not agreed on as liquidated damages but goes in reduction of damages. Of course the parties may agree that the deposit shall be treated as liquidated damages. In the next place Courts of Equity do not regard a stipulation for the forfeiture of a deposit as a stipulation for a penalty from which equity will relieve. In the case of *Manian Patter* v. *The Madras Railway*

Company(1) to which my learned brother was a party, this Court accepted, and acted on, this rule and dissented from the case of *Srinivasa* v. *Rathnasabapathy*(2) in which it had been lost sight of, proceeding upon the authority of *Wallis* v. *Smith*(3)in which Sir George Jessel states the rule clearly as follows at page 258:—"There is a class of cases relating to deposits. Where a deposit is to be forfeited for the breach of a number of stipulations, some of which may be trifling, some of *which may be for the payment of money on a given day*, in all these cases the Judges have held that this rule" (of treating the stipulation as a penalty) "does not apply, and *that the bargain of the parties* is to be carried out." The italics are mine. In the earlier case of *In re Dagenham (Thames) Dock Company Ex-parte Hulse*(4) which has been cited, a stipulation that half the purchase money should be paid in advance and forfeited for any breach of the conditions was treated as a penalty, but the amount was so large as to take it out of the ordinary class of deposits, and it does not appear to have been treated as such, and that is probably why Sir George Jessel did not think it necessary to refer to it as qualifying the rule laid down by him.

In the present case the price was Rs. 41,000 of which Rs. 4,000 was paid in advance, and Rs. 20,000 was to be paid by means of a mortgage and the balance of Rs. 17,000 before the 24th May next when the conveyance was to be executed, and if there was any delay on the part of the vendee the Rs. 4,000 was to be forfeited. The contract also contains a stipulation that the vendor was to execute the conveyance either in favour of the purchaser or of those pointed out by him. This last provision cannot mean that the purchaser had a right to make the vendor part with his land in parcels to third parties for an apportioned amount of the purchase money; its only effect was to oblige the vendor on payment of the purchase money to execute separate conveyances of different parcels of the land if the vendor so desired. Subsequently to the execution of the contract, the purchaser introduced one Muniya Pillai to the vendor as willing to purchase a part of the land and on the 28th of March the vendor executed an agreement to sell the land to Muniya Pillai for Rs. 12,500, exhibit D, and

(1) (1906) I.L.R., 29 Mad., 118.
(2) (1893) I.L.R., 16 Mad., 474.
(3) (1882) 21 Ch.D., 243.
(4) (1873) 8 Ch., App., 1022.

subsequently executed the sale deed, exhibit E, in his favour. It is admitted it was agreed between the original vendor and the purchaser that this was to be treated as a part performance of the contract and a part payment of Rs. 12,500 under it, but I cannot see how this transaction can have the effect of converting the stipulation for the forfeiture of the deposit into a penalty or of relieving the purchaser from the terms of his contract. It is next contended that the plaintiff is entitled to recover on the authority of *Howe* v. *Smith*(1). I am unable to accept that contention. It is found and is clear that in this case time was of the essence of the contract, and just before the day of payment the defendant gave notice to the plaintiff that if payment was not made within the stipulated time the contract would be avoided. After that it seems to me quite clear that the purchaser was not entitled either to a decree for specific performance or to recover damages against the defendant for breach of contract. If so, according to the test laid down by Fry, L.J., in *Howe* v. *Smith*(1), he also lost the right to the return of the deposit. Lord Justice Bowen treats the question as one to be determined by the intention of the parties expressed in the contract, and Cotton, L.J., does not, in my opinion, lay down any different rule. That was a case in which before the Judicature Act according to the view of Courts of Equity time was not of the essence of the contract. There was, I may observe, no express provision for forfeiture of the deposit, for non-payment of the purchase money on the due date, and it was even provided that if not paid on the due date it should bear interest. On the Common Law Side, however, time was regarded as of the essence of such contracts, and the effect of the Judicature Act was to substitute the equitable for the common law rule. As there time was not of the essence of the contract, in that case, the vendor was not entitled to rescind for mere non-payment on the appointed day; and even delay which might disentitle the purchaser to specific performance might not, in Lord Justice Cotton's opinion, in some circumstances be sufficient to entitle the vendor to retain the deposit; in such a case there must be something more which would amount to a repudiation by the purchaser, and entitle the vendor to treat the contract as rescinded and

(1) (1884) 27 Ch.D., 89.

retain the deposit. This however is no authority in my opinion for the proposition that where time is of the essence of the contract, and the vendor owing to non-payment is entitled to treat the contract as rescinded and does so, he is bound to return the deposit. *In re Scott and Alvarez's Contract*(1), Lindley, L.J., held that the Judicature Act made no difference as to the right of a purchaser to maintain a suit for the recovery of his deposit, which must still be governed by the terms of the contract. "It appears to me the purchaser would fail if he brought an action at law to recover his deposit; and I must say I think the case Mr. Farewell has referred to of *Corrall* v. *Cattell*(2), is decisive on that point." The legal answer is this: "There is no breach of contract at all; you have taken your chance with respect to your deposit; and unless you show a breach by the vendor of his bargain, you are not entitled to have that deposit back." It all comes back to this that, as laid down by Sir George Jessel, stipulations for the forfeiture of deposits are not penalties and must be enforced according to the terms of the contract. As regards the case of *Jackson* v. *De Kadich*(3) which is not fully reported it is sufficient to distinguish it from the present case, that, in that case, there was no condition for forfeiture of the deposit, and it is unnecessary to consider how it is to be reconciled with the case of *Howe* v. *Smith*(4), especially as it was the case of a vendor who after obtaining a decree for specific performance came to the court and asked for rescission.

As regards Indian cases, I have already referred to the case of *Srinivasa* v. *Ratnasabapathi*(5), and the case of *Manian Patter* v. *The Madras Railway Company*(6). The case of *Lachman Das* v. *Chater*(7) was not a case of deposit. The case of *Bishan Chand* v. *Radha Kishan Das*(8), and the case of *Balvanta* v. *Bira*(9), are in accordance with the view taken in this judgment. I would therefore allow the appeal and dismiss the suit with costs throughout.

SANKARAN-NAIR, J.—The question is whether the plaintiff is entitled to recover the deposit. The plaintiff agreed on the 24th February 1903 (see exhibit A) to purchase certain lands from

(1) (1895) 2 Ch., 603 at p. 612.
(2) (1839) 4 M & W., 734.
(3) (1904) W., N., 168.
(4) (1884) 27 Ch. D., 89.
(5) (1893) I.L.R., 16 Mad., 474.
(6) (1906) I.L.R., 29 Mad., 118.
(7) (1888) I.L.R., 10 All., 29.
(8) (1897) I.L.R., 19 All., 489.
(9) (1899) I.L.R., 23 Bom., 56.

the defendant for Rs. 41,000. "Out of which" a sum of Rs. 4,000 was paid "as advance" on that date to the defendant. Rs. 17,000 was to be paid before the 24th May next. The defendant agreed on such payment to execute the sale deed; and for the balance of Rs. 20,000 the plaintiff undertook to execute a bond hypothecating these properties to the defendant. The plaintiff was to forfeit the above said amount of advance if he failed to pay before that date and obtain the sale deed. If there was a delay on the part of the defendant to execute the sale deed "before the due date" he was to return the deposit with an additional sum of Rs. 4,000. The plaintiff now claims specific performance or the return of the deposit. The claim for specific performance is disallowed by the Subordinate Judge as he held that time was of the essence of the contract and the defendant was therefore entitled to rescind the contract on the expiry of the stipulated time and that he rescinded it. The claim for the return of the deposit has been allowed.

The defendant appeals.

It is admitted that the plaintiff entered into the contract not for purchasing the properties for himself but for selling the lands piece-meal at a profit to third parties. He was to introduce intending purchasers to the defendant, and the agreement of the 24th February 1903 provided that the defendant was to execute the conveyances in their favour. On the 28th March 1903, the defendant agreed to sell (exhibit D) to one Muruga Pillai some of the lands in exhibit A for Rs. 12,500, of which Rs. 3,000 was then paid. Rs. 4,000 was to be paid on the 31st May 1903, when the defendant was to execute the conveyance, and the rest was to be paid in two years. On the 30th May the sale deed was executed. On the 15th May the defendant warned the plaintiff that there was only one week more for the expiry of the time under exhibit A and that the transaction must be concluded before that date. The sale not having been effected on the 24th, on the 25th the defendant rescinded the contract and informed the plaintiff that he had forfeited the deposit. On the 22nd July the defendant sold some lands for Rs. 20,000 (exhibit H) to one Aghorappier, and, on the 5th August some other lands for Rs. 12,500 (exhibit F) to one Muthukumara Pillai, and there was also a subsequent sale for Rs. 200 to another person. In addition to the deposit the defendant has, therefore, realised Rs. 45,200.

It is admitted that the sale to Muruga Pillai under exhibits D and E was in pursuance of the contract. It is found by the Subordinate Judge, and we agree with him in that finding, that the subsequent sales were not in performance of the original agreement, exhibit A. He also finds that though the subsequent sales were not brought about by the plaintiff on account of the defendant's rescission of the contract "he did something in the way of recommending the purchases by those vendees"; and he further found "it cannot be said in these circumstances that plaintiff has wholly and absolutely failed to carry out his part of the agreement."

It is not in fact contended that the defendant has actually sustained any damage by reason of the breach of contract by the plaintiff or by its rescission by the defendant. He does not claim any damages. The only question, therefore, for consideration is whether the defendant is not entitled to retain the deposit under terms of the contract?

It appears to me that the English cases lay down the rule that to forfeit the deposit it must appear that not only has the contract not been performed within the specified time, but the defaulting party has no intention of performing the contract or that he repudiates it; and that where the vendor rescinds it before the purchaser abandons or repudiates the contract, he is not entitled to retain the deposit, see *Howe* v. *Smith*(1). Cotton, L.J., says "There must be acts on the part of the purchaser which not only amount to delay sufficient to deprive him of the equitable remedy of specific performance but which would make his conduct amount to a repudiation on his part of the contract." Bowen, L.J., says in *Howe* v. *Smith*(1): "It is obvious that the party may lose his right to insist on specific performance before an equitable tribunal, without at the same time having necessarily so acted as to justify the other side in saying that the contract is altogether at an end. . . . . We have to look to the conduct of the parties and to the contract itself, and, putting the two things together, to see whether the purchaser has acted not merely so as to break his contract, but to entitle the other side to say he has repudiated and no longer stands by it." So, also Fry, L.J., in *Howe* v. *Smith*(1) referring to the 25th section of the Judicature Act of 1873 says: "The effect of this clause is, in my opinion, that the purchaser seeking damages is no longer obliged to prove his willingness and readiness to complete on the day named, but may still recover if he can prove such readiness and willingness within a reasonable time after the stipulated day." If before the lapse of such reasonable time or repudiation by the purchaser the vendor rescinds the contract he cannot retain the deposit. Thus in Sugden's 'Vendors and Purchasers', 14th edition, page 22, "A stipulation in a contract that in case the vendor cannot deduce a good title or if the purchaser cannot pay the money on the appointed day, the agreement shall be void, does not enable either party to avoid the agreement by refusing to perform his part of it; the seller may avoid the contract if the purchaser does not pay the money . . . . *And if he (the vendor) insist that he has the right to rescind the contract, he cannot at the same time retain the deposit*" *Morley* v. *Cook*(2). So in Fry on 'Specific Performance', 3rd edition, section 1487, it is stated that the vendor is entitled to retain the deposit, "where the purchaser unjustifiably repudiates the contract or it in any other way goes off through his default." Neither under the Indian Contract Act nor in English law as pointed out by Fry, L.J., in the extract from his judgment already quoted does the contract go off merely by non-payment before the stipulated time. So the two conditions are (1) the contract must go off and (2) the going off must be due to the purchaser's default, which must be something else than non-payment. Farwell, J., in *Jackson* v. *DeKadich*(3) also was of opinion that the vendor cannot have rescission and at the same time damage for the breach of the contract, *i.e*, retain the deposit. In *Howe* v. *Smith*(1) and the other cases, there was either abandonment or repudiation of the contract by the purchaser before the vendor sold the lands.

It is clear, therefore, the defendant is not entitled to retain the deposit; because the plaintiff never abandoned the contract or repudiated it, and the defendants rescinded it on the 25th May though the plaintiff was entitled to perform the contract within a reasonable time after the 24th. Moreover the plaintiff's conduct,

(1) (1884) 27 Ch.D., 89 at p. 95.

(1) (1884) 27 Ch.D., 89 at p. 103. (2) (1842) 2 Hare, 106 at pp. 110, 111.
(3) (1904) W.N., 168.

it is found by the Subordinate Judge, shows his willingness to carry out his promise after that date. In all the cases cited where a party has been allowed to retain the deposit, the other party has failed to perform the contract within a reasonable time after the stipulated date or has by his conduct shown that he refuses to perform the contract and repudiates it.

The breach of the contract, the failure to perform on or before the specified date, clearly entitles the defendant to compensation under sections 73 and 74 of the Indian Contract Act; but the contract still subsists and the question whether the deposit is forfeited cannot arise till the determination of the contract. The appeal in my opinion fails on this ground.

Again, if we have to decide this case with reference to the ordinary rules which distinguish in English law a penalty from liquidated damages, then it appears to be clear that this provision must be treated as a penalty. Thus, supposing in this case the agreement was carried out before the 24th May, except as to the item last sold for Rs. 200, or supposing there was a piece of land worth only Rs. 5 to be sold, then the stipulation that the plaintiff is to lose his deposit of Rs. 4,000 must be treated as a penalty according to the rule in *Kemble* v. *Farren*(1), in which it was held "that a very large sum should become immediately payable in consequence of the non-payment of a very small sum, and that the former should not be considered to be a penalty appears to be a contradiction in terms, the case being precisely that in which the Courts of Equity have always relieved." The same rule is thus stated by Cotton, L.J., in *Wallis* v. *Smith*(2) "that comes within the same principle as where the courts have interfered where one of the covenants has been for payment of a sum of money when the damage is capable of being assessed accurately and is very much below the sum named."

The case of *Betts* v. *Burch*(3) is in point. In *Betts* v. *Burch*(3), the plaintiff agreed to sell and the defendant to purchase some property of which possession was to be given on or before the 13th October and in the event of either party not complying with *every particular set forth* in the agreement the defaulter should forfeit and pay the other £50. The plaintiff

(1) (1829) 6 Bing., 141. (2) (1882) 21 Ch.D., 243 at p. 270.
(3) (1859) (4) H & N, 506.

sued to recover the amount as he alleged the defendant broke the agreement and did not take possession. It was held that the plaintiff was not entitled to recover. Baron Martin said, "The plaintiff's counsel have established that the same construction must be put on the agreement for both parties. Now, as that is so, it would follow, if the contention contended for on the part of the plaintiff were to prevail, that if a very small part of the price were unpaid the defaulter would be liable to the penalty of £50. The cases are too strong and I am bound to say that this is a penalty," *i.e.*, as pointed out by Lord Justice Lindley in *Wallis* v. *Smith*(1), the £50 would be payable even though £1 only might be unpaid. In this case there was no deposit. But there is no reason why the case of deposits should be treated as an exception to the general rule. See *In re Dugenham (Thames) Dock Company Ex-parte Hulse*(2), which is an instance of a successful attempt to recover back the deposit money. In that case a company agreed to purchase land for £4,000 and deposited £2,000: the remaining £2,000 was to be paid on a day named in the agreement with a provision that if *the whole of* £2,000 was not paid on that day, the vendors were to repossess themselves of the land without any obligation to repay the deposit. The time was extended by an agreement which provided that the £2,000 with all interest should be entirely paid and discharged before a certain date. This was held to be a penalty. The reason is thus stated: "When you look at the last agreement, it provides that if the whole £2,000 with interest or any part of it, however small, remains unpaid after a certain day, then the company shall forfeit the land and the portion of the purchase money they have paid." This case also treats a deposit as damages payable by the defaulting party and applies to it the rule that the stipulation which provides for payment of a sum of money larger than the amount payable by the defaulting party is a penalty. With reference to this case Mr Krishnaswami Ayyar contended that, if it in any way supports the respondent's contention, it is opposed to the more recent cases in which it has been held that a deposit is not only a part payment but a security for the performance of the contract and therefore is liable to be forfeited on failure to carry out the contract.

(1) (1882) 21 Ch.D., 243 at p. 276. (2) (1873) 8 Ch. App., 1022.

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I shall refer to some of those cases, though it has to be remembered that they cannot throw light on the Indian Contract Act passed long before.

It is, no doubt, often said on the authority of the decisions referred to by Mr. Krishnaswami Ayyar that the cases distinguishing between a penalty and liquidated damages do not apply to a pecuniary deposit. But this is so on the ground that if there be only one event upon which the money is become payable, and there is no adequate means of ascertaining the precise damage that may result to the plaintiff from the breach of the contract, the parties may fix a given amount to avoid the difficulty. The rule therefore does not apply to cases where the damages may be accurately estimated. It does not get rid of the rule that where the provisions of the contract show the stipulation to be only a penalty, it must be treated as such and should not be enforced The deposit will not then be forfeited. I shall refer to a few cases that lay down that rule, drawing attention in particular to the law as it was understood before the Indian Contract Act, 1872.

The case of *Palmer* v. *Temple*(1) decides that, where there is no forfeiture clause, the fact that it is a deposit, does not necessarily show that the amount is forfeited and not to be returned: and when the party who holds the deposit is entitled to claim damages, he must hold it to the use of the other party, reducing the damages to that extent, if he is entitled to recover more than the deposit. This seems reasonable, because if it is absolutely forfeited, it cannot go in reduction of damages. The deposit according to this case, therefore, is really the damages payable by one to the other. as settled by the parties themselves by their agreement.

The case that will be next referred to, *Hinton* v. *Sparkes*(2), —where there was a forfeiture clause, makes this quite clear. The agreement in that case contained the stipulation that as earnest of an agreement for the purchase of a public house "the purchaser has paid into the hands of the vendor £50 which is to be allowed in part payment at the completion of the agreement . . . and if the purchaser shall fail to perform his part of the agreement, then the deposit money shall become forfeited, in part of the following

(1) (839) 9 Ad. & E., 508.

(2) (1868) L.R., 3 C.P., 161.

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damages; and if either of the parties neglect or refuse to comply with any part of the agreement he shall pay to the other £50, hereby mutually agreed upon to be the damages actually ascertained and fixed on breach hereof." As a fact the sum of £50 was not paid but the purchaser gave only an I.O.U. for the amount, but the Judges held that this made no difference. The purchaser made default and the vendor claimed the amount. The Chief Justice was of opinion that so far as the stipulation that £50 shall be the damages, ascertained and fixed, was concerned, that was not in the nature of a penalty. *Palmer* v. *Temple*(1) was distinguished on the ground that there was no condition of forfeiture: and it was held that as there was a stipulation that the money was to be forfeited, the vendor was entitled to the amount of the deposit represented by the pro-note. In that case on behalf of the vendor the contention was that the £50 was recoverable as liquidated damages and the purchaser pleaded that it was a penalty and, apart from the claim on the ground that there was an I.O.U., the only question was whether the £50 was a penalty or liquidated damages, and, in the course of the argument, Bovill, C.J., remarked at page 163, "Is there any case where money, deposited as in this case, has been treated as a penalty and not as a liquidated sum," and he was of opinion that the cases cited showing the distinction between penalty and liquidated damages have no application to a case where the agreement contains a stipulation of forfeiture. From the observations made in the course of the argument and the arguments in the case it is clear that the case of a deposit with a condition of forfeiture was not treated, as has been erroneously assumed, as not falling within the class of cases which turn upon the distinction between penalty and liquidated damages. Willes, J., pointed out at page 166, "In the event of the purchaser's default the deposit is to be forfeited, and there is abundant reason for supposing that the parties meant that the damages as against the purchaser should be the sum they have set down."

In my opinion there is a clear authority for the position that the reason why the purchaser is to forfeit the deposit is that he has agreed that it is to be taken as the damages payable by him.

(1) (1839) 9 Ad. & E., 508.

So too, in *Lea* v. *Whitaker*(1), all the three Judges concurred in laying down the same principle, that the intention of the parties must be pursued and where the language of the stipulation shows that the deposit was the agreed amount of damage, then the party committing the breach of the agreement is not entitled to recover his deposit. The other party retains it as the liquidated or estimated damages to be retained by the other.

These decisions were before or about the time of the Indian Contract Act. In *Wallis* v. *Smith*(2), the plaintiff agreed to deposit £5,000 by payment to the bankers to the joint account of the plaintiff and the defendant. Fry, J., after referring to the authorities above cited held at page 252, "these authorities are very strong to show that where a deposit has been placed in the hands of a third person and that is primarily the fund for the payment of the sum in question, that sum is liquidated damages and not a penalty. That applies strongly to the present case." In appeal, Jessel, M.R., classified the decisions and laid down four propositions to determine whether a stipulation is a penalty or a forfeiture. Referring to deposits as one of such cases, Jessel, M. R., says at page 258, "I now come to the last class of cases. There is a class of cases relating to deposits where a deposit is to be forfeited for a breach of a number of stipulations, some of which may be trifling, some of which may be for the payment of money on a given day, in all those cases the Judges have held that this rule does not apply and that the bargain of the parties is to be carried out." The opinion of Cotton, L.J., has been already cited. He evidently was of opinion that the rule that a covenant to pay a sum of money where the damage is capable of being assessed accurately and is very much below the sum mentioned must be treated as a penalty applied to the case of a deposit also. But he held that on the facts this principle was not applicable and that the sum of £5,000 must be treated as liquidated damages. Lindley, L.J., also held in that case which was one of deposit at pages 274 and 275 that "it has long been settled that where a person agrees to pay a larger sum if he does not pay a small one, he does not mean what he says, and the contract is not to have the effect one would suppose it was intended to have." In that case, in his opinion, the damage could not be ascertained. This case also supports the

(1) (1872) L.R., 8 C.P., 70.

(2) (1882) 21 Ch.D., 243.

view that a deposit can be retained only as liquidated damages but "where the damage can be small or trivial" or ascertainable and is less than the deposit, then it is to be treated as a penalty.

In *How* v. *Smith*(1), it was held that a deposit is not only a part payment but is also an earnest to bind the bargain so entered into, and creates by the fear of its forfeiture a motive in the payer to perform the rest of the contract. The Judges also agree that the question is one of construction of the document to discover the intention of the parties. *Palmer* v. *Temple*(2) was for this purpose relied upon, and Fry, L.J., says that if the intention is not expressed they have to enquire what terms are implied.

The only other English case that need be referred to is the case of *Soper* v. *Arnold*(3), Lord MacNaughten stated therein at page 435, "The deposit serves two purposes. If the purchase is carried out it goes against the purchase money—but its primary purpose is this, it is a guarantee that the purchaser means business; and if there is a case in which a deposit is rightly and properly forfeited it is, I think, when a man enters into a contract to buy real property without taking the trouble to consider whether he can pay for it or not." In this case there was a stipulation that the purchaser should forfeit the deposit.

It will be observed that there is a distinction between these cases and the case, *In re Dagenham (Thames) Dock Company Ex-parte Hulse*(4).

In the latter case, the deposit was to be forfeited for non-payment of a smaller amount which did not appear to be so in the other cases. As pointed out by Mr. Mayne with reference to *Wallis* v. *Smith*(5), the forfeiture of the deposit for non-payment on a certain day is apparently due to the fact that the damages resulting therefrom cannot be accurately estimated or any lesser sum apportioned as payable in the event of a breach. (Mayne on 'Damages', 7th edition, page 160.) The rule laid down in *In re Dagenham (Thames) Dock Company Ex-parte Hulse*(4) is not therefore affected by these latter decisions.

(1) (1884) 27 Ch.D., 89.
(2) (1839) 9 Ad. & E., 508.
(3) (1889) 14 App. Cas., 429.
(4) (1873) 8 Ch.A., 1022.
(5) (1882) 21 Ch.D., 243.

Thus it appears to me that though the English Law in 1872, when our Act was passed, treated the question whether the payer is entitled to recover the deposit or not as turning upon the intent of the parties to be collected from the whole instrument, that intent was often different from what the words in their natural sense conveyed. The cases decided that certain words in certain events bear a particular meaning: and it was assumed that when the parties entered into the contract knowing that the courts would attach such special meaning to those words, the parties must have used those words in the sense in which the Courts understand them, though on the face of them, they may have a different meaning.

One of the artificial rules so laid down to discover the intent is that where there is a deposit made under a contract for a sale of land, and the contract is repudiated, then the deposit is to be treated as liquidated damages not recoverable by the repudiating party, because in such cases it is difficult to assess accurately the damage sustained. Even in the case of a deposit if such an intention can be gathered from the document as a whole, it will be treated only as a penalty (*Palmer* v. *Tempie*(1)); or if the deposit is larger than the amount ascertained to be due (see *In re Dagenham (Thames) Dock Company Ex-parte Hulse*(2) and *Wallis* v. *Smith*(3)), then also it will be deemed a penalty.

The real object of the Courts of Equity was to relieve parties from their oppressive contracts. It was felt that while a party to a contract is really entitled only to the specific performance of his contract or for damages which he may have sustained on account of non-performance, it is inequitable to allow him to derive any undue benefit far in excess of any damage he may have sustained, though the parties may have expressly stipulated to that effect. So these rules of construction were adopted. The question is whether the Indian Contract Act adopted this theory of a fictitious intention to be discovered by these extremely artificial rules of construction, which have perplexed English lawyers themselves, or laid down the simple rule that where a contract is broken, the damages alone shall be assessed and paid,

(1) (1839) 9 Ad. & E., 506. (2) (1873) 8 Ch.A., 1022.
(3) (1882) 21 Ch.D., 243.

and laid on the Courts the task in all cases of assessing the damages.

It is no doubt in the appellant's favour that the Indian cases generally discuss the question only with reference to the rules laid down in the English cases and, with one exception, the Contract Act is not even referred to. I shall refer to a few of the cases cited.

In *Srinivasa* v. *Rathanasabhapathy*(1), the suit was brought by a purchaser of the interests of a contractor who had deposited a certain sum of money with a Municipal Council under a contract which provided that the deposit should be forfeited on any default made by him in performing his contract. The contractor failed to perform the contract and the deposit was declared forfeited. In a suit by the purchaser it was held that the stipulation of forfeiture was in the nature of a penalty as it made the deposit liable to be forfeited, irrespective of the importance of the breach, and was not enforceable. The purchaser got a decree for the amount. The case of *Lachman Das* v. *Chater*(2), and apparently the case of *Howe* v. *Smith*(3), [*Soper* v. *Arnold*(4) seems to be a mistake] were relied upon. It is important that in this case there was no claim for damages by the Municipality and that claim was not considered. The next case is *Manian Patter* v. *The Madras Railway Company* (5), that also was the case of a contractor who deposited a certain sum of money with the Madras Railway Company which was liable to be forfeited on the contractor's default. The rule laid down in that case by Subramania Aiyar, J., and myself was that the forfeiture will not be interfered with, if the amount deposited was reasonable in amount and, as it did not appear unreasonable, the forfeiture was upheld.

On further consideration I do not think that this view is inconsistent with the decision in *Srinivasa* v. *Rathnasabhapati*(1). Both of them are clear authorities against the appellants' contention that on breach of the contract the deposit is unconditionally forfeited. They, in effect, decide that it can only be claimed as damages In *Manian Patter* v. *The Madras Railway Company*(5), it was further held that it may be presumed to be the reasonable amount of damages which a Court ought to award, a presumption

(1) (1893) I.L.R., 16 Mad., 474. (2) (1888) I.L.R., 10 All., 29.
(3) (1884) 27 Ch.D., 89 at p. 96. (4) (1889) 14 App. Cas., 429.
(5) (1906) I.L.R., 29 Mad., 118.

which may be rebutted by evidence. Where damages are not claimed or they are less than the deposit, then it is unreasonable to enforce the deposit. This alone was necessary for the decision. The reasonableness or otherwise of the amount depends upon the nature of the loss sustained. In the present case no loss has been sustained and no damages claimed. There are also certain observations to which so far as they are inconsistent with this judgment I do not now adhere.

In *Lachman Das* v. *Chater*(1), the case which was followed in *Srinivasa* v. *Rathanasabhapathy*(2), the entire amount in an administration bond became payable on breach of any of the conditions of the bond. The bond was executed and the stipulation was made to secure the due performance of the contract to exhibit in Court a true inventory of the estate and for the due collection and administration of the estate according to law. It was held that the stipulation, though made as a guarantee for performance, was a penalty and that the plaintiff was only entitled to damages and as he had not suffered any, the plaintiff's claim was disallowed.

However, in *Bishanchand* v. *Radha Krishna Das*(3), the learned Judges following *Ex parte Barrell*(4), and *Howe* v. *Smith*(5), held that the plaintiff was not entitled to recover a deposit after he had repudiated the contract for a sale of land. So far the decision is consistent with the authorities. But they apparently proceed further. The defendant therein claimed only Rs. 2,000 as damages and the Judges held that he was entitled to recover the full deposit of Rs. 6,500 even though he admitted that his damages amounted to only Rs. 2,000. The observations of the learned Judges fully support the appellant.

In *Ibrahimbhai* v. *Fletcher*(6), there was a defect of title and the question therefore really did not arise for decision. In *Balvanta* v. *Bira*(7), following *Howe* v. *Smith*(5), it was held that where the contract goes off on account of the purchaser's default he forfeits the deposit.

It will be noticed that all these decisions purporting to follow the English rulings arrive at conclusions not easily reconcileable with one another.

(1) (1888) I.L.R., 10 All., 29.
(2) (1893) I.L.R., 16 Mad., 474.
(3) (1897) I.L.R., 19 All., 489.
(4) (1875) I.L.R., 10 Ch., 512.
(5) (1884) 27 Ch. D., 89.
(6) (1897) I.L.R., 21 Bom., 827 at p. 853.
(7) (1899) I.L.R., 23 Bom., 56.

I shall now consider the provisions of the Indian Contract Act. Under that Act, if a party fails to perform his promise before the time specified, the contract does not become voidable if time is not of the essence of the contract, the only result of the failure being that he becomes liable to pay compensation. To enforce a stipulation of forfeiture of deposit seems obviously inequitable unless of course we adopt the rule that, however oppressive, the terms are to be strictly carried out in all cases of deposit. If time is of the essence of the contract then the contract only becomes voidable at the option of the other party, but till he exercises his option the contract subsists, so far as specific performance is concerned as before (section 55 of the Indian Contract Act).

Sections 73 and 74 of the Indian Contract Act are intended to get rid of the distinctions between penalties and liquidated damages, and it appears to me that section 74 as amended by Act VI of 1899 shows with sufficient clearness that a deposit, as such only, is not forfeited by any breach of contract. That section provides that 'if the contract contains any other stipulation by way of penalty' reasonable compensation must be awarded 'not exceeding the penalty stipulated for'. If the deposit is treated only as part payment, it is not contended—and the authorities are clear—that it is not forfeited. The decisions uphold the forfeiture on the ground of its being a guarantee for the due performance. The word 'penalty' in this section means any provision intended to compel the performance of a contract and hence includes a deposit. The argument that, if a deposit is not forfeited, it ceases to be security for the performance of any contract would apply with equal force to every stipulation which is not enforced on the ground of its being a penalty. The provision that we will get something less than the deposit is inconsistent with the view that he is entitled to retain the whole deposit.

Where a person, at whose option, under section 55 of the Indian Contract Act, a contract is voidable, *rescinds* it, while he gets compensation under sections 73 and 74 for the breach, he has to *restore* any benefit so far as may be to the other party (section 64), the object being to replace the parties in the position which they occupied before the contract was made. The deposit has *primâ facie* therefore to be restored under this section. This is consistent with the rule of English law that where there is no

abandonment or repudiation of the contract by the purchaser and the vendor puts an end to the contract, he cannot claim to retain the deposit.

It was argued that section 64 of the Indian Contract Act applies only to contracts voidable under section 19 or 19-A. Section 55 shows that the contracts referred to therein are voidable, and I see no reason to limit the operation of the section as suggested.

It was then contended that this is not a benefit derived under the contract. I am unable to accept this contention either. If not a part of the contract, there is no fresh consideration and a promise to fulfil a pre-existing obligation cannot be a consideration. There is in fact only one contract. The deposit is also part of the consideration. If it be a different contract, then the forfeiture must be absolute which, it is admitted, is not the case, as it will go in reduction of damages, or will be treated as part payment if the sale is subsequently carried out. It stands on the same footing for this purpose as the stipulation by the defendant to pay Rs. 4,000 to the plaintiff on his default. That cannot be a different contract and is clearly only a penalty. Not only deposits but penalties also may be enforced on the same ground. If we uphold this contention of the appellant, we shall have to declare those deposits forfeited which are only penalties according to English decisions and also in cases where there is no repudiation. The section also recognises no difference between deposits for sales of land and for other purposes, nor between contracts in which time is of the essence and others.

It was also argued that it is open to a party to waive the benefit of any provision of law in his favour and as the plaintiff has agreed to forfeit the deposit, the stipulation must be enforced. This argument would apply to every penalty. These sections are intended to prevent a party from enforcing the express provisions of his contract and therefore that there is such a stipulation is no reply. See section 1 of the Contract Act.

My conclusions are:—According to the English decisions where there is a deposit by a purchaser under a contract of sale of land, the deposit is not forfeited by him, where there is no repudiation or abandonment of the contract by him: and where the vendor rescinds it before the contract is put an end to by the purchaser, he cannot retain the deposit.

Where the damages sustained can be assessed and it is below the deposit amount, it will not be forfeited. I think *Srinivasa* v. *Rathanasabhapathy*(1) is rightly decided.

Under the Indian Contract Act the vendor can recover only the damages sustained by breach of contract and if he rescinds the contract he must restore the deposit.

As in this case no damage has been sustained and there is no plea to that effect, I would dismiss the appeal with costs.

WALLIS, J.—As my learned brother is in favour of confirming the decree of the lower Court, the appeal is dismissed with costs.

The memorandum of objections is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Abdur Rahim.

1909. November 14, 16.

KADIR IBRAHI ROWTHEN AND OTHERS (DEFENDANTS NOS. 1 TO 5 AND FIRST AND FIFTH DEPENDANTS' REPRESENTATIVES),

APPELLANTS IN SECOND APPEAL NO. 466 OF 1904 AND PETITIONERS IN CIVIL REVISION PETITION NO. 113 OF 1904),

v.

ARUNACHELLAM CHETTIAR AND OTHERS (PLAINTIFFS AND FIFTH PLAINTIFF'S REPRESENTATIVES), RESPONDENTS IN ALL.*

Trusts Act, II of 1882, *s.* 36—*Lease by trustee for term exceeding twenty-one years not void but only voidable.*

A lease by a trustee for a term exceeding twenty-one years is not void and illegal under section 36 of the Indian Trusts Acts, but only voidable at the instance of the *cestui que trust*.

SECOND APPEALS and Civil Revision Petition against the decrees of H. Moberly, District Judge of Madura, in Appeal Suits Nos. 445 and 444 of 1902 and 51 of 1903, presented against the decrees of T. Srinivasa Ayyangar, District Munsif of Paramagudi, in Original Suits Nos. 3 of 1901, 21 of 1901 and 18 of 1901, respectively.

The plaintiffs in these suit were the lessees of the Ramnad zamindari under a lease deed, dated the 28th September 1899, executed by the Diwan Trustee Rao Bahadur Venkataranga Aiyar

(1) (1893) I.L.R., 16 Mad., 474.

* Second Appeals Nos. 465 and 466 of 1904 and Civil Revision Petition No. 113 of 1904.

in whose favour the Raja of Ramnad executed a settlement deed for the zamindari on the 12th July 1895. The defendant was the tenant and pattadar of the village Rajasingamangalam. The lease deed entitled the plaintiff to recover from the tenants the arrears due by them to the zamindari till fasli 1308.

This suit was brought by the plaintiff to recover rent for faslis 1307–1309.

The defendant pleaded *inter alia* (1) that plaintiff's suit was barred by section 42 of the Code of Civil Procedure Act XIV of 1882 as the cause of action arose along with that is S.C. No. 582 of 1900 on the file of the Lower Appellate Court brought against the defendant for arrears of fasli 1306; (2) that as plaintiffs had taken a lease for over twenty-one years the lease was not valid under section 36 of the Indian Trusts Act and so their title as landlord based under the lease deed was not valid.

These contentions were over-ruled by both the Lower Courts. The District Munsif's judgment dealing with the latter was as follows:

"The defendant's contention is that, opposed to the law enacted in section 36 of the Indian Trusts Act, the plaintiffs' first lease deed, being for a term of 25 years (more than 21 years allowed under the section), is legally invalid and the plaintiffs could not claim title as landlords thereunder and could not take proceedings under Act VIII of 1865 and collect rent from tenants. It is not denied by the plaintiffs that section 36 of the Trusts Act applies to their lease. The last paragraph of section 36 says 'Except with the permission of a Principal Civil Court of original jurisdiction no trustee shall lease trust property for a term exceeding 21 years from the date of executing the lease.' Admittedly no sanction or permission of the Principal Civil Court was obtained by the trustee here for executing the lease deed of September 1899 to plaintiffs for a longer term than 21 years. So the whole question is what is the legal and proper construction of the words—no trustee shall lease trust property for a longer term than 21 years; in other words, what is the legal effect of a lease deed for 25 years, such as the one in the present case, whether it is illegal and invalid in the sense that no legal rights could pass thereunder, whether it is legally void or only voidable. The section quoted above says nothing; it is silent on the point. By executing a lease deed for 25 years instead of 21 years, the trustee has simply exceeded the

power given him by law. Whether this excess of power or authority invalidates the lease in toto or makes it valid as to the term allowed by law and invalid as to the excess, or makes the lease only voidable at the instance of the beneficiary we have to consider. On general principles of law as laid down in Broom's legal maxims, 5th edition, page 177, wherein it is stated that a lease for 20 years by person empowered to lease for 10 years is valid for a term of 10 years, the present lease may be held valid or good for 21 years though executed for 25 years."

"The provision in the act relating to trustee's power to lease for a term of 21 years is intended solely, I believe, for the benefit and in the interest of the beneficiary and therefore where that limitation is transgressed by the trustee, the beneficiary may avoid the lease or even ratify it, if he likes. It strikes me therefore that the lease for 25 years is only voidable at the option of the beneficiary and not void. The words are 'no trustee shall lease for longer term than 21 years' and not that a lease for more than 21 years is invalid. They govern the trustee's powers in respect of the trust property and as between the trustee and the beneficiary the former shall be liable to make good to the latter any loss arising from the transaction. The provision of law in question does not contemplate or was not intended to contemplate any question of public interest and the protection thereof, nor is based on any grounds of public policy, so that a transaction involving a violation or trangression thereof might be termed illegal or unlawful, and no rights and obligations could pass thereunder. Such a transaction could be regarded as *ultra vires* the trustee and not *malum prohibitum*. No authorities have been cited and no arguments addressed by the defendant's pleader in support of his contention that the lease is illegal. On the other hand the construction I put on the provision in Trusts Act which is contended for by the plaintiffs is the only right and proper construction is amply borne out by authorities. Section 29 of the Guardian and Wards Act contains a similar wording as to the powers of a guardian to alienate the ward's property. It says 'he (guardian) shall not without previous permission of the Court.

(*a*) mortgage or charge or transfer by sale, gift, etc..... any, part of the immoveable property of his ward or

(*b*) lease any part of that property for any term exceeding 5 years.'

"To avoid any misconception as to the effect of the words 'shall not mortgage &c.' or 'shall not lease, etc.' Section 30 provides that a disposal of immoveable property by a guardian in contravention of the provision in section 29 is voidable at the instance of any other person affected thereby. The Trusts Act is a private enactment (relating to private trusts) and the Guardian and Wards Act is also a similar enactment. Almost similar words used by the legislature in both the Acts have been thus explained in the latter enactment, though not in the former. Similar words therefore in the Trusts Act already quoted must by way of analogy be construed and explained in a similar manner and the lease for more than 21 years should therefore be held only voidable at the instance of the beneficiary who could be affected thereby. The law laid down in section 30 of Act VIII of 1890 as to the legal character of the disposal of ward's property by a guardian in contravention of the prohibition contained in section 29 is followed in I.L.R., 22 Madras, page 289, and I.L.R., 24 Calcutta, page 671."

"Again the words 'he shall not be entitled to bring the property to sale", &c., in section 99 of the Transfer of Property Act have been construed, as making a sale brought in contravention of the prohibition contained in the said section only voidable and not void, on the ground that the provision was intended only for the benefit of a certain class of persons, persons who had a right to the equity of redemption and not for protection of public interest, nor as laying down a rule of General Policy (See *Mayan Pathuti* v. *Pakuran*) (I.L.R., 22 Mad., 348)."

"Finally the Bombay High Court in *Turner* v. *The Bank of Bombay* (I.L.R., 25 Bom., 52) have, in construing the words in section 37 of the Presidency Banks Act (Act XI of 1876) which run "*The Director shall not make any loan* or advance (c) upon mortgage or in any other manner upon the security of any immoveable property or the documents of title relating thereto", &c., . . . held that the Director's transaction in violation of the prohibition contained in the said section is not illegal but would be only unauthorised and wrong or would be an excess of authority as against the shareholders for which the Directors would have to be responsible to the shareholders or corporators in respect of any loss occasioned thereby. In the original and appellate judgments in this case the English cases are quoted to show that a transaction

in violation of similar terms of a statute is not illegal but only unauthorised and the distinction between what is unauthorised or *ultra vires* in the literal sense, and what is illegal (*malum prohibitum* or *malum inse*) is pointed out clearly and forcibly."

Defendants appealed to High Court.

A. Krishnaswami Ayyar for *P. R. Sundara Ayyar* for appellants.

T. Rangaramanujachriar for first to fourth respondents and *S. Srinivasa Ayyangar* for first to fourth and seventh respondents.

JUDGMENT.—We do not think that the suit is barred by section 43, Civil Procedure Code, Act XIV of 1882. The small cause suit was not framed as a suit for the rent of fasli 1306. It was based on an alleged entrustment of the paddy of the zamindar to the tenant for safe custody. The cause of action therefore for non-payment of rent in the present suit is different from that in the small cause suit.

The appellant further contends that the lease under which the plaintiff's claim is wholly invalid and void because it is for a term of twenty-five years, whereas section 36 of the Indian Trusts Act enacts that no trustee shall lease trust property for a period exceeding twenty-one years except with the permission of the Court. He relies on the case of the *Bishop of Bangor* v. *Parry*(1). That was a case on the construction of the language of section 29 of the Charitable Trusts Amendment Act, 1855. It related to a charitable trust and the learned Judge who decided it relied on a decision under section 3 of Stat. 13 Eliz., c. 10, in which the language of the statute is that the leases there referred to are "utterly void and of non-effect to all intents, constructions and purposes." In section 36 of the Indian Trusts Act there is no such declaration that leases in excess of twenty-one years are void. Each statute must be construed with reference to its own language and scope. The Indian Trusts Act refers to private trusts. Section 36 is intended for the benefit of the *cestui que trust*, and this is secured better by treating such leases as voidable than by holding that they are necessarily illegal and void. We are of opinion that such leases are not void as being *malum prohibitum*, and illegal *per se*, though they no doubt are voidable at the instance of the *cestui que trust*. The District Munsif has dealt fully

(1) (1891) 2 Q.B., 277.

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with this question in paragraphs 11 to 15 of his judgment, and we are of opinion that the cases quoted by him *Sivaya Pillai* v. *Munisami Ayyan*(1) and *Mayan Pathuti* v. *Pakuran*(2) and *Turner* v. *The Bank of Bombay*(3), justify us in the view that we take as to the proper construction to place on section 36 of the Trusts Act.

We therefore dismiss these second appeals and the civil revision petition with costs.

APPELLATE CIVIL.

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

1909. December 9.

MAHOMED ESUF (DEFENDANT), APPELLANT,

v.

RAJARATNAM PILLAI (PLAINTIFF), RESPONDENT.*

Trade mark, infringement of—Essentials necessary to maintain action for.

It is settled law that a dealer in, or a manufacturer of a particular article who adopts a name for that article, whether the name be a purely fancy name or a descriptive name, cannot restrain another dealer from using the same name simply upon the ground that the article so named has acquired a reputation, even though it may be that the public have grown accustomed to buy the artic'e in question only relying on the name and without examining the quality of the article. For a man to be entitled to restrain another from using a particular name with reference to a commodity he must show that the public have grown to associate that particular name with himself as the manufacturer of, or dealer in, the article.

Barlow v. *Govindram*, [(1897) (I.L.R., 24 Calc., 364), referred to.]

SECOND APPEAL against the decree of M. Mundappa Bangera, Subordinate Judge of Trichinopoly, in Appeal Suit No. 93 of 1906, presented against the decree of M. J. Veeraragava Aiyar, District Munsif of Trichinopoly, in Original Suit No. 321 of 1903.

The plaintiff sued for an injunction to restrain the defendant from passing off cigars of his own manufacture as the goods of

(1) (1899) I.L.R., 22 Mad., 289.
(2) (1899) I.L.R., 22 Mad., 348.
(3) (1901) I.L.R., 25 Bom., 52.
* Second Appeal No. 36 of 1908.

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the plaintiff by selling them under the name of "Albert" a name by which the plaintiff's cigars had acquired a reputation during the past seventeen years.

The defendant denied plaintiff's right to the exclusive use of the name "Albert" and that the name signified in the market that the goods to which it was affixed were the manufacture of the plaintiff. He alleged that he and his family had been selling cigars and using the said name from a time prior to the year from which plaintiff's firm had been using it; that there was no infringement of plaintiff's right and that plaintiff's suit was barred by limitation.

The District Munsif upheld the defendant's contention and dismissed the suit with costs.

On appeal, the Subordinate Judge found that "the plaintiff's cigars had acquired a wide reputation under this name (*i.e.*, Albert) throughout India and that he sold them by thousands and lakhs between 1887 and 1890." The decree of the lower Court was reversed and an injunction was granted as asked for by plaintiff.

Defendant appealed to the High Court.

L. A. Govindaraghava Ayyar for *P. R. Sundara Aiyar* and *T. Natesa Aiyar* for appellant.

E. B. Osborne for respondent.

JUDGMENT (SIR ARNOLD WHITE, C.J.).—This appeal has been strenuously argued by Mr. Govindaraghava Ayyar. I see no reason to quarrel with his statement of law with regard to the question we have to determine. I think it may be said to be now well settled that a dealer in, or, a manufacturer of, a particular article, who adopts a name for that article, whether the name be a purely fancy name or a descriptive name, cannot restrain another dealer from using the same name simply upon the ground that the article so named has acquired a reputation, even though it may be that the public have grown accustomed to buy the article in question relying on the name and without examining the quality of the article. For a man to be entitled to restrain another from using a particular name with reference to a commodity he must, I think, as the law stands, be in a position to show that the public have grown to associate that particular name with himself as the manufacturer of, or dealer in, the article. I do not know that

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one need refer to authorities at any length. I may refer to a decision of the House of Lords in *Reddaway* v. *Banham* reported in 1896 A.C., 199 (*see* too *John Smidt* v. *Reddaway & Company*(1)). The House of Lords case was a very strong one, because there the name which was adopted was a true description of the particular commodity. We find the law laid down, I think, quite accurately, by Mr. Justice Sale in *Barlow* v. *Gobindram*(2). He puts it thus. I quote the head-note :—"To show that a particular trade number has acquired a reputation in the market, and that purchasers buy the goods by that number and not from an examination of the nature or quality of the cloth is not sufficient to establish the right of exclusive user of that number. There must be such an association between the number and the firm's name as to indicate in the understanding of the public that the goods bearing that number came from that particular firm." The same view was taken in a later Calcutta case *Munna Lal Serowjee* v. *Jawala Prasad*(3). And, as regards our own Court, we find the law laid down in substantially the same terms in *Nooroodeen Sahib* v. *Charles Souden*(4). Therefore, it seems to me that law does not present any serious difficulty in the case.

Of course it must be borne in mind that we are dealing with this case in second appeal and the question we have to consider, and really the only question we have to consider, is "has the learned Subordinate Judge found that the reputation acquired by this particular brand of cigars—the Albert brand—was acquired in connection with cigars bearing that brand which were manufactured by the plaintiff, or, in other words, has the public come to associate the name of the plaintiff with that particular brand ?"

Now let us just see what the findings of the learned Subordinate Judge are. In paragraph 7 of his judgment he says "Plaintiff's cigars had acquired a wide reputation under this name throughout India and he sold them by thousands and lakhs, between 1887 and 1890." Mr. Govindaraghava Ayyar asked us to regard that finding as merely a finding that cigars known as "Albert" cigars had acquired a wide reputation under this name throughout India. Well, if that be what the learned Subordinate Judge meant, it seems to me the reference to the

(1) (1905) I.L.R., 32 Calc., 401.
(2) (1908) I.L.R., 35 Calc., 311.
(3) (1897) I.L.R., 24 Calc., 364.
(4) (1905) 15 Mad. L.J., 45 and 46.

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plaintiff is meaningless. What he finds is that the plaintiff's cigars had acquired a wide reputation. He seems to find that these cigars known as the "Albert" brand had acquired a wide reputation as the plaintiff's cigars and not merely as cigars known as the "Albert" brand. That this is what the learned Subordinate Judge meant seems clear when we read this paragraph 7 by the light of his further findings in the case.

Turning to paragraph 9, we find "plaintiff's case is that his cigars became famous under that name and that the defendant should not be allowed to put up his cigars as those of the plaintiff by adopting the same name and thereby diverting his customers and depriving him of the profits which he might make by the sale of his own "'Albert' cigars." And then, in paragraph 12, we find "taking the evidence, oral and documentary, adduced in this case as a whole, there can be no doubt that plaintiff has succeeded in proving that he was the first man in the market with the name of "Albert" for the cigars of his manufacture and that his cigars had acquired a reputation as such before the defendant began to pass off his cigars under the same name." I think, therefore, we have findings that cigars had acquired a reputation as cigars manufactured by the plaintiff's firm.

Mr. Govindaraghava Aiyar has asked us to say that the judgment shows that the learned Subordinate Judge had not addresssed his mind to that aspect of the case. Taking the judgment as a whole, I see no reason why we should hold that the learned Subordinate Judge has not considered this question. I think this second appeal should be dismissed with costs.

KRISHNASWAMI AYYAR, J.—I agree. I am not satisfied with the discussion by the Subordinate Judge of the evidence bearing on the question as to whether the plaintiff has acquired a right in the trade mark and whether the defendant has been guilty of an infringement of the same. Mr. Govindaraghava Aiyar has asked us to send the case back for a further finding on the ground that the evidence has not been properly discussed. But I think the finding is clear, and it is not open to us to send a case back merely because the Subordinate Judge has not discussed the evidence in as satisfactory a manner as he should have done.

APPELLATE CIVIL.

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

1909. December 8, 9.

MINAKSHI AMMAL (DEFENDANT), APPELLANT,

v.

VISWANATHA AIYAR (PLAINTIFF), RESPONDENT.*

Will—Mutual and joint wills—Power of survivor of joint will to revoke—Survivor can revoke unless he derives some benefit under the will.

Where two persons agree to make mutual wills, and one of them dies, the survivor can revoke his will unless he has taken some benefit under the will of the deceased testator.

Stone v. *Hoskins*, [(1905) L.R., *Prob.*, *Dn.* 194], referred to.

SECOND APPEAL against the decree of F. D. P. Oldfield, District Judge of Tanjore, in Appeal Suit No. 950 of 1906, presented against the decree of K. S. Lakshmi Narasaiyer, District Munsif of Valangiman, in Original Suit No. 315 of 1905.

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

P. S. Subrahmania Ayyar for The Hon. The Advocate-General for appellant.

T. R. Krishnasawmy Ayyar for respondent.

JUDGMENT—SIR ARNOLD WHITE, C.J.—In this case one Subbier and one Seshi Ammal who were the father and mother of the defendant in the suit and the grandfather and grandmother of the plaintiff (the plaintiff being the son of the defendant) made a joint will in December 1897. In the year 1899 the testator died. In the year 190[illegible] the testatrix executed a gift to her daughter, the defendant, of the amount which the plaintiff in the present suit claims he is entitled to recover from the defendant as a legacy bequeathed to him by the will.

Now if the testatrix's will is irrevocable and that is the v[illegible] taken by the District Judge, the plaintiff is entitled to [illegible]d. If, on the other hand, the testatrix's will is revocable, it [illegible]) taken that it had been duly revoked or superseded by the [illegible]1904 to the defendant and the plaintiff is not entitled to [illegible] That was the view taken by the District Munsif who [illegible]d the suit.

* Second Appeal No. 1428 of 1907.

The will is to this effect. It recites that the testator and the testatrix have no male heirs and have only female heirs and that they have made the arrangements set forth in the will so that their daughters and their heirs may have no misunderstandings after their death in respect of the immoveable and moveable properties possessed by them. Then the will proceeds to refer to properties of the value of Rs. 800, which belonged to the testator, and to property of the value of Rs. 1,200 which belonged to the testatrix, making Rs. 2,000 in all. Then the two properties are dealt with together. Out of the Rs. 2,000 one daughter is to take Rs. 800 and pay Rs. 400 to another daughter. The eldest daughter is to take Rs. 1,200 and out of that pay Rs. 400 to another daughter's son. Then the will further provides that the heirs of the eldest daughter—the eldest daughter being the mother of the plaintiff—shall perform the funerals and that the eldest daughter shall pay Rs. 400 to the plaintiff after the funeral ceremonies. We will take it that the plaintiff fulfilled the condition precedent as regards the performance of the funeral ceremonies. If, therefore, the disposition under the will is irrevocable he is entitled to recover this Rs. 400.

The law with regard to the question we have to decide is laid down in Theobald on "Wills," 6th edition, page 17: "Persons may make joint wills, which are however revocable at any time by either of them or by the survivor . . . . A joint will may be made to take effect after the death of both testators; and if the joint will is not a disposition by each testator of his own property, but a disposition of joint property after the death of the survivor, the will cannot be proved till the death of the survivor. . . . . It seems that two persons may agree to make mutual, wills which remain revocable during the joint lives by either with notice to the other, but become irrevocable after the death of one of them, if the survivor takes advantage of the provisions made by the other." A similar statement of the law is to be found in Williams on "executors", 10th edition, page 94 and in Jarman on "Wills", 1893 Edition, Volume I, page 27. With regard to the authorities, so far as I am aware, the only authority which can be said in any way to support the contention advanced by the plaintiff, who is the respondent before us, is a judgment of Lord Comden which is very shortly reported in a case in Chancery decided so

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long ago as 1769, *Dufour* v. *Periera*(1). That case, however, was discussed and distinguished in the later case of *Walpole* v. *Oxford*(2) and the decision in that case is clearly against the plaintiff's contention that the will is irrevocable. The Privy Council case *Denyssen* v. *Mostert*(3), is an appeal from the Cape of Good Hope, and it turns, at any rate to some extent, on questions of Roman and Dutch Law. So far as I know, there is nothing in that case which helps the contention put forward on behalf of the plaintiff. But the most recent, and, as it seems to me, the clearest exposition of the law on this question is that given by Lord Barnes, Sir Gorell Barnes, as he then was, in the case of *Stone* v. *Hoskins*(4), he says: It appears to me that the result is tolerably plain. If these two people had made wills which were standing at the death of the first to die, and the survivor had taken a benefit by that death, the view is perfectly well founded that the survivor cannot depart from the arrangement on his part, because by the death of the other party, the will of that party and the arrangement have become irrevocable; but that case is entirely different from the present, where the first person to die has not stood by the bargain and her 'mutual' will has in consequence not become irrevocable." By the "mutual will" he means the will made by the survivor. "The only object of notice is to enable the other party to the bargain to alter his or her will also, but the survivor in the present case is not in any way prejudiced. He has notice as from the death."

Applying that principle to the facts of the case before us, we have to see whether it can be said that the survivor has taken a benefit. It was suggested that she took a benefit by the death of the co-testator. That may be. It may be that in this case if the wife died first the husband took a benefit and if the husband died first the wife took a benefit; but the benefit so taken was under the ordinary law and not under the provisions of the will. As I understand the will, there is nothing which gives the surviving testator or testatrix a benefit on the death of the testator or testatrix who predeceases.

No doubt the object of the will was to give the issue certain advantages. Those advantages would accrue to the issue on the

(1) 1 Dec., 419.
(2) (1797) 30 Eng., Rep., 1076.
(3) (1872) L.R., 4 P.C., App. 236.
(4) (1905) L.R., Prob. Dn., 194 at page 197.

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death of both the testator and the testatrix and not before. But we should be extending the equity doctrine if we were to hold that it applied to an advantage of that sort. The advantage contemplated by the doctrine and recognised in the cases apparently is a benefit or an advantage obtained by the survivor under the provisions of the will. Now I do not think it possible to say that that happens in this case. I must hold that in my judgment the District Munsif is right and the District Judge is wrong. I come to this decision with some reluctance; but the law seems to me to be so clear that I can come to no other conclusion. The result is that the decree of the lower Appellate Court is set aside and that of the District Munsif restored with costs throughout.

KRISHNASWAMI AYYAR, J.—I agree with the learned Chief Justice. The suit is to enforce a legacy. A will was made by the plaintiff's grandparents. It is called a mutual will. So far as one can see from the language of the instrument it really is a will by two persons, each of his or her own property, but the dispositions are contained in one paper. In this case no agreement or arrangement between the testator and the testatrix is alleged and in none of the cases that have been discussed by the learned Chief Justice was it competent to any person to set up that the will was irrevocable in the absence of a plea that there was an arrangement between the persons who made their wills that each should stand by the other.

Now, as I have already said, the dispositions contained in this will are dispositions by each of his or her own property and as the plaintiff has not started his case with any allegation of an arrangement between the two, it seems to me that the plaintiff is bound to fail on this very ground. But assuming that there was an arrangement to be implied from the language of this instrument, even then it is clear on the authorities that it cannot be said that the wills are irrevocable. For, it is plain upon the cases that have been discussed that, in order that the will should be irrevocable, it is necessary that the person attempting to revoke it should have received a benefit under the will of the other.

Now in this case if the wife died first, I think it would be impossible to contend that the husband would succeed to the properties She disposed of the properties after the death of the husband, it is true, in favour of her daughters and the plaintiff, a

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daughter's son. But so far as any intermediate estate is concerned that is, the estate undisposed of by the will, it will pass under the law of intestacy to the daughters and not to the husband. It may be that, so far as the husband is concerned, if he dies first, his life-estate will pass to the widow; but it passes not under the terms of the will but under the law of intestacy. But, so far as I have been able to understand the authorities, it is only in cases where a benefit is received by a mutual testament under the terms thereof that he or she can be said to be precluded from revoking the will. I come therefore to the conclusion that the will is really superseded by the gift which the testatrix has made. The gift deals with properties which are dealt with by the will and if all the properties dealt with by the will are disposed of by this gift, there is no property left upon which the will could operate. The second appeal must, therefore, be allowed, the decree of the District Judge reversed and that of the District Munsif restored. The plaintiff must pay the costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Abdur Rahim.

1909. December 17.

CHIDAMBARA REDDIAR (FIRST PLAINTIFF), APPELLANT,

v.

NALLAMMAL AND OTHERS (SECOND PLAINTIFF AND SIXTH TO EIGHTH DEFENDANTS), RESPONDENTS NOS. 1 TO 3, 5.*

Hindu Law—Reversioner, suit by—Suit by next male reversioner maintainable without proof of collusion of nearer female reversioner.

The rule that suits to set aside alienations by a female heir having a limited interest should be brought by the next reversioner and that a remote reversioner cannot sue without showing collusion between the female heir and the next reversioner, does not apply where the next reversioner is a female and the suit is brought by the nearest male reversioner.

Where a widow having daughters makes an alienation, the nearest male reversioner may sue without proving collusion between the widow and daughter.

SECOND APPEAL against the decree of E. L. Thornton, District Judge of Trichinopoly, in Appeal Suit No. 120 of 1906, presented

* Second Appeal No. 1409 of 1907.

BENSON AND ABDUR RAHIM, JJ.

CHIDAMBARA REDDIAR v. NALLAMMAL.

against the decree of T. Srinivasa Aiyangar, District Munsif of Kulitalai, in Original Suit No. 1076 of 1903.

T. V. Seshagiri Ayyar for appellant.

P. S. Parthasarathi Ayyangar and *N. Rajagopalachariar* for first and seventh respondents.

JUDGMENT.—The plaintiff and defendants Nos. 3 to 5 who did not join in the suit, are the nearest male reversioners of the deceased owner of the land in dispute. The first defendant is a widow, and the second defendant is a daughter, by another wife, of the deceased. The District Judge has held that the plaintiff cannot maintain the suit to set aside alienations by the widow because the second defendant is entitled to succeed after the widow's death in preference to the plaintiff and there was no collusion between the first and second defendants. He relies on the decision in *Rani Anand Kunwar and another* v. *The Court of Wards on behalf of Chandra Shekhar, a minor*(1), but in that case the plaintiff was not the nearest male reversioner. The principle of that case has no application where the nearer heir is a female and as such is entitled only to a limited estate.

This is distinctly laid down in the decision of this Court in *Raghupati* v. *Tirumalai*(2), and also in *Abinash Chandra Muzumdar* v. *Harinath Shaha*(3), (see also Mayne's "Hindu Law," paragraph 646, 7th edition). The respondent's vakil endeavours to support the District Judge's decision by reference to the case of *Chiruvolu Punnamma* v. *Chiruvolu Perrazu and another*(4), but we do not think it has any application to the facts of this case.

The District Judge has not gone into the merits. We therefore set aside the decree of the District Judge and remand the appeal to him for disposal according to law.

Costs will abide the result.

(1) (1881) I.L.R., 6 Calc., 764.
(2) (1892) I.L.R., 15 Mad., 422.
(3) (1905) I.L.R., 32 Calc., 62, at p. 65.
(4) (1906) I.L.R., 29 Mad., 390.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Abdur Rahim.

1909. December 8.

RAMANATHAN CHETTIAR (PETITIONER), PETITIONER,

v.

ANANTHANARAYANA AIYAR AND ANOTHER (COUNTER-PETITIONER AND SECOND PETITIONER), RESPONDENTS.*

Civil Procedure Code, Act XIV of 1882, *s.* 622—*Religious Endowments Act XX of* 1863, *s.* 18—*District Judge may in disposing of petitions under s.* 18, *make inquiries.*

An order of a District Judge under section 18 of Act XX of 1863 is not open to revision under section 622 of Act XIV of 1882, unless he acts illegally in the exercise of his jurisdiction.

In re Venketaswara, [(1887) (I.L.R., 10 Mad., 98)], referred to.

A District Judge acting under section 18 of Act XX of 1863 has power to make enquiries before disposing of the application for leave to sue and is not bound to decide on a bare perusal of the application.

PETITION, under section 622 of the Civil Procedure Code, praying the High Court to revise the order of Arthur F. Pinhey, District Judge of Madura, in Original Petition No. 381 of 1907.

Application under section 18 of Act XX of 1863 to remove counter-petitioner, manager of Sriminatcho Sundaraswaral Devastanam. The District Judge called for an affidavit from the counterpetitioner and being satisfied with his explanation dismissed the application.

Petitioners moved the High Court under section 622 of the Civil Procedure Code, Act XIV of 1882.

P. R. Sundara Ayyar and *K. Srinivasa Ayyangar* for petitioner.

T. Rangachariar and *C. V. Anantakrishna Ayyar* for respondent.

JUDGMENT.—A preliminary objection is taken that the order of the District Judge under section 18, Act XX of 1863, is not open to revision under section 622 of the Civil Procedure Code and reliance is placed on the case of *In re Venkateswara*(1). The petitioner's vakil contends that the District Judge acted illegally in the exercise of his jurisdiction within the meaning of section 622 of the Civil Procedure Code in that he did not give his decision on a bare perusal of the application for leave to sue,

* Civil Revision Petition No. 283 of 1908.

(1) (1887) I.L.R., 10 Mad., 98.

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but made some enquiry and received an affidavit from the manager in reply to the allegations in the petition. No authority in support of this view is cited and we think that it is unreasonable. Section 18 would afford no protection against improper suits if the Court could refuse leave only if the facts alleged in the petition did not disclose any cause of action, for any plaint which disclosed no cause of action would be rejected under the General Law of Procedure independently of the special provision in section 18. Moreover the provision in section 19 of Act XX of 1863 that the Court before giving leave may order the manager and other temple authorities to file accounts, negatives the contention of the petitioner's vakil. That contention has also been negatived in the recent unreported decisions of this Court in Criminal Revision Petition No. 20 of 1908. The District Judge, then, did not act illegally in the exercise of his discretion, and no petition under section 622, Civil Procedure Code, lies (*In re Venkateswara*(1)).

We dismiss this petition with costs.

APPELLATE CRIMINAL.

Before Mr Justice Subrahmania Ayyar, C.I.E., Officiating Chief Justice, and Mr. Justice O'Farell.

1899. September.

THE PUBLIC PROSECUTOR

v.

SARABU CHENNAYYA.*

Evidence Act I of 1872, *s.* 91—*Search-list does not exclude oral evidence of matters stated therein—Confession not recorded in compliance with orders of Government—Such confession admissible if voluntary.*

Section 91 of the Evidence Act has no application when the writing is not evidence of the matter reduced to writing.

A search-list is not evidence of the matter stated therein and it does not therefore exclude oral evidence of such matter.

Although G.O., No. 2883, Judicial, paragraph 5 (dated 17th December 1887) directs that no Magistrate may record any confession or statement under section

(1) (1887) I.L.R., 10 Mad., 98.

* Criminal Appeal No. 284 of 1889. Reported under the direction of Benson and Abdur Rahim, JJ., (Ed.)

SUBRAHMANIA AYYAR, OFFG. C.J., AND O'FARELL, J.

THE PUBLIC PROSECUTOR v. SARABU CHENNAYYA.

167, Criminal Procedure, Code until he has first recorded in writing his reasons for believing that the accused is going to make such statement voluntarily: *Held*, that non-compliance with an order of Government as to the formalities to be observed in recording confessions, does not render a confession inadmissible in evidence. The Court has to determine whether such confession was voluntary or not.

APPEAL under section 417 of the Code of Criminal Procedure against the judgment of acquittal passed on the accused by H. Moberly, Sessions Judge of Cuddapah, in Calendar Case No. 85 of 1898.

In this case the accused was charged under sections 232, and 235, Indian Penal Code. The evidence showed that a search was made of his house by the second prosecution witness, a Head Constable, who found a counterfeit rupee and other articles used for counterfeiting. The witnesses to the search never entered the house and did not see the Head Constable find the articles. The Sessions Judge held that a search list was a document required by law to be prepared at every search (section 103 (2), Criminal Proceedure Code), that it must according to law specify the articles found at the search and the places in which the articles are respectively found, that the witnesses not being actually present the search was not made in accordance with law as laid down in section 103 (1), Criminal Procedure Code, 1898, and that the search list was not therefore admissible in evidence. Further that as the matter of the search was required by law to be reduced to the form of a document (Indian Evidence Act, section 91), no oral evidence could be adduced with reference to the search.

In regard to a confession alleged to have been made to the Stationary Magistrate and produced in evidence against the accused the Sessions Judge held that whereas by paragraph 5 of G.O., 17th December 1887, No. 2883, Judicial, no Magistrate may record any confession or statement under section 167 of the Criminal Procedure Code until he has first recorded in writing his reasons for believing that the accused was going to make such statement voluntarily, and no such writing appearing on the record, the confessional statement was not evidence.

The Public Prosecutor for appellant.

The accused appeared in person.

JUDGMENT.—The Sessions Judge's reasoning as to the inadmissibility of oral evidence regarding the possession by the accused of articles alleged to have been found on search is difficult

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to understand and appears to us to be based on a confusion of ideas. The Judge finds that the search was not conducted according to law. If this were so, it would follow according to his own reasoning that the so-called search-list was not a search-list at all and section 91, Indian Evidence Act, would have no application. Independently of this, however, we observe that section 91 clearly presupposes that where a certain matter is required by law to be reduced to writing, the writing is itself evidence of the matter so reduced. If the writing is not evidence of the matter, section 91 has obviously no application. Now a search-list is clearly not evidence of the facts stated therein. It is simply a declaration not on oath or affirmation or subject to cross-examination made by a police officer and persons present at a search that certain formalities were observed and certain events took place. Oral evidence may therefore be given as to what took place at the time of search. The Sessions Judge is also in error in supposing (as he apparently does) that a confession is inadmissible because the terms of a certain Government order have not been complied with. The order, however salutary its provisions may be, has not the force of law. What the Sessions Judge had to determine was whether the confession was voluntary or not and this he has not done. The informalities in the manner in which the search was conducted may diminish the weight of the evidence given as to possession of the incriminating articles by the accused but they do not preclude the admission of such evidence. The failure also to take precautions enjoined by Government in the recording of the confession may be a circumstance to be weighed in considering whether the confession was or was not voluntary. There was clearly evidence on which the Sessions Judge was bound to take the opinion of the assessors and he was not correct in acquitting the prisoner on the supposition that there was no legal evidence of his guilt.

We allow the appeal and set aside the order of acquittal and direct a retrial.

APPELLATE CRIMINAL.

Before Mr. Justice Benson and Mr. Justice Abdur Rahim.

1910. January 7.

ELAMATHAN

v.

EMPEROR.*

Evidence Act I of 1872, s. 91—Oral evidence admissible to prove what took place at time of search.

Where a search has been conducted under the Criminal Procedure Code, the search-list is not the only evidence admissible as to the matters dealt with therein.

Section 91 of the Evidence Act does not exclude oral evidence of what took place at the time of search.

Abdul Khadir and others v. *Queen-Empress*, (Weir's "Criminal Rulings," 4th edn., vol. 2, p. 515), dissented from.

The Public Prosecutor v. *Sarabu Chennayya*, [(1910) I.L.R., 33 Mad. 413)], followed.

PETITION, under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the judgment of V. Sreenivasachariar, Sub-Divisional Magistrate of Madura Division in Criminal Appeal No. 59 of 1909, confirming the conviction and sentence of the lower Court.

The case for the prosecution was that there was a theft of clothes from the complainant's house, and that the matter was reported to the police. The house of the accused was searched. The search-list stated that some of the articles missing were found *in the house*. At the trial the prosecution adduced oral evidence to show that they were found *in a locked box*. The accused was convicted of theft on the presumption raised by the possession of stolen articles. On appeal against this conviction it was contended that section 91 of the Evidence Act excluded all evidence but the search-list to prove what took place at the time of search and the oral evidence that the articles were found in a locked box was inadmissible. This plea was over-ruled and the conviction was confirmed.

The accused moved the High Court under sections 435 and 439 of the Criminal Procedure Code.

* Criminal Revision Case No. 498 of 1909.

BENSON AND ABDUR RAHIM, JJ.

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K. Narayana Rao for petitioner.

The Public Prosecutor, *contra*.

ORDER.—The petitioner's pleader contends that the search-list is the only evidence admissible as to the matters dealt with therein and relies on the case of *Abdul Khadir and others* v. *Queen-Empress*(1). We are unable to accept that ruling as correct. If it were adopted it would lead to results most prejudicial to the proper trial of accused persons. And we observe that a directly contrary view was taken in the case of *The Public Prosecutor* v. *Sarabu Chennayya*(2). We think this latter view is correct. We do not think the sentence excessive

We dismiss the petition

APPELLATE CIVIL.

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

1909. December 13.

IRENE FANNY COLQUHOUN (PLAINTIFF), APPELLANT,

v.

FANNY SMITHER (DEFENDANT), RESPONDENT.*

Contract of marriage, action for procuring breach of—Parent or guardian procuring breach maliciously or by false representations liable.

An action is maintainable against a person for inducing a party to break a contract of marriage entered into by such party.

A parent or guardian inducing a child or ward to break such a contract is liable when such parent or guardian does so maliciously or by false representations.

Although malice is not the gist of the action in such cases, it may, if alleged and proved, displace the protection or privilege which arises from the relation between the party procuring the breaking of the contract and the party breaking it.

APPEAL against the judgment of Wallis, J., dated 16th February 1909, made in the exercise of the ordinary original jurisdiction of this Court in Civil Suit No. 369 of 1908.

(1) Weir's Crl. Rulings, 4th Ed., Vol. II, p. 515.
(2) (1910) I.L.R., 33 Mad., 413.
* Original Side Appeal No. 6 of 1909.

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The facts are sufficiently stated in the judgment appealed from, the material portions of which are as follows:—

"This is a suit by the plaintiff against the defendant for maliciously procuring the defendant's son to break his promise of marriage to the plaintiff and a preliminary issue has been framed as to whether the plaint discloses any cause of action.

It is not suggested that such a suit has ever been brought or maintained in any Court in which the common law is administered but it is said that it is covered by the authority of *Quinn* v. *Leathem*(1) a case which was decided by the House of Lords after much controversy and has since been followed not only in England but also by the Courts of the United States.

It was there laid down by Lord Macnaghten that 'a violation of a legal right committed knowingly is a cause of action and that it is a violation of a legal right to interfere with contractual regulations recognised by law if there be no sufficient justification for the interference.'

If then the principle of *Quinn* v. *Leathem*(1) is applicable to interference with contracts to do particular acts is there any ground for excepting interference with contracts to marry and allowing any one, if he can, to procure another not to fulfil his or her promise of marriage? The action for breach of promise is no doubt rather a peculiarity of the common law; it is not allowed in some other systems and great authorities have been in favour of abolishing it. Still, in the absence of authority, I am not prepared to hold and it is unnecessary for the purposes of this case to hold that procuring a breach of promise of marriage can in no case be an actionable wrong and the case put by Joyce, J., of the jilted suitor suing his successful rival may be left until it arises. This is a suit against a mother for procuring a breach of promise of marriage by her son and I am of opinion that such a suit will not lie, because I think the relation of mother and son is a sufficient justification for the mother's interference to make it not actionable. Following the English enactments the Indian Christian Marriage Act, 1872, to which the parties are subject does not endeavour to prevent persons of full age from marrying without the consent of their parents or even strike with nullity marriages contracted under age without such consent, probably because the recognition of such

(1) (1901) A.C., 495 at p. 501.

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irregular marriages is regarded as the lesser evil. It does not as the French Law does or did until quite recently render marriages of persons under twenty-five null and void if entered into without the parents' consent, and even after that age require three formal demands or "sommations respectueuses" to be addressed to the parents and so give them fresh opportunities of urging their objections. But because our law does not enable parents to prevent children of full age from contracting marriages of which they disapprove, it does not follow that parents have no interest or duty to dissuade their children from contracting marriages which they consider unsuitable. In my opinion they have such an interest and duty and a right of interference based thereon and it would, I think, be carrying respect for the sanctity of contracts to altogether unreasonable lengths if such interference were to be held actionable. Generations of parents have exercised this right of interference without question and I am not prepared to question it now.

As to the extent of the right if it exists, it cannot, I think, be subject to the parents subsequently satisfying a Judge or jury that these were good grounds for interference. Such a limited right of interference would be highly perilous to exercise and indeed illusory. Nor can such interference be rendered actionable by alleging and proving that it was malicious. As now settled by the cases already referred to malice is not the gist of an action such as this but interference without sufficient justification and in this case the plaint itself discloses sufficient justification. The further allegation in paragraph 8 that the plaintiff procured the breach of promise by false representations does not disclose a cause of action as no false representations are pleaded. There is of course no allegation in the plaint that the defendant has either libelled or slandered the plaintiff.

In the result I hold that the plaint discloses no cause of action and accordingly reject it and dismiss the suit with costs."

Against this judgment the plaintiff appealed.

V. Viswanatha Sastri for appellant.

E. R. Osborne for respondent.

JUDGMENTS (Sir CHARLES ARNOLD WHITE, C.J.).—This is an appeal from the judgment of Mr. Justice Wallis dismissing the suit upon a preliminary issue: "Does the plaint disclose any cause of action." The suit is no doubt a peculiar one. So far as I know it

is a case of first *impression* and the learned Judge points out in his judgment that it is not suggested that such a suit has ever been brought or maintained in any court in which the common law is administered. The suit is one for damages brought against the mother of a man who had promised to marry the plaintiff The plaint sets out that the plaintiff had agreed to enter into a contract of marriage with the son of the defendant. Then it alleges that the son of the defendant had broken the promise to marry the plaintiff. The allegations in paragraph 6 of the plaint are that the defendant set up the son to make some utterly false and frivolous statements against the plaintiff to justify the refusal and the son finally refused to perform the contract in consequence. Paragraph 8 alleges that the defendant has for some illegal and ulterior purpose of her own maliciously and by false representations and otherwise induced and instigated her son to break the contract and the son refused to perform the contract in consequence. As I have said, the suit was disposed of by the learned Judge on the preliminary issue: "Does the plaint disclose any cause of action?" Therefore we must deal with the case as if we were deciding it on what under the old English Practice was known as 'Demurrer', that is, we must assume that every allegation in the plaint is true.

The learned Judge proceeds in his judgment to discuss the various authorities in which the doctrine, which was first laid down, I think, in *Lumley* v. *Gye*(1) arose for consideration. He refers to the cases of *Quinn* v. *Leathem*(2) and *Glamorgan Coal Company* v. *South Wales Miners' Federation*(3). And he also refers to the *National Phonograph Company, Limited* v. *Edison Bell Consolidated Phonograph Company, Limited*(4) and to *Allen* v. *Flood*(5). All these are cases decided by the House of Lords. To the cases discussed by the learned Judge, we may add a recent decision of the House of Lords in *Conway* v. *Wade*(6).

Having finished his discussion of the authorities, the learned Judge proceeds "If the principle of *Quinn* v. *Leathem*(2) is applicable to interference with contracts to do particular acts, is there any ground for excepting interference with contracts to marry

(1) (1853) 2 E. & B., 216.
(2) (1901) A.C., 495.
(3) (1903) 2 K.B., 545.
(4) (1908) 1 Ch., 335.
(5) (1898) A.C., 1.
(6) (1909) A.C., 506.

and allowing any one, if he can, to procure another not to fulfil his or her promise of marriage." Then he observes "The action for breach of promise is, no doubt rather a peculiarity of the common law" and proceeds "In the absence of authority I am not prepared to hold and it is unnecessary for the purposes of this case to hold that procuring a breach of promise of marriage can in no case be an actionable wrong." Then the learned Judge goes on: "This is a suit against a mother for procuring a breach of promise of marriage by her son and I am of opinion that such a suit will not lie because I think the relation of mother and son is a sufficient justification for the mother's interference to make it not actionable". With all respect I am unable to agree with the learned Judge, because it seems to me that while he was anxious not to extend this particular branch of the law further than it had already been carried under the decisions to which he refers, he did. in effect, extend the law, or at any rate, he has laid down a novel proposition of law, which I am not prepared to accede to. The learned Judge seems to me to hold that the doctrine, which is now well established that the procuring of a breach of contract by a third party may be an actionable wrong is not applicable when the breach is a breach of promise to marry and where the relation between the party who procures the breach and the party who broke the contract is that of mother and son. Now I am not prepared to go so far as that. I am not prepared to say that the mere fact of the relationship of mother and son, in itself, excludes the operation of what is now a well-established doctrine of law.

Then later on in his judgment the learned Judge says:—"Nor can such interference" (that is the interference by a mother with a contract to marry which is entered into between her son and somebody else) "be rendered actionable by alleging and proving that it was 'malicious.' As now settled by the cases already referred to, malice is not the gist of an action."

I entirely agree that malice is not the gist of the action. But it may well be that, if malice is alleged and proved, it may displace the protection or the privilege or whatever we may call it, which arises from the relation between the party who procures the breaking of the contract and the party who breaks the contract. Then the learned Judge goes on: "As now settled by the cases already referred to, malice is not the gist of an action such as this, but interference without sufficient justification and, in this case,

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the plaint itself discloses sufficient justification." There again with all respect I find myself unable to agree with the learned Judge, because I cannot find within the four corners of the plaint allegations which show sufficient justification in the party who induced the breaking of the contract. It may be that, if an order for particulars had been made (the result of which would be that at the trial the plaintiff would be pinned down to those particulars and would be precluded from giving evidence as to matters which were not referred to in the particulars), it may be that reading the plaint and the particulars it would appear from what was said in the particulars, or what was not said in the particulars, that the plaint itself discloses sufficient justification on the part of the party who induced or procured the breach of the contract. But, in the absence of particulars and on the plaint as it now stands, I am unable to say that the plaint itself discloses sufficient justification.

Then the learned Judge goes on "The further allegation in paragraph 8 that the defendant procured the breach of promise by false representations does not disclose a cause of action as no false representations are pleaded." It seems to me that in paragraph 8 there is a general allegation of false representations.

It may be the particulars of that allegation, if given, would show that the alleged false representations are not of such a character as to disclose a cause of action. But in view of the general allegation of false representations I am unable to say that the plaint does not *primâ facie* at any rate, disclose a cause of action in regard to the false representation. I think the decree must be set aside and the case sent back to the Court of First Instance. Costs will abide the event.

KRISHNASWAMI AYYAR, J. I agree in the order of remand. I agree with Mr. Justice Wallis in holding that malice is not the gist of the action. But it does not follow from that statement that where a justification is pleaded, the presence of malice may not remove the justification. I adopt the statement of law made by Sir Frederick Pollock at page 329, 8th edition, of his book on 'Torts.' He says:—"It cannot be reasonably maintained, for example, that a parent or guardian may not advise his daughter or ward to break off an improvident engagement to an unworthy suitor." But as it is alleged in this case that the breaking of the engagement is procured maliciously and by means of misrepre-

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sentations, it seems to me that the person so procuring a breach is not protected. Sir Frederick Pollock also points out that the disposition of the Courts is to be very cautious in admitting exceptions to the rule of liability for procuring breaches of contract. I am not able to appreciate the view of Mr. Justice Wallis that because the defendant in this case stands in the position of mother, *ipso facto*, she is justified in procuring the breach, although it may be she has done so maliciously and by misrepresentations to her son. Costs will abide the event.

A. E. Rencontre—Attorney for respondent.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Munro.

A. N. RAMASAMI AIYAR AND ANOTHER (PLAINTIFFS IN BOTH), APPELLANTS IN BOTH,

v.

VEERAPPA CHETTY AND OTHERS (FIRST, SECOND AND THIRD DEFENDANTS IN BOTH), RESPONDENTS IN APPEAL SUIT No. 187 OF 1904 (FIRST, SECOND AND THIRD RESPONDENTS IN APPEAL SUIT No. 188 OF 1904).

ARUNACHALA PANDARAM AND OTHERS (FOURTH, FIFTH, SIXTH AND SEVENTH DEFENDANTS), RESPONDENTS IN APPEAL SUIT No. 188 OF 1904. *

1909. November 29, 30. December 1. 1910. January 11.

Executor de son tort, liability as—Widow in possession of husband's undivided property not liable as executor de son tort, when such property has devolved on coparceners—Decree, suit on—No suit maintainable on decree, when the passing of the decree gives no cause of action independent of the original cause of action—Res judicata—Subsequent suit on same cause of action barred though different reliefs claimed—Suit against partners, parties to.

On the death of an undivided coparcener, the estate vests in the survivors and there is no estate belonging to a deceased person.

The widow of the deceased, by the fact of being in possession of a portion of the joint family property, does not become liable as an executor *de son tort*, as she has not intermeddled with any estate belonging to a deceased person.

A suit is not maintainable on a decree, when the mere passing of the decree does not give rise to a cause of action distinct from the original obligation.

* Appeals Nos. 187 and 188 of 1904.

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The passing of a decree against an undivided coparcener does not give rise to such a cause of action against other coparceners, except his sons, whatever be the nature of the original debt on which the decree was passed.

A decision in a prior suit may bar a subsequent suit on the same cause of action, though the reliefs claimed in the two suits may be different.

To a suit for winding up a partnership, all partners having distinct interests must be parties; and where such a suit, brought against all the partners, is not maintainable against some, the suit must be dismissed.

APPEALS against the decrees and judgments of A. C. Tate, District Judge of South Arcot, in Original Suit Nos. 13 and 14 of 1903 respectively.

The facts for the purpose of this case are sufficiently stated in the judgment.

P. R. Sundara Ayyar and *C. V. Anantakrishna Ayyar* for appellants.

G. S. Ramachandra Ayyar for *T. R. Ramachandra Ayyar* for third respondent.

S. Srinivasa Ayyangar for first respondent.

S. Srinivasa Ayyar for first and second respondents.

JUDGMENT (MUNRO, J.).—The first plaintiff in these appeals brought Original Suit No. 8 of 1900 against Subbaraya Chetti, Siva Chidambara Chetti and Narayana Rao, for dissolution of partnership, for winding up of the partnership accounts and for the recovery from Subbaraya Chetti of a certain sum of money. It was alleged that under the partnership agreement Subbaraya Chetti was the managing partner, that a sum of money was given to him by the plaintiff and Narayana Rao's father and that he refused to furnish accounts. The cause of action was stated to have arisen in September 1899 when the partnership trade was stopped. A decree was passed dissolving the partnership and directing Subbaraya Chetti to pay the first appellant Rs 2,976-8-2¾ with interest. Subbaraya Chetti having died before execution, the first appellant sought to execute the decree under section 234, Civil Procedure Code, against Rathina Ammal, the widow, and Veerappa Chetti, the undivided brother of Subbaraya Chetti. The District Judge passed a certain order against which there was an appeal to this Court. This Court held that the decree against Subbaraya Chetti was purely a decree *in personam* against him, and further remarked that there was nothing on the record to show that Subbaraya Chetti was sued in his representative capacity as manager of the family or that the trade in respect of which the

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suit was brought was one that was necessarily a family business and not Subbaraya Chetti's individual trade. With these views I entirely agree. The decree was therefore not allowed to be executed against Veerappa Chetti by attaching and bringing to sale joint family property which had come to him by survivorship, whether it was ordinary family property or property acquired for the family by the partnership trade. As regards the separate property of Subbaraya Chetti, it was held that execution under section 234, Criminal Procedure Code, should proceed only against his widow who was his legal representative and the name of Veerappa Chetti was struck off the record. The first appellant and his son, the second appellant, then filed Original Suit Nos. 13 and 14 of 1903 and, those suits having been dismissed, presented the present appeals.

The plaint in Original Suit No. 13, which was against Veerappa Chetti, Veerappa Chetti's son and Rathina Ammal as first, second and third defendants, sets out that the present first appellant acting as manager of his family, Subbaraya Chetti acting as manager of his family, and others entered into a partnership; that disputes having arisen, Original Suit No. 8 of 1900 above referred to, was brought; that Subbaraya Chetti had carried on the partnership trade for the benefit of the joint family then consisting of himself and Veerappa Chetti and that, as the family had enjoyed the benefit of the trade, the first and second defendants were bound to pay to the plaintiffs the amount due to them by Subbaraya Chetti; that Subbaraya Chetti represented the joint family in Original Suit No. 8 of 1900; that the finding in Original Suit No. 8 of 1900, that Rs. 2,976-8-2¾ was due to the plaintiffs by Subbaraya Chetti and that the latter was liable to pay that amount with interest at 12 per cent. per annum from the 26th March 1900, the date of the plaint in Original Suit No. 8 of 1900, was binding on the first and second defendants, as also the order of the Court dissolving the partnership as from the 16th December 1901, the date of the decree; that the first and second defendants were bound to pay the amount above mentioned, and that the third defendant was also liable to pay that amount because she was in possession of property belonging to the joint family of a larger value than that amount; and that the cause of action arose on the 16th December 1901, the date of the decree or in July 1902, by which date is apparently meant the date of

Subbaraya Chetti's death. The prayer was that the defendants do pay the plaintiffs Rs. 4,186-8-2¼, made up of Rs. 2,976-8-2¼ with interest as abovementioned.

In Original Suit No. 14, in addition to the three persons impleaded as defendants in Original Suit No. 13, there were four other defendants. Of these four only two, the fifth and sixth defendants, need be considered, they being the persons who as partners were made defendants with Subbaraya Chetti in Original Suit No. 8 of 1900. The plaint in Original Suit No. 14 made the same main allegations as were made in the plaint in Original Suit No. 13, mentioned the institution of Original Suit No. 13, and prayed that if the Court should, for any reason hold in Original Suit No. 13 that the first and second defendants were not bound by the findings in Original Suit No. 8 of 1900, and that the plaintiffs were not in Original Suit No. 13 entitled to recover the amount due to them, the partnership might be wound up, and the accounts of the partnership taken, and that the plaintiffs might be paid the amount found due to them by such defendants as were found liable. The cause of action was stated to have arisen on the same dates as in Original Suit No. 13.

Two of the issues framed in Original Suit No. 13 were—

(1) Whether or not section 244, Civil Procedure Code, is a bar to the maintenance of the present suit either against first and second defendants or against the third defendant? and

(2) First and second defendants not having been parties to Original Suit No. 8 of 1900, does the fresh suit to make them liable to satisfy the decree in that suit lie?

On the first of these issues the District Judge found that section 244, Civil Procedure Code, was a bar to the suit as against the third defendant. He found the second of the issues in the negative, and accordingly dismissed the suit. Both these findings are attacked in Appeal No. 187.

That the suit was rightly dismissed as against the third defendant is clear. So far as the separate property of Subbaraya Chetti is concerned, the plaintiff's only remedy was to execute the decree in Original Suit No. 8 of 1900 against the third defendant, Subbaraya Chetti's legal representative, under section 234, Civil Procedure Code, section 244, Civil Procedure Code, being a bar to a suit against the third defendant in respect of such separate property. With regard to the joint family properties of

which the third defendant is said to be in possession, it is contended that the third defendant was properly impleaded because she may be regarded as an executor *de son tort* and *Magaluri Garudiah and others* v. *Narayana Rungiah*(1) and *Narayanasawmy Pillai* v. *Essa Abbayi Sait, etc.*(2) are relied upon. Even if the third defendant is in possession of joint family property, she cannot be regarded as an executor *de son tort* in regard to it. An executor *de son tort* is a person who intermeddles with the estate of a deceased person. The joint family property cannot be regarded as the estate of Subbaraya Chetti. The interest he had in it passed at his death to his coparceners by survivorship. The cases quoted are both cases in which the estate of a deceased person had been intermeddled with. The mere fact that the third defendant may have family property in her possession cannot give the plaintiffs a cause of action against her in a suit like the present, as the District Judge has properly pointed out.

The next question is whether the suit is maintainable as against the first and second defendants. The cause of action is stated in the plaint to have arisen on the 16th December 1901 or in July 1902. How any cause of action against the defendants accrued to the plaintiffs on the second of these dates is not explained. The first date is the date of the decree in Original Suit No. 8 of 1900 and the prayer in the plaint is for the recovery of the amount due under that decree by Subbaraya Chetti. The suit is therefore clearly to recover from the defendants a decree debt due by Subbaraya Chetti and the question is whether the plaintiffs have any cause of action for such a suit. If the first and second defendants were the sons of Subbaraya Chetti, they would be under a pious obligation to pay the decree debt and the passing of the decree would give a fresh cause of action against them quite independently of the original cause of action on which the suit against Subbaraya Chetti was brought—*Periasami Mudaliar* v. *Seetharama Chettiar*(3). But being only his undivided brother and nephew they are not bound to pay any debt contracted by him unless contracted for the benefit of the family, and it cannot be said that the debt imposed upon Subbaraya Chetti by the decree was a debt contracted by him for the benefit of the family, whatever was the nature of

(1) (1881) I.L.R., 3 Mad., 359. (2) (1905) I.L.R., 28 Mad., 351.
(3) (1904) I.L.R., 27 Mad., 243.

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the debt upon which Original Suit No. 8 of 1900 was brought. The decree debt is not the original debt but a new debt altogether —*Periasami Mudaliar* v. *Seetharama Chettiar*(1) and must of its own force give a cause of action if the plaintiffs are to maintain a suit upon it. I am therefore of opinion that the suit was rightly dismissed as against the first and second defendants also and would dismiss Appeal No. 187 with costs.

In Original Suit No. 14 the District Judge found that the suit, as against the third defendant, was barred by section 244, Civil Procedure Code, for the same reasons as in Original Suit No. 13. He also found that the suit was barred by the same section as against the fifth and sixth defendants who were parties to Original Suit No. 8 of 1900. The third issue framed was first defendant not having been a party to Original Suit No. 8 of 1900, whether the present suit brought on the same cause of action as Original Suit No. 8 of 1900 is maintainable? This issue the District Judge found in the negative and dismissed the suit.

That the cause of action in Original Suit No. 14 of 1903 was the same as the cause of action in Original Suit No. 8 of 1900 was clearly not disputed in the lower Court. Here it is suggested that the cause of action was different because in Original Suit No. 8 there was a prayer for dissolution of partnership in addition to the prayer for winding up. The cause of action is not affected by the relief claimed. In Original Suit No. 8 it was alleged that the trade stopped in September 1899 and it was prayed that the partnership accounts might be wound up. It is not alleged in Original Suit No. 14 that there were any fresh transactions after September 1899 or any accounts to be gone into other than those which had to be gone into in Original Suit No. 8. The cause of action for winding up the partnership is therefore clearly the same in both suits. The fifth and sixth defendants were parties to Original Suit No. 8 and no fresh suit can be brought against them on the same cause of action. They were therefore wrongly impleaded in the present suit. But to a suit for winding up a partnership each partner having a distinct interest must be a party—*Lindley on Partnership 7th Edition, page* 504. This proposition is not disputed, and fifth and sixth defendants are therefore manifestly necessary parties to any suit for winding up the

(1) (1904) I.L.R., 27 Mad., 243.

MILLER AND MUNRO, JJ.

RAMASAMI AIYAR v. VEERAPPA CHETTY.

partnership now in question. They have not been placed on the record as mere *pro forma* defendants. The prayers in the plaint make no distinction between the fifth and sixth defendants and the other defendants, but ask for relief against whichever defendant may be found liable. As therefore the fifth and sixth defendants cannot properly be made parties, the whole suit must fail. I would therefore dismiss Appeal No. 188 with costs.

Miller, J.—I agree. The appeals are dismissed with costs.

APPELLATE CIVIL.

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

VENKATRAMA IYER AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

ESUMSA ROWTHEN AND OTHERS (DEFENDANTS, NOS. 1, 10, 11 AND 12), RESPONDENTS.*

1909. November 22, 23. December 7.

Mortgage—Decree, mortgage of—Mortgagee has a charge on amount realised in execution of decree mortgaged—Civil Procedure Code, Act XIV of 1882, *s.* 276—*Attachment and mortgage of decree on same day—Mortgage valid unless attaching creditor shows it to have been effected during the pendency of attachment.*

Where a decree is mortgaged and the amount due under the decree is subsequently realised in execution, the mortgagee has a charge on the amount so realised.

The mortgagee is entitled to a charge on property which through no fault of his has taken the place of the mortgaged property.

Singaravelu Udayan v. *Rama Iyer*, [(1903) 13 *M.L.J.*, 306], dissented from.

The receipt by one Court of a notice of attachment by another Court is not a judicial act to which the principle that judicial acts must be presumed to have been done at the earliest point of time of the date thereof would apply. Where therefore a decree is mortgaged on a certain date, and notice of attachment of such decree is received by the Court on the same day, it lies on the attaching creditor seeking to set aside such mortgage as made during the pendency of attachment under section 276 of the Civil Procedure Code to show that the receipt of such notice was prior to the execution of the mortgage.

When a decree is attached and the attachment is subsequently withdrawn by agreement, the attachment does not continue against the money realised in execution of such decree in the absence of anything to that effect in the agreement.

* Second Appeal No. 1153 of 1907.

WHITE, C.J., AND KRISHNASWAMI AYYAR, J.

VENKATRAMA IYER v. ESUMSA ROWTHEN.

SECOND APPEAL against the decree of F. Du P. Oldfield, District Judge of Tanjore, in Appeal Suit No. 513 of 1906, presented against the decree of T. S. Thiagaraja Aiyar, District Munsif of Mannárgudi, in Original Suit No. 349 of 1905.

The facts for the purpose of this case are sufficiently set out in the judgment.

S. Srinivasa Ayyar for appellants.

V. Purushothama Ayyar for the Hon. The Advocate-General and *T. R Venkatrama Sastri* for fourth respondent.

JUDGMENTS (Sir CHARLES ARNOLD WHITE, C.J.).—I have read the judgment which my learned brother is about to deliver and I concur.

With regard to the question whether the plaintiff has a lien on the money in deposit in the Munsif's Court, it seems to me on further consideration, that the view taken in the judgment of this Court to which I was a party namely, *Singaravelu Udayan* v. *Ramayer*(1) was wrong, and that it is not supported by the decision in *Gurney* v. *Seppings*(2) to which reference is made in the judgment.

I think the decree of the Courts below should be modified in the manner indicated in the judgment of my learned brother, and that the respondents should pay the appellant's costs throughout.

KRISHNASWAMI AYYAR, J.—The first defendant mortgaged the decree in Original Suit No. 254 of 1891 against defendants Nos. 2 to 9 on the file of the District Munsif of Mannargudi, to the plaintiff. The mortgage deed is dated the 3rd of November 1904. The tenth defendant who had obtained a Small Cause decree against the first defendant on the file of the Subordinate Judge's Court of Tanjore attached the decree in Original Suit No 254 of 1891 under section 273 of the Civil Procedure Code of 1882. This order of attachment was received by the Mannargudi Munsif on the 3rd of November, *i.e.*, the same day as the date of the mortgage. Defendants Nos. 11 and 12, other decree-holders against the first defendant, attached the said decree—subsequently to the plaintiff's mortgage, in execution of their respective decrees. The tenth defendant having afterwards withdrawn the attachment, the first defendant executed his own decree in Original Suit No. 254 of 1891 and realised the sum of Rs. 801 which was kept in deposit to the credit of that cause in the District Munsif's Court of Mannargudi. The plaintiff's suit is for the recovery of his

(1) (1903) 13 M.L.J., 306.

(2) (1845) 15 L.J. Ch., 385.

WHITE, C.J., AND KRISHNASWAMI AYYAR, J.

VENKATRAMA IYER v. ESUMSA ROWTHEN.

mortgage amount from the amount in deposit. Both the Courts below have concurred in dismissing the suit, as against the money in deposit. The first question for decision is whether section 244 of the Code of Civil Procedure of 1882 bars the suit. It is contended for the respondent that the plaintiff is the assignee of the decree-holder in Original Suit No. 254 of 1891 and is bound therefore to apply in execution of that decree for the realisation of the amount due under it and cannot institute a separate suit. It is unnecessary to consider for the purposes of this case whether a mortgagee of a decree is an assignee within the meaning of section 232 of the Code of Civil Procedure, 1882. There can be no doubt, however, that as mortgagee, he can sue his mortgagor for sale of the mortgaged property (see appeal against Order Nos. 107 to 109 of 1906) and the purchaser may then proceed to execute the decree which he has purchased. The present suit, it must be remembered, is not for realisation of the amount due by the judgment-debtors of the first defendant but for recovery of the plaintiff's claim from the amount in deposit to the credit of the first defendant in Original Suit No. 254 of 1891. The questions arising between the plaintiff and the first defendant or those arising between the plaintiff and the tenth, eleventh and twelfth defendants are not questions arising between the parties to the suit No. 254 of 1891 or their representatives. Section 244 of the Code of Civil Procedure 1882 cannot therefore bar the present suit.

It is again urged for the respondent that on the date of the mortgage to the plaintiff execution of the decree in Original Suit No. 254 of 1891 had become barred under section 230 of the Code of Civil Procedure, 1882, and that therefore no interest passed to the plaintiff under his mortgage. This contention is clearly untenable. In the first place the decree in Original Suit No. 254 of 1891 was then under execution, an application for execution being pending which had been preferred within twelve years from the date of the decree. The plaintiff as mortgagee of the decree was certainly entitled to the benefit of the execution. In the second place assuming that a fresh application by the plaintiff would become barred, the plaintiff is not seeking to execute any decree more than twelve years old but only proceeding to recover by suit the amount due to him from moneys realised by the first defendant. It is difficult to see how section 230 of the Civil Procedure Code of 1882 can affect the plaintiff's right.

It is next contended that the plaintiff's mortgage is subsequent to the tenth defendant's attachment and that the plaintiff is postponed to the tenth defendant and also to the eleventh and twelfth defendants who, though their own attachments were later than the plaintiff's mortgage have, it is said, valid claims enforceable under the tenth defendant's attachment. The attachment of the tenth defendant was, as already stated, on the same date as that of the plaintiff's mortgage. Under section 273 of the Civil Procedure Code, 1882, it only takes effect from the date of the receipt of the notice by the Court whose decree is attached. At all events a private alienation by the holder of the decree attached is void under section 276 of the Civil Procedure Code, 1882 only if made during the continuance of the attachment, "duly intimated and made known" in the manner provided by section 273. It is plain that a transaction which is *primâ facie* valid, can only be invalidated by the attaching decree-holder showing to the satisfaction of the Court that the alienation was made during the pendency of the attachment (*Satya Charan Mukerei* v. *Madhub Chunder Karmakar*(1)). The tenth defendant has clearly failed to show it. It is argued that the receipt of the notice by the Mannargudi Munsif was a judicial act, and must be presumed to have been done at the earliest point of time on the 3rd of November, while the alienation in favour of the plaintiff being a private transaction he is bound to show the actual time at which the transaction was concluded. Reliance is placed upon the decisions in *Wright* v. *Mills*(2) and *Clarke* v. *Bradlaugh*(3). These decisions do not support the respondent's contention. In the latter case a writ of summons was held not to be a judicial act and the legal fiction, assuming it was applicable to judicial acts without qualification, as to which doubts were expressed, was held inapplicable to a writ of summons. It is impossible to suppose that the receipt by the Mannargudi Munsif of the notice of attachment issued by the Subordinate Judge of Tanjore was a judicial act to which such a fiction could be applied. It follows, therefore, that the defendant has not shown that the alienation in favour of the plaintiff was during the pendency of an attachment.

(1) (1903) 9 C.W.N., 693. (2) (1859) 4 H. & N., 488.
(3) (1881) 8 Q.B.D., 63.

Section 276 of the Civil Procedure Code, 1882, cannot then, in my opinion, invalidate the mortgage. But assuming the above view to be erroneous, the attachment of the tenth defendant was withdrawn by exhibit J. It was strenuously argued by the learned vakil for the respondents that exhibit J was not an absolute withdrawal of the attachment but conditional on the money realised by the first defendant in execution of his decree being kept in deposit. But the condition having been fulfilled the withdrawal of the attachment must take effect according to the terms of exhibit J. No attachment of the money in deposit was substituted in place of the attachment of the decree. It is difficult to hold that notwithstanding the terms of exhibit J the attachment continued as before so as to invalidate the alienation in the plaintiff's favour under the terms of section 276 of the Civil Procedure Code, 1882. Defendants Nos. 11 and 12, however, stand in a distinctly worse position. Their attachments were later than the mortgage. They are *primâ facie* postponed to the mortgagee. The money realised was not realised in execution of the decrees of any of the attaching decree holders. The first defendant executed the decree in Original Suit No. 254 of 1891. Defendants Nos. 11 and 12 would not therefore be entitled to any rateable distribution under section 295, Civil Procedure Code, 1882, out of moneys realised by the first defendant in execution of his decree, after the tenth defendant had withdrawn his attachment. It is essential to a valid claim for rateable distribution that the assets should have been realised by the tenth defendant executing the first defendant's decree by way of executing his own decree. If we are to assume that under exhibit J the tenth defendant entered into a special arrangement with the first defendant for making the money realised by the first defendant in execution, available to the tenth defendant to the extent of his claim, such an arrangement cannot avail the eleventh and twelfth defendants who can only put forward claims enforceable under the tenth defendant's attachment as entitled to priority against the plaintiff's mortgage. In the view here expressed it is unnecessary to consider the conflicting views propounded by the Bombay High Court in *Sorabji Edulji Warden* v. *Govind Ramji F. N. Wadia and another*(1), and by the Allahabad High Court in *Manohar Das*

(1) (1892) I.L.R., 16 Bom., 91.

v. *Ram Autar Pande*(1), as to the meaning of the phrase "claims enforceable under the attachment" in section 276 of the Civil Procedure Code, 1882.

There is yet another argument advanced by the respondents which remains to be noticed. It is contended by Mr. Venkatarama Sastry that the decree in Original Suit No. 254 of 1891 being no longer in existence by reason of the decree amount having been realised in execution, the plaintiff's mortgage is at an end and the plaintiff has no lien on the money s in deposit in the Munsif's Court of Mannargudi but only a personal claim against the first defendant. The decision in *Singaravelu Udayan* v. *Ramayer*(2) is cited in support of this view. With great respect to the learned Judges who decided this case I am unable to follow this decision. *Gurney* v. *Seppings*(3) cited therein does not appear to support the view expressed in that case. The Lord Chancellor allowed the mortgagee to proceed with his action against the mortgagor on condition of his depositing the money realised into Court as security for the sub-mortgagee. Relying on this case, Coote observes at page 850, Vol. II (seventh edition) of his 'Law of Mortgages' "If the debt is got in by the original mortgagee he is bound to apply it in discharge of the sub-mortgage." See also Fisher on 'Mortgages,' page 854. No reference is made in *Singaravelu Udayan* v. *Ramayer*(2) to section 73 of the Transfer of Property Act and to the principle underlying that section. There are numerous authorities in support of the position that the mortgagee is entitled to a charge upon the property which through no fault of the mortgagee has taken the place of the mortgaged property. It is well known that the money or the property given by Government in substitution for the lands taken up under the Land Acquisition Act is charged in favour of the mortgagee who had his claim upon the property so taken. See *Vira Ragava* v. *Krishnasami*(4), *Jotoni Chowdhurani* v. *Amor Krishna Saha*(5). The charge upon the proceeds of a sale of mortgaged property for arrears of revenue or of rent declared by section 73 of the Transfer of Property Act is recognised in *Gosto Behary Pyne* v. *Shib Nath Dut*(6) in *Beni Prosad Sinha* v. *Rewat Lall*(7) and *Kamalakant*

(1) (1908) I.L.R., 25 All., 431.
(2) (1903) 13 M.L.J., 306.
(3) (1845) 15 L.J. Ch., 385.
(4) (1883) I.L.R., 6 Mad., 344 at p. 347.
(5) (1908-1909) 13 C.W.N., 351.
(6) (1898) I.L.R., 20 Calc., 241.
(7) (1897) I.L.R., 24 Calc., 746.

Sen v. *Abul Barkat*(1). Where an undivided share in property is mortgaged and the mortgagor gets specific property in lieu of the share on partition, it has been held that the mortgage is a valid encumbrance on the substituted property. *Byjnath Lall* v. *Ramoodeen Chowdry*(2), *Hem Chunder Ghose* v. *Thako Moni Debi*(3), *Joy Sankari Gupta* v. *Bharat Chandra Bardhan*(4), *Lakshman* v. *Gopal*(5), *Amolak Ram* v. *Chandan Singh*(6), and section 44 of the Transfer of Property Act. The puisne mortgagee is on the same principle entitled to a charge on the surplus sale-proceeds on a sale under the first mortgage (*Berhamdeo Pershad* v. *Tara Chand*(7)). It would be difficult indeed to hold that so far as the first defendant (the mortgagor) is concerned he would be at liberty to realise his decree and deal with the proceeds to the prejudice of his mortgagee, the plaintiff. As regards defendants Nos. 10, 11 and 12 if there be any force in their contention it affects them quite as much as the plaintiff for they merely attached the decree of the first defendant and not the amount realised in execution of it and they not having therefore any lien upon the amount in deposit, are not entitled to raise any objection to the plaintiff obtaining a decree against the first defendant and the amount which stands to his credit. As already observed, however, I am inclined to hold that the plaintiffs have a valid charge on the amount in deposit in the Munsif's Court at Mannargudi. I would modify the decrees of the Courts below and declare that the plaintiffs are entitled to a lien for the amount decreed, on the amount in deposit in the District Munsif's Court at Mannargudi to the credit of the first defendant in the Original Suit No. 254 of 1891 and that the plaintiffs are entitled to draw that sum from that Court in execution of this decree. The respondents will pay the appellants' costs throughout on the amount decreed by the Courts below.

(1) (1900) I.L.R., 27 Calc., 180.
(2) (1873) L.R. 1 I.A., 106.
(3) (1893) I.L.R., 20 Calc., 533.
(4) (1899) I.L.R., 26 Calc., 434.
(5) (1899) I.L.R., 23 Bom., 385.
(6) (1902) I.L.R., 24 All., 483.
(7) (1906) I.L.R., 28 Calc., 92.

APPELLATE CIVIL.

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

1909. December 20.

YAKKANATH EACHARAUNNI VALIA KAIMAL (FIRST DEFENDANT AND LEGAL REPRESENTATIVES OF THE FIRST DEFENDANT), APPELLANTS,

v.

MANAKKAT VASUNNI ELAYA KAIMAL AND OTHERS (PLAINTIFF AND DEFENDANTS NOS. 2 TO 5), RESPONDENTS.*

Civil Procedure Code, Act V of 1908, s. 99—Misjoinder includes non-joinder—What parties necessary in suit against karnavan of tarwad to enforce contract of previous karnavan—When act of karnavan impeachable.

In a suit to enforce against the karnavan of a tarwad in his capacity as such karnavan a contract made by a previous karnavan on behalf of the tarwad, it is not necessary to add the other members of the tarwad as parties.

'Misjoinder' in section 99 of the Civil Procedure Code of 1908 includes 'non-joinder.'

A contract made by the karnavan of a tarwad, if prudent and fair at the time it was made, is binding on his successor in office.

SECOND APPEAL against the decree of J. H. Munro, District Judge of South Malabar, in Appeal Suit No. 26 of 1907, presented against the decree of S. Ragunathiya, Subordinate Judge of South Malabar, at Palghat, in Original Suit No. 56 of 1905.

The plaintiff and defendants were members of an undivided tarwad of which the first defendant was karnavan. The plaintiff was karnavan of a branch entitled to be maintained by the tarwad. A suit against the predecessor of the first defendant for maintenance by the predecessor of the plaintiff was compromised by the former agreeing on behalf of the tarwad to pay the latter, as representing the branch, a certain amount for maintenance. This suit was brought to recover arrears for six years. The defendants contended, *inter alia*, that all the members of the tarwad should be made parties, and that the arrangement was not binding on the tarwad, and that the arrangement had been revoked.

The District Munsif held that the arrangement was not binding on the tarwad and that it had been revoked, and he accordingly dismissed the suit. On appeal this judgment was reversed and a decree was passed in plaintiff's favour.

* Second Appeal No. 1277 of 1907.

First defendant appealed.

M. Kunjunni Nair for appellant.

T. R. Krishnaswami Ayyar for *T. R. Ramachandra Ayyar* for third and fourth respondents.

WHITE, C.J., AND KRISHNASWAMI AYYAR, J.

YAKKANATH EACHARAUNNI VALIA KAIMAL v. MANAKKAT VASUNNI ELAYA KAIMAL.

JUDGMENT (SIR CHARLES ARNOLD WHITE, C.J.).—The main defence in this suit was that exhibit B, which is an arrangement which was entered into by the first defendant's predecessor in office as karnavan of the tarwad and the plaintiff's predecessor-in-interest, has been revoked. The District Judge finds that it has not been revoked. This is a question of fact which is binding on us in second appeal.

Then, on behalf of the appellant, it was argued that exhibit B is not binding on him as the successor in office of the man by whom the agreement was entered into. I feel some doubt as to whether we should allow this point to be raised before us at all, because the judgment of the learned District Judge, as I read it, strongly suggests that the point was never taken before him.

The agreement purports, as I read it, to have been entered into by the first defendant's predecessor-in-office on behalf of the tarwad and I see no reason for holding that it is not binding on his successor in office, the first defendant.

The further point which was argued before us was the question of parties and it was contended that the suit ought to have been dismissed on the ground of non-joinder. Now the plaintiff in the present suit is the manager of the tavezhi, the first defendant is the manager of the tarwad, and certain members of the plaintiff's tavezhi have been made supplemental defendants. The point as to alleged *non-joinder* is this: that all the members of the first defendant's tarwad should have been made defendants to the suit. On behalf of the appellant we were referred to a decision *Mammali* v. *Pakki*(1). That was a suit for increase of maintenance against the karnavan of the tarwad and it was there held by this Court that all the members of the tarwad were necessary parties to that suit. I think that case is clearly distinguishable from the case before us. In *Mammali* v. *Pakki*(1) the suit was for an increase of the rate of maintenance and it was not based upon any agreement entered into by the karnavan. The present suit is on an agreement to pay maintenance

(1) (1884) I.L.R., 7 Mad., 428.

at a specified rate executed by a former karnavan and, as I have said, I see no reason for holding that the agreement is not binding on the tarwad. It purports to be entered into by the karnavan representing the tarwad. In these circumstances the present case in regard to the question of the suggested *non-joinder* is not governed by the decision in *Mammali* v. *Pakki*(1). In any way, it seems to me that under section 99 of the present Code of Civil Procedure we are not called upon to give effect to the objection in regard to parties.

It is contended that section 99 speaks only of *misjoinder* of parties or causes of action. But it has been held by this Court in *Mahabala Bhatta* v. *Kunhanna Bhatta*(2) for the purpose of construing the section to which the present section 99 corresponds that the word *misjoinder* includes *non-joinder*, I think that the second appeal must be dismissed with costs.

KRISHNASWAMI AYYAR, J.—I agree. The appellant attacks the judgment of the District Judge on the ground that exhibit B is not binding upon him because the property allotted for the maintenance of the plaintiff's branch gives at present a larger income than it was expected to yield at the time when it was allotted. It seems to me that this is not a sufficient ground for modifying an arrangement that was entered into by a karnavan. The question as regards the propriety of the arrangement made by the karnavan in 1879 is certainly open to the present karnavan to raise. But if it was a *bonâ fide* and proper and prudent arrangement to make at the time it was entered into, it seems to me that the ground on which that arrangement is now attacked is not available to the present representative of the tarwad.

As regards *non-joinder*, in the circumstances of this case, it is at best an irregularity, which does not vitiate the decision on the merits, and therefore section 99 of the present Code of Civil Procedure would seem to be sufficient to dispose of that objection. But, looking at the question on its merits, it seems to me that it is not clear that there is a *non-joinder* in this case. The contention is open to exception. The suit is brought upon an arrangement entered into by a karnavan against the successor of that karnavan. It is sought to enforce it against him in his capacity as the karnavan of the tarwad. In such a suit he

(1) (1884) I.L.R., 7 Mad., 428. (2) (1898) I.L.R., 21 Mad., 373 at p. 382.

represents all the other members of the tarwad and therefore it would seem to me to be unnecessary to make the other members parties, though if they made an application at the earliest possible stage to join on the record as parties to the suit, such an application ought to be favourably viewed. There was no such application in this case. Nor was there any application by the first defendant that the other members should be joined as parties. The mere objection, therefore, that they have not been joined seems to me to be of no validity whatever in a suit brought like the present one for the enforcement of an arrangement made by the predecessor of the present karnavan. I agree in dismissing the second appeal with costs.

APPELLATE CIVIL.

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

APPANDAI VATHIYAR AND OTHERS (NOS. 1 TO 3 LEGAL REPRESENTATIVES OF FIRST PLAINTIFF AND PLAINTIFFS NOS. 6 AND 7), APPELLANTS,

v.

BAGUBALI MUDALIYAR AND OTHERS (FIRST DEFENDANT, FOURTH LEGAL REPRESENTATIVE OF FIRST PLAINTIFF AND SECOND DEFENDANT), RESPONDENTS.*

1909. December 22 1910. January 25.

Hindu Law—Jains—Inheritance—Competition amongst heirs—Mother's sister's son preferred to maternal uncle's son—Observations on the principles regulating the order of succession among Bandhus.

Under Hindu Law a mother's sister's son is entitled to succeed to the estate of a deceased Hindu in preference to a maternal uncle's son.

SECOND APPEAL against the decree of F. Du P. Oldfield, District Judge of Tanjore, in Appeal Suit No. 500 of 1906, presented against the decree of A. N. Anantarama Ayyar, District Munsif of Tanjore, in Original Suit No. 277 of 1904.

Suit by the original plaintiff, Annasawmi Vathi, as heir to one Gunapala Vathi, who died on 16th October 1901, to recover certain properties deposited by the latter with the defendants. The defendants contended, *inter alia*, that the original plaintiff as well as

* Second Appeal No. 1060 of 1907.

plaintiffs Nos. 2–8 who were brought on record as the other heirs of deceased were not the heirs of the deceased Gunapala Vathi.

The following issues material to the decision in this case were framed :—

"Whether the plaintiff was the heir of Gunapala Vathi and was entitled to the property ?"

"Were the supplemental plaintiffs also heirs of the deceased Gunapala Vathi entitled to recover the property in suit ?"

The District Munsif recorded evidence on the question of relationship and found that the first plaintiff was entitled to recover the properties. His judgment on this point is as follows :—

"Under these circumstances I believe plaintiffs' evidence and find that the relationship set up by plaintiffs is true. Plaintiffs Nos. 1 to 3 and 6 to 8, being Gunapala's mother's bandhus, are, I think, his legal heirs. Plaintiffs Nos. 4 and 5, who are his mother's sisters, are not heirs. According to the Smiriti Chandrika plaintiffs Nos. 6 and 7 who are Gunapala's mother's sister's sons are preferential to her brother's sons, but this point is not quite settled. Plaintiffs Nos. 2, 3, 6 and 7 have relinquished their right in favour of the first plaintiff. Exhibit B is the notice sent by third plaintiff to first defendant. Exhibit L is the notice sent by second plaintiff. The first plaintiff is thus entitled to recover the properties."

The first defendant alone appealed; the sixth and seventh plaintiffs were not parties to the appeal.

The District Judge accepted the lower Court's finding on the question of relationship and following the text of the Smiriti Chandrika held that the son of a maternal uncle was postponed to the son of a maternal aunt.

He allowed the appeal and dismissed the first plaintiff's suit.

Plaintiff appealed to the High Court.

S. Varadachari for the Hon. the Advocate-General for first to fourth and sixth appellants.

T. R. Ramachandra Ayyar and *G. S. Ramachandra Ayyar* for first respondent.

JUDGMENT.—The only question for consideration in this case is whether the mother's sister's son or the maternal uncle's son is the preferential heir to the estate of a deceased Hindu. The matter is involved in considerable obscurity and no clear pronouncement can be gathered from the texts of the Hindu Law. The commentators

are also mostly silent upon the subject. The well-known text cited, as that of Vriddha Satatapa or sometimes as that of Baudhayana, divides Bhandhus into three classes, namely, Atma bandhus, Pitri bandhus and Matri bandhus. The Mitakshara is explicit that these three classes succeed in the order in which they are named ; see "Mitakshara," Chapter ii, Sec. 6, Pl. 2. And the Privy Council accepting the decision of this Court in *Muttusami* v. *Muttukumarasami*(1) has approved of this order in *Muttusami Mudaliar* v. *Simambedu Muthukumaraswami Mudaliar*(2). The question of the order of succession of the three classes of bandhus being thus settled, the further question arises as to the order of succession *inter se* of the bandhus comprised in each class. The maternal uncle's son and the mother's sister's son are both expressly named in the class Atma bandhus. But there is no indication in the Mitakshara, unless the order in which they are placed is such an indication, as to their respective priority. Mr. Mayne observes in section 579 "Perhaps the order of enumeration is not intended to convey any right of precedence." The Smrithi Chandrika which is the next best authority after the Mitakshara in Southern India before giving the list of nine bandhus, quoting the same text of Vriddha Satatapa, says in Chapter XI, Sec. 5, Pl. 13, "Cognate kindred. A description of these is given as follows in a different Smrithi *according to their order of relationship.*" The learned translator in his summary at the end of the section gives the twenty-fourth place to the son of the mother's sister and the twenty-fifth to the son of the maternal uncle, thus recognising the order in which bandhus are named as indicating the order of succession. The Sarasvati Vilasa which is also a recognised authority in Southern India says in Pl. 595 "The bandhapas are exhibited in another law code in the order of their greater propinquity," and proceeds to quote the same text of Vriddha Satatapa which names the maternal aunt's son before the maternal uncle's son amongst Atma bandhus. It is strange, however, that, though there is a discussion and a decision in placita 597 and 598 as to the precedence of Atma bandhus over Pitri bandhus and of the latter over Matri bandhus, there is none as to the order amongst the bandhus of each class. Again in the Vyavahara Mayukha which is an authority in the Mitakshara school, though

(1) (1893) I.L.R., 16 Mad., 23. (2) (1896) I.L.R., 19 Mad., 405.

of special value only in the Presidency of Bombay, it is stated after citing the text of Vriddha Satatappa "Here, *i.e.* (among these) the order of succession is that stated in the text." Mr. Mandlik adds a note that this order applies to the three classes *as well as to the several members of those classes*. These are the only references that we have been able to find to the question of the order of succession among the bandhus of each class. There is of course the circumstance that the text of the ancient law-giver, whoever he was, has named the mother's sister's son before the maternal uncle's son. There is a rule of the Mimamsa that effect should be given to the order in which persons and things are named unless the sense requires a different order; see *Jaiminiya Nyayamala Ch.* v. *Adhikarana*. In the absence of any decisive principle dictating a different order the duty of the interpreter of the law is to accept the order in which they are named as based upon some rule which they may be unable to discover or upon the mere *ipse dixit* of the law-giver. The three commentaries that have been referred to, viz., the Smirithi Chandrika, the Saraswati Vilasa and the Vyavahara Mayukha have stated no reason for placing the mother's sister's son before the maternal uncle's son. We cannot accede to the suggestion that the exigencies of metre may have dictated the order. It may not be difficult to speculate and suggest a reason as it was attempted to be done by Mr. Ramachandra Ayyar that the mother's sister's son offers oblations to the same three maternal ancestors to whom the deceased himself offers, while the maternal uncle's son in offering oblations to his three paternal ancestors offers only to two who are common to himself and the deceased. To this it may be answered that the offerings of the maternal uncle's son are superior because they are offered to paternal ancestors while those that are offered by the mother's sister's son are offered to maternal ancestors. It may also be that on the theory of propinquity which is the guiding principle in determining the order of succession according to the Mitakshara school the mother's sister's son is to be deemed to be nearer than the mother's mother's son, for while custom sanctions the marriage of the mother's brother's daughter it has not countenanced the marriage of the mother's sister's daughter. But we cannot regard such speculations as the above as a basis for judicial decisions, for the logical application of such theories is sure to land us in difficulties from which it will be impossible to escape.

Among the English text writers on the "Hindu Law", West and Buhler in Vol. I, page 134, say "the rule as to *the nine specified* bandhus may be expressed thus. A man's own bandhus are the sons of his own paternal aunt and of his maternal aunt and uncle. The same relatives of his father are his bandhus. The same relatives of his mother are her bandhus. *They succeed in the order* in which they have been enumerated." There can be no doubt that the order of succession referred to is in relation to the nine specified bandhus. Golap Chandra Sirkar Sastri lays down three rules as governing cases of competition between bandhus.

"(1) The nearer in degree on whichever side is to be preferred to one more remote.

(2) Of those equal in degree one related on the father's side is to be preferred to one related on the mother's side

(3) When the side is the same the circumstance of one being related to a male and another to a female makes no difference." Applying the last of these rules to the present case it is difficult to say in whose favour the author would decide the priority—the mother's sister's son or the maternal uncle's son. Perhaps there being no inferiority in consequence of his mother's sex, the author might accept the order in which the mother's sister's son is named as determining his precedence. Two other well-known writers, however, on the Hindu Law, namely, Bhattacharya (at p. 460) and Sarvadhicari (at pp. 700 and 716) have given precedence to the maternal uncle's son over the mother's sister's son. They have both elaborately discussed the principles determining the order of succession among bandhus. But their views have been strongly criticised by Mr. Golap Chandra Sirkar (pp. 48—54 and 65—76). One obvious criticism of the views of those eminent writers is that they conflict with the explicit pronouncement of the Mitakshara that all Pitri bandhus are postponed to the Atma bandhus. Both according to Sarvadhicari and Battacharya, the paternal grandfather's sister's son and the sister's son of even more distant paternal ancestors would come in before the Atma bandhus *ex parte materna*. It is also to be remembered that the theory of the religious efficacy of oblations has coloured their judgment in a matter which falls to be determined under the Mitakshara principle of propinquity. The theory of spiritual oblations has really no place in the Mitakshara scheme of succession.

The definition of Sapinda in the Achara Kanda of the Mitakshara entirely repudiates the notion of connection by spiritual offerings. It is also expressly there stated "wherever the term *Sapinda* is used there, directly or mediately, connection with parts of one body is to be understood." See Golap Chandra Sirkar Sastri's Hindu Law, pp 58 and 59. Again in Chapter II, section 3, Verse 4, Vignaneswara reiterates his view as to propinquity being the sole governing principle thus "nor is the claim in virtue of propinquity restricted to Sapindas but on the contrary it appears from this very text that the rule of propinquity is effectual *without any exception* in the case of Samanodhokas as well as other relatives when they appear to have a claim to the succession." In the face, therefore, of these distinct pronouncements it is difficult to decide the question under consideration on any theory of superior religious efficacy. In the very text as to the succession of cognate kindred, chapter II, section 6, Pl. 2, Vignaneswara begins by saying "by reason of *mere affinity* the cognate kindred of the deceased are his successors in the first instance"; see also Mayne, sec. 579. It is plain on a consideration of the foregoing references that the Mitakshara pays no attention to the theory of funeral oblations. See the remarks of the Privy Council in *Lallubhai Bapubhai* v. *Cassibai*(1) and of Knox, J., in *Suba Singh* v. *Sarafraz Kunwar*(2). The Viramitrodaya which is an authority in the Benares school bases its rules of succession on considerations of propinquity though the capacity to confer spiritual benefit is sometimes referred to as a further ground of support; see *Suba Singh* v. *Sarafraz Kunwar*(2) and Sircar's Viramitrodaya, pp. 186 and 194. It must however be admitted that the Privy Council and the Madras High Court have occasionally adverted to considerations of the religious efficacy of oblations as a factor in determining the relative priority of competing claimants to succession; see *Bijyah Ram Singh* v. *Bayah Ugur Singh*(3), *Muttusami* v. *Muttukumarasami*(4), *Balusami Pandithar* v. *Narayana Rau*(5). Indeed Mr. Justice Muttuswami Ayyar in *Muthusami* v. *Muttukumarasami*(4) formulates his conclusion at page 30 thus: "As between

(1) (1881) I.L.R., 5 Bom., 110 at pp. 118, 121.
(2) (1897) I.L.R., 19 All., 215 at pp. 223, 224, 226, 231.
(3) (1870) 13 M.I.A., 373 at p. 392.
(4) (1893) I.L.R., 16 Mad., 23 at p. 30.
(5) (1897) I.L.R., 20 Mad., 342 at p. 348.

bandhus of the same class the spiritual benefit they confer upon the propositus is as stated in Viramitrodaya a ground of preference." As pointed out by us, however, the Viramitrodaya says at page 194; "Greatness of propinquity is alone the criterion of succession." Whatever may be the true position of the Viramitrodaya it cannot outweigh, so far as the Southern Presidency is concerned, the distinct pronouncement of the Mitakshara itself as to propinquity being the sole test of succession and the express statement of the order contained in the Smrithi Chandrika and the Sarasvati Vilasa. Our attention was drawn to the observations in *Balusami Pandithar* v. *Narayana Rau*(1) at p. 348 regarding the propriety of introducing considerations of religious benefit in some cases. Assuming they are well founded they are open to the same remarks that we have made as regards Mr. Justice Muthuswami Ayyar's dictum in *Muttusami* v. *Muttukumarasami*(2), *Tirumalachariar* v. *Andalammal*(3) was also relied on for the view "that all other considerations being equal the claimant between whom and his stem there intervenes only one female link may legitimately be preferred to the claimant who is separated from the stem by two such links." This observation may no doubt apply to the present case. But the important qualification of "all other considerations being equal" excludes the operation of the rule, for the express authority of the Smrithi Chandrika, the Sarasvati Vilasa, and the Vyavahara Mayukha must be given effect to.

The question has sometimes been discussed as to the place of bandhus not named in the list of Satatapa. It has been argued that they should all come in only after the enumerated bandhus. But this view has been rightly negatived in *Gunesh Chunder Roy* v. *Nil Komul Roy*(4) in the case of the sister's son as against the mother's sister's son and in *Mohandas* v. *Krishnabai*(5) in the case of the maternal uncle as against the mother's sister's son. It is obvious that the decision in these cases was in favour of the person of greater propinquity. Whatever might have been the reason for naming only certain of the bandhus there can be no implication that they have all priority over others unnamed in the text. But the introduction of the maternal uncle and the sister's

(1) (1897) I L.R., 20 Mad., 342 at p. 348.
(2) (1893) I.L.R., 16 Mad., 23 at p. 30.
(3) (1907) I.L.R., 30 Mad., 406.
(4) (1874) 22 W.R., 264.
(5) (1881) I.L.R., 5 Bom., 597.

son into the list of bandhus so as to effect a breach in the order of persons named is no reason for repudiating the notion of order amongst the persons *inter se* who have been named.

We are, therefore, inclined to hold that the mother's sister's son should be preferred to the maternal uncle's son. In rejecting the notion of superiority by reason of the religious efficacy of oblations we have felt ourselves more at liberty in this case in consequence of the fact that the parties to the suit are Jains and that though the Hindu Law is *primâ facie* held applicable to them, its religious developments should not have unrestricted operation; see Mayne, section 516.

The second appeal is dismissed with costs.

APPELLATE CIVIL.

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

1910. December 2, 9.

ABDULLA BEARY (DEFENDANT), APPELLANT,

v.

MAMMALI BEARY AND ANOTHER (PLAINTIFF AND SUPPLEMENTAL RESPONDENT IN THE LOWER APPELLATE COURT. PLAINTIFF'S ATTACHING CREDITOR), RESPONDENTS.*

Transfer of Property Act IV of 1882, *s.* 55, *cl.* 4 (*b*)—*Sale—Consideration therefor—Covenant by purchaser to discharge liabilities of seller—Breach of covenant gives rise to action for damages only—Statutory charge under cl.* 4 (*b*) *negatived by contract to the contrary arising by implication.*

When a purchaser of immoveable property covenants, in consideration of the transfer of such property to him, to discharge certain liabilities of the seller and further stipulates that, upon his failure to do so, he shall be liable for any damages resulting from such default:

Held, that upon breach of such a covenant the seller is entitled to be compensated in damages but has no charge upon the property in the hands of the purchaser under section 55, cl. 4 (*b*) of Act IV of 1882.

To negative the statutory charge afforded by section 55 it is sufficient if 'a contract to the contrary' arises by implication.

Webb v. *Macpherson*, [(1903), 30 I.A., 238], referred to.

In re Albert Life Assurance Company v. *Western Life Assurance Society*, [(1870), 11 Eq., 164], followed.

* Second Appeal No. 1475 of 1907.

Ramakrishna Ayyar v. *Subrahmania Ayyar*, [(1906), I.L.R., 29 Mad., 305], distinguished.

SECOND APPEAL against the degree of H. O. D. Harding, District Judge of South Canara, in Appeal Suit No. 307 of 1906, presented against the decree of M. Narasinga Rao, District Munsif of Kasaragod, in Original Suit No. 40 of 1906.

Suit to recover the price of certain property sold by the plaintiff to the defendant on the liability of the properties conveyed.

The plaintiff alleged that he executed an instrument of sale, Exhibit A, of certain immoveable properties in favour of the defendant for Rs. 1,650; that the defendant agreed to pay Rs. 1,350 from and out of the purchase-price to certain creditors of the plaintiff. That the defendant failed to pay the said amounts.

The plaintiff prayed for a decree for the abovementioned sum on the liability of the property conveyed.

The defendant pleaded *inter alia* that the plaintiff was not entitled to a charge upon the properties for the unpaid purchase-money; that his remedy, if any, was by way of damages and that the suit was barred by limitation.

The material terms of Exhibit A, the sale deed, were as follows:—

Deed of sale of land executed on 22nd of January 1894, in favour of Abdulla Beary by Mammali Beary is as follows: Having sold to you this day the undermentioned property, Rs. 1,650 (one thousand six hundred and fifty), the price settled hereof have been received by me, as per undermentioned particulars. Therefore, I have delivered the said properties to you even now. Henceforward neither myself nor my descendants as well, have any right whatever to the said property.

* * * *

The particulars of the receipt of Rs. 1,650, the price fixed for the abovesaid properties, are received being kept with you in consideration of the agreement of your paying one thousand three hundred and fifty to these three persons, viz., (1) Kasaragod Patnasetty Achutaya, (2) Venketesha Kamthi's son Shesu Kamthi and (3) Subraya Bhatta, and obtain receipt therefor to whom it was settled that I should pay the said sum in accordance with the provisions of the registered sale-deed for Rs. 10,500 obtained on 9th June 1892, ... in all Rs. 1,650, as per particulars have been received. The Rupees one thousand six

hundred shown to be paid to the aforesaid persons should be paid to the respective persons within eight days from this date, and receipts obtained. In case receipts are not obtained accordingly, you are responsible to pay not only the interest due by me to them from the date of this deed but for the damages that may result therefrom.

The District Munsif passed a decree in favour of the plaintiff in terms of the prayers contained in the plaint.

On appeal this decree was confirmed by the District Court.

The defendant appealed to the High Court.

K. Bashyam Ayyangar for *K. P. Madhava Rao* for appellant.

H. Balakrishna Rao for *K. Narsina Rao* for second respondent.

JUDGMENT.—The Courts below have given a decree to the plaintiff for the purchase-money of certain property conveyed by him to the defendant on the liability of the properties conveyed. Exhibit A, dated the 22nd of January 1894, is the conveyance executed by the plaintiff. The price is fixed thereby at Rs. 1,650. It is stated to be kept with the purchaser in consideration of an agreement by him to discharge certain liabilities of the plaintiff. It is further stipulated that the money so reserved with the purchaser should be paid to the respective persons to whom the plaintiff was liable within eight days from the date of the sale and that the purchaser should, in default of payment, be liable for interest due to them from the date of sale and any damages resulting from such default. The defendant (the purchaser) having made default in payment, the plaintiff is entitled to sue for damages for the breach of contract. The Courts below have treated the suit as one for the purchase-money. They have held the plaintiff to be entitled to a charge upon the property in the hands of the buyer under section 55, clause 4 (*b*) of the Transfer of Property Act. If this were correct, the plaintiff's suit would of course be in time under article 132 of the Limitation Act. But if the damages claimed by the plaintiff are not purchase-money due to him and he is entitled to no charge it is clear that the suit is barred by lapse of time. Has the plaintiff then a charge in this case? By the terms of the contract the purchase money is not payable to the plaintiff. He has no right of action to recover it. How then can he have a charge upon the property conveyed when no money is due to him under the conveyance? Section 55 says he has, in the absence of a contract to the contrary, and the Judicial

Committee of the Privy Council say in *Webb* v. *Macpherson*(1) that to displace the statutory charge "it must be shown that there was a clear contract to the contrary between the parties." It is true there is no express contract in this case against a charge, but is there not, to use the language of the Privy Council "at least something from which it is a necessary implication that such a contract exists." When it is argued that the purchase money is to be paid to another, is that agreement consistent with the vendor retaining a charge? The purchaser no doubt is under a duty to the plaintiff to perform the covenant to pay the plaintiff's obligees. But he is under no obligation to pay the plaintiff any purchase money. The charge created by the statute in favour of the vendor is only security for purchase money payable to him. We are therefore inclined to hold that a contract to the contrary arises by implication to negative the statutory charge. It is no doubt pointed out by the Privy Council that the statutory charge in India is "different in origin and nature from the vendor's lien given by Courts of Equity to an unpaid vendor". See also the notes to *Mackreth* v. *Symmons*(2). But exclusion of such charge by contract express or implied being contemplated it is clearly open to us to negative it if we find as in this case a contract by necessary implication to the contrary. It is perhaps not easy to define what circumstances may give rise to a necessary implication. The intention of the parties must be gathered from a variety of facts. But when the vendor gets in return for his conveyance a promise to pay the purchase money or a part thereof to a third person whom the vendor is under obligation to pay it is perfectly safe to say that there is a contract to the contrary negativing a charge in the vendor's favour. If in England such a contract has been inferred under like circumstances to exclude the equitable lien of the unpaid vendor, we shall not be acting wrongly in making use of English decisions for purposes of illustration. *In re Albert Life Assurance Company* v. *Western Life Assurance Society*(3) in consideration of the Albert Company undertaking the liabilities and engagements of the Western Society, the latter conveyed a lease and mortgages belonging to it and when on failure of the former the Society claimed a lien on the lease and mortgages conveyed.

(1) (1903) 30 I.A., 238 at p. 244. (2) 2 W. & T. Eq. C., 935.
(3) (1870) L.R. 11 Equity, 164.

Sir James Bacon, Vice-Chancellor, refused to allow it. In *Webb* v. *Macpherson*(1), the Privy Council point out "that a conveyance or sale in consideration of a covenant to pay a sum of money in the future is different from a sale in consideration of money which the purchaser covenants to pay. "The distinction," they say, "may seem fine but it is a real distinction and it is one which if made out *might have had* the effect which the High Court have given to it." In that case the price was fixed at Rs. 81,000, Rs. 30,000 was paid down and the balance of Rs. 51,000 was agreed to be paid to the vendor in certain instalments. The sum of Rs. 51,000 was part of the purchase money payable to the vendor though payment was deferred. It was therefore distinguishable from cases in which to use the language of Vice-Chancellor Bacon, "the engagement to do the thing was the consideration for the transfer and the vendor having accepted that engagement has the very thing he bargained for and cannot say the consideration has not passed to him? The English Courts do not recognize a lien in such a case. Lord St. Leonards states the distinction in these words "There is a marked distinction between a conveyance as for money paid with a separate security for the price whether by covenant bond or note and a conveyance expressed to be in consideration of covenants which the purchaser enters into by the deed itself," Sugdens "Vendors and purchasers" page 554. Notwithstanding the decision of the Privy Council in *Webb and another* v. *Macpherson*, we may on the authority of the English cases (see also *Earl of Jersey* v *Briton Ferry Floating Dock Company*(2), *In re Brentwood Brick and Coal Company*(3) whose weight is still left unimpaired hold that the conveyance was in consideration of covenants to pay in the future and not for purchase money payable to the vendor in which latter case alone the charge created by the statute can attach. But however this may be, it is enough for the purpose of this case to say that a promise to pay a stranger is a mere covenant, the breach of which must be compensated in damages and that there is no occasion for the statutory charge in favour of the unpaid vendor to arise.

Stress was laid for the appellant on the provision in exhibit A that the vendor and his descendants have no right to the property

(1) (1903) 30 I.A., 238 at p. 244. (2) (1869) L.R. 7 Eq. 409.
(3) (1876) 4 Ch. B. 562.

conveyed. But this in our opinion is nothing more than the common declaration in conveyances that the vendor does not reserve to himself and to his heirs any right in the property conveyed and has no reference to the unpaid vendor's lien or charge in the event of non-payment.

It was also contended that according to the instrument the receipt of the purchase money was acknowledged and no question of the right of the unpaid vendor could arise. But as pointed out in Dart's "Vendors and Purchasers" volume 2, pages 739 and 740 the vendors's lien (and we conceive the statutory charge in India as well) is not lost by such acknowledgment, see also sections 54 and 55 of the Conveyance Act, 1881.

Upon the finding however that there was no purchase money payable to the vendor, the plaintiff had no charge. This view is not in accordance with the actual decision in *Ramakrishna Aiyar* v. *Subrahmania Ayyar*(1), the facts of which are similar to those of the present. No question was raised or considered in that case as to whether any purchase money was due to the plaintiff. The sole point decided was that there was a statutory charge as distinguished from a vendor's lien. The authority of that case therefore does not preclude us from holding that the plaintiff in this case is not entitled to a charge. The decrees of the Courts below must be reversed and the suit dismissed with costs throughout.

(1) (1906) I.L.R., 29 Mad., 305.

APPELLATE CIVIL.

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

1910. January 10, 19.

RATHNASABAPATHI PILLAI AND OTHERS (FIRST, THIRD, SEVENTH AND EIGHTH DEFENDANTS), APPELLANTS,

v.

RAMASAMI AIYAR (PLAINTIFFS), RESPONDENTS.*

Specific Relief Act I of 1877, ss. 9, 42—Trustee of temple—Wrongful dismissal and dispossession by co-trustees—Suit for declaration, invalidity of dismissal and injunction—Consequential relief—No claim to recover possession—Suit so framed not maintainable—Landlord—Possession by receipt of rent—Dispossession—Interest capable of delivery and possession.

When A, the trustee of a temple who had been ousted from possession by his co-trustees sued for a declaration that his dismissal from the trusteeship was invalid and for an injunction restraining his co-trustees and the temple committee from interfering with the exercise of his rights as trustee, there being no prayer for consequential relief in the nature of possession against his co-trustees :

Held, that the suit was not maintainable.

That possession should have been sued for and not a mere declaration.

An injunction is a discretionary relief and cannot be claimed by a plaintiff out of possession when he does not ask for possession against defendants who are actually in possession :

Kunj Bihari v. *Keshavlal Hiralal* [(1904) I.L.R., 28 Bom., 567], *dissented from.*

Jagadindra Nath Roy v. *Hemantra Kumari Debi* [(1905) I.L.R., 32 Calc., 129 (P.C.)], *referred to :*

Held further, that notwithstanding the lands belonging to the temple were in the physical possession of tenants, yet the plaintiff's right to receive rents was capable of possession which if disturbed entitled him to bring a suit for possession under section 9, Specific Relief Act.

Jagannatha Chetty v. *Rama Rayer*, [(1905) I.L.R., 28 Mad., 238], followed.

Abdul Kadir v. *Mahomed*, [(1892) I.L.R., 15 Mad., 15], followed.

Narayana v. *Shankunni*, [(1892) I.L.R., 15 Mad., 255], followed.

SECOND APPEAL against the decree of F. Du P. Oldfield, District Judge of Tanjore, in Appeal Suit No. 518 of 1906, presented against the decree of J. S. Gnaniyar Nadar, District Munsif of Tiruvalur, in Original Suit No. 95 of 1905.

* Second Appeal No. 667 of 1907.

SANKARAN NAIR AND KRISHNASWAMI AYYAR, JJ.

RATHNASABAPATHI PILLAI v. RAMASAMI AIYAR.

Suit by the plaintiff, a trustee of a temple seeking a declaration that his dismissal from the trusteeship by his co-trustees and the temple committee was invalid ; for an injunction restraining the co-trustees from interfering with the exercise of his rights as a trustee and for damages against the devastanam committee. The plaintiff alleged that he had been ousted from possession of the temple lands by the eighth and ninth defendants. The eighth and ninth defendants *inter alia* contended that the temple and its properties were in their possession and management ; that the plaintiff had been out of possession since 7th September 1904 ; and that the plaintiff had no right to the declaration and injunction sought for in the plaint.

The contentions of the remaining defendants are immaterial for the purposes of this report.

The District Munsif framed the following material issue :—

" Whether the plaintiff was in possession of the temple properties, and if not, whether he was entitled to bring this suit for an injunction only ?"

The District Munsif held that the removal of the plaintiff was valid, and that as the plaintiff was not in possession of the temple properties, after the appointment of the eighth and ninth defendants, co-trustees, the suit for a mere injunction and declaration was not maintainable.

On appeal by the plaintiff, the District Judge reversed the Munsif's decree and allowed the plaintiff's claim. No objection was taken on appeal before the District Court that the District Munsif's finding that the plaintiff was out of possession was erroneous.

The portion of the District Judge's judgment dealing with the maintainability of the suit was as follows :

" The lower Court held that plaintiff should have asked for such possession as it was possible for a trustee to obtain. *Narayana* v. *Shankunni* (15 Mad., 255) is relied on for two purposes. As in the present suit there was a prayer for a declaration that a document, corresponding to the order of dismissal here, was not binding, and there was then a prayer for a declaration of title without a prayer for possession. It was held that the facts that the properties were in the immediate possession of third parties, tenants, and next that the right of which declaration was claimed was a joint right with some of the defendants, did not make the

prayer for possession unnecessary. As regards the first it is not clear to what class of tenancy those in question belonged; demises granted by the defendants are mentioned in the judgment, which presumably rebutted the presumption that the tenants held with occupancy right; there is nothing similar here, and, if the trustee's right is simply to collect rents, and there is nothing to the contrary, a declaration of plaintiff's right, as between him and defendants, would enable him to do so. The case in question is no authority for the view that plaintiff should have sued the tenants in the present suit, or need sue the eighth and ninth defendants, the existing trustees, when they are not alleged to have created the tenancies. As regards the question of joint right, the case must be distinguished from the present; plaintiff has reserved his contention that eighth and ninth defendants are not proper trustees, and the effect of his doing so can be considered, when he sues on it for their removal, or a declaration regarding their character. At present his contention is simply that they are enjoying rights and performing duties, in which he is entitled, as a trustee, to share. In the case relied on the plaintiff as against third defendant, at least, claimed that his possession should be ended, and their own substituted, and against first, and, apparently, second defendants claimed what the Court described as a possession distinct from that which these defendants had. It has not been shown in what the possession possible for a trustee, a suit for which the lower Court suggested, could consist, or what properties it could actually affect, or in what manner. As was asked in *Kunj Bihari* v. *Keshavlal* (28 Bom., 567) "how would practical effect be given to an award of possession of an office otherwise than by preventing interference with the rights of which it is made up"? *Vengan* v. *Chinnu* (14 M.L.J., 290) relied on by defendants, does not relate to the duties of a trustee or the claim to a declaration regarding them, but to the immediate possession of property usurped, it appears, by a trespasser; it is therefore not in point. In these circumstances it has not been shown that plaintiff's suit is wrongly framed."

The first, third, seventh and eighth defendants appealed to the High Court.

T. V. Gopalaswami Mudaliar for appellants.

G. S. Ramachandra Aiyar for respondent.

JUDGMENT.—The suit is by a dismissed trustee for a declaration of the invalidity of his dismissal and an injunction restraining the co-trustees and the temple committee from interference with his exercise of the rights of a trustee. The District Munsif dismissed the suit holding that the removal of the trustee was valid and that as the plaintiff was out of possession the suit for a mere declaration and injunction was not maintainable. On appeal the District Judge reversed the Munsif's decree and allowed the plaintiff's claim. He held that the plaintiff's dismissal was irregular and that he was entitled to sue for the declaration and injunction. No ground was taken before him on appeal that the Munsif's finding as to the plaintiff being out of possession was erroneous. He rests his judgment on the authority of the decision in *Kunj Bihari* v. *Keshavlal Hiralal*(1) and distinguishes the decision in *Narayana* v. *Shankunni*(2) and the remarks of Subrahmania Ayyar, J., in *Vengan Poosari* v. *Patchamuthu*(3). We are unable to agree with his view. No doubt the Bombay case referred to appears to support the District Judge; but in the face of the decisions of this Court we are unable to agree with him. The present case being clearly one of plaintiff having been ousted from possession it is open to him to sue for joint possession with defendants Nos. 8 and 9 who are admittedly the other trustees of the temple. It is said that the lands of the temple are in the physical possession of the tenants and that the plaintiff cannot have such possession himself. Besides the lands, there are the temple itself and moveable properties belonging to the temple. And even as regards the landland's right to receive rents it is certainly capable of possession. It has been well pointed out in *The Zemindar of Vizianagram* v. *Behara Suryanarayana Patrulu*(4) that the interest of the landlord which may consist in the mere receipt of the rents is capable of delivery and possession and sections 264 and 319 of the Code of 1882 have been framed on that supposition. It has been held under section 9 of the Specific Relief Act, by this Court that possession by receipt of rents may be disturbed and the person dispossessed may bring a suit for possession under that section within six months of such dispossession (see *Jagannatha Charry* v. *Rama Rayer*(5)). In *Abdulkadar* v. *Mahomed*(6) and in *Narayana* v. *Shankunni*(2) it appears that there were

(1) (1904) I.L.R., 28 Bom., 567. (2) (1892) I.L.R., 15 Mad., 255.
(3) (1903) 14 M.L.J., 290.
(4) (1902) I.L.R., 25 Mad., 587 at pp. 591, 592.
(5) (1904) I.L.R., 28 Mad., 238. (6) (1892) I.L.R., 15 Mad., 15.

tenants in actual possession of the property. It was held by this Court, notwithstanding that circumstance, that a suit for possession should have been brought against the rival claimants to possession by receipt of rents. If the observations in *Subramanyan* v. *Paramaswaran*(1) are at variance with the view expressed in the above cases, we cannot accept them as correct. We must therefore hold that property in the actual possession of the tenants is capable of possession by the landlord (see also *Suryanarayanamurthi* v. *Tammanna*(2)) and one person claiming to be landlord ousted by another cannot content himself with suing for a mere declaration but must sue for consequential relief in the nature of possession against his rival claimants. And if the rival claimants are entitled to joint possession with the plaintiff, the plaintiff must sue for joint possession with them. It is however contended on the authority of the Bombay case, first, that section 42 of the Specific Relief Act does not require the whole consequential relief to be claimed and that injunction is a sufficient relief consequent on the declaration and secondly, that the rule requiring a plaintiff to seek for possession as consequential relief where he asks for a mere declaration is not applicable to trustees of temples. As regards the first position assuming that section 42 of the Specific Relief Act is to be understood as not requiring the whole consequential relief to be claimed, we think a plaintiff out of possession is not entitled to ask for an injunction merely against the person in possession. This question has been fully discussed to the judgment of Subrahmania Ayyar, J., in *Vengan Poosari* v. *Patchamuttu*(3), though his actual decision in the case was not upheld on appeal on another ground. Upon a review of the English cases the learned Judge came to the conclusion that injunction is not the appropriate relief where the plaintiff is entitled to claim possession against the defendants. Kerr on Injunctions (4th edition) states at page 82 "the result of the cases apart from the alteration made by the Judicature Act of 1873 was that where the plaintiff was out of possession the Court would refuse to interfere by granting an injunction unless there was fraud or collusion or unless the acts perpetrated or threatened were so injurious as to tend to the destruction of the estate." Again at page

(1) (1887) I.L.R., 11 Mad., 116 at p. 122. (2) (1901) I.L.R., 25 Mad., 504.
(3) (1903) 14 M.L.J., 290.

114 "if the trespass or damage is complete and the title is a pure legal title, the Court would not in general interfere by way of mandatary injunction, there being a full remedy at law by ejectment." The passages above cited are supported by a number of English cases some of which Mr. Justice Subramania Aiyar has referred to in his judgment in *Vengan Poosari* v. *Patchamuttu*(1). It is true that the language of section 25, sub-section 8 of the Judicature Act of 1873 is wider and allows an injunction whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise. But notwithstanding the generality of the language the principle laid down by Kindersley, Vice-Chancellor, in *Lowndes* v. *Bettle*(2), and approved of by the Court of Appeal in *Stanford* v. *Hurlstone*(3) has been re-affirmed, *viz.*, that while defendant is in possession and the plaintiff seeks an injunction without possession, his claim will not be upheld. See *Leeds and Liverpool Navigation Company* v. *Horsefall*(4). An injunction is a discretionary relief under section 52 of the Specific Relief Act and the considerations adverted to by Mr. Justice Subramania Aiyar in the case in *Vengan Poosari* v. *Pachamuttu*(1) against the grant of such relief in this country where the plaintiff is entitled to ask for possession against the defendant are entitled to full weight. If therefore the plaintiff in the present case cannot claim an injunction when he is out of possession and defendants Nos. 8 and 9 are in possession, the only other relief claimed in the plaint that remains is a mere declaration. It is thoroughly well established that the plaintiff cannot sue for a mere declaration when he is entitled to consequential relief. Speaking with all respect, it appears to us that the learned Chief Justice of Bombay has overlooked the fact that injunction is a discretionary relief and cannot be claimed by a plaintiff out of possession when he does not ask for possession against the defendant who is actually in possession.

Passing to the next point, viz., that the plaintiff is only a trustee of the temple, we are unable to appreciate the distinction. It is said that the property is vested in the idol and that an injunction restraining interference secures to the plaintiff the rights he claims in the most complete manner. In the Bombay case the

(1) (1903) 14 Mad. L.J., 290. (2) 33 L.J., Ch. 451 at p. 454.
(3) (1878) L.R., 9 Ch., 116. (4) 33 Solicitor's Journal, 188.

SANKARAN-NAIR AND KRISHA-SWAMI AYYAR, JJ.

RATHNA-SABAPATHI PILLAI v. RAMASAMI AIYAR.

plaintiff claimed the office of an Acharya but it included the management of a temple and of inams and other properties attached to it. It was not a mere performance of certain duties which might involve no possession of properties. Under those circumstances it is difficult to see that a mere restraint from interference is equivalent to the transfer of possession from the defendant to the plaintiff. The learned Chief Justice of Bombay asks "how would practical effect be given to an award of possession of an office otherwise than by preventing interference with the rights of which it is made up." Where tangible moveable and immoveable property is also attached to the office, the question as regards the property is easily answered. There are provisions in the Code for giving possession of immoveable property and the possession of such property is a great deal more than the prevention of other people's interference. But even where it is a mere office of which possession is claimed, article 124 of the Limitation Act explains the mode of possession which certainly is more than the mere restraint of another from interference. Possession is positive and connotes acts of dealing with the property and sometimes beneficial enjoyment while an injunction which restrains another from interference is negative. The fact of the idol being the owner and the plaintiff the trustee does not appear to us to affect the question. In *Jagadindra Nath Roy* v. *Hemanta Kumari Debi*(1), the Judicial Committee of the Privy Council while recognizing that an idol may be regarded as a judicial person capable as such of holding property, observed "Assuming the religious dedication to have been of the strictest character it still remains that the possession and management of the dedicated property belongs to the Sebait and this carries with it the right to bring whatever suits are necessary for the protection of the property. Every such right of suit is vested in the Sebait and not in the idol." It follows that the circumstance of a trustee suing is no answer to the objection that possession should have been sued for and not a mere declaration. For the foregoing reasons we hold that the present suit is not maintainable and in reversal of the decree of the District Judge we restore the decree of the District Munsif with costs in this and the lower Appellate Court.

(1) (1905) I.L.R., 32 Calc., 129.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Sankaran-Nair.

SESHAPPAYA (PLAINTIFF), APPELLANT,

v.

VENKATRAMANA UPADYA AND ANOTHER (DEFENDANTS NOS. 1 AND 3), RESPONDENTS.*

1908. November 17, 18. December 8. 1909. July 20. 1910. January 5.

Civil Procedure Code, Act XIV of 1882, *s.* 13—"*Person claiming under*", *who is*—*Test to determine interest represented—Landlord does not represent interest of mulgeni tenant—Estoppel—No estoppel where party not misled.*

The mulgeni tenure is a permanent heritable tenure and mulgeni interest is not an interest subordinate to that of the lessor.

In order to estop a party in a subsequent suit by the decision in a former suit against another party on the ground that the former claims under the latter within the meaning of section 13 of the Civil Procedure Code it must be shown that the party in the former suit represented the interest claimed in the latter suit. A party represents all interests owned by him at the time of the action as also interests belonging to others which are subordinate to his. A decision against him will bind interests acquired from him subsequently and all subordinate interests represented by him whensoever acquired.

A mulgeni tenant will not be bound by a decision against his lessor as his interest is not subordinate to that of the lessor.

To estop a party, it must be shown that his acts or representations misled the party setting up the estoppel.

SECOND APPEAL against the decree of P. J. Itteyerah, Subordinate Judge of South Canara, in Appeal Suit No. 123 of 1905, presented against the decree of V. B. Ramaswami Aiyar, District Munsif of Kundapur, in Original Suit No. 458 of 1904.

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

"The property originally belonged to Shesha Navada. In execution of a decree obtained by plaintiff against him, it was attached and sold by the Court when it was purchased by plaintiff on 30th May 1903 (exhibit C). The property was delivered to him on 12th March 1904 (exhibit D).

The first defendant claims under a mulgeni grant made by Ganapaya Urala who claimed to have purchased the property from Shesha Navada under exhibit XIX on 3rd May 1892. When plaintiff attached the property as Shesha Navada's, Ganapaya

* Second Appeal No. 386 of 1906.

Urala intervened with a claim petition but his claim was rejected, and a subsequent suit instituted by him to establish it was dismissed by the Original and Appellate Courts (exhibits E and B).

It is, therefore, contended by plaintiff that the first point is *res judicata* as between plaintiff and first defendant. No doubt first defendant derived his title from Ganapaya Urala, but he obtained it before the previous suit had been instituted against him. In 8 Allahabad, 324, it was held that a person who obtained title from another before the suit was instituted against him is not a person claiming under him, and that section 13 of the Code of Civil Procedure must be interpreted as if, after the words "under whom they or any of them claim" the words "by a title arising subsequently to the commencement of the former suit" had been inserted. To hold otherwise would be opening a wide door to fraud. I agree with the District Munsif in finding that the matter is not *res judicata*.

The sale by Shesha Navada to Ganapaya Urala is said to have been granted collusively and without consideration to defraud his creditors. Ganapaya Urala was Shesha Navada's brother-in-law, but there is no evidence to show that the latter had any creditors except plaintiff and those mentioned in exhibit XIX whom Ganapaya Urala was to pay off."

The plaintiff's suit was dismissed and the judgment was confirmed on appeal. Plaintiff appealed.

K. Bashyam Ayyangar for *K. P. Madhava Rao* for appellant.

B. Sitarama Rao for first respondent.

JUDGMENT.—In Original Suit No. 77 of 1900 on the file of the District Munsif of Kundapur, Ganapaya Urala having been defeated on a claim petition arising out of an attachment made by the present plaintiff, sued the present plaintiff to establish title to the property attached. The suit was dismissed on a finding that the conveyance on which he founded his title, a sale by the owner Shesha Navada, was fraudulent and not intended to convey any interest. The decision was affirmed on appeal.

The plaintiff now sues alleging that after the dismissal of Ganapaya Urala's suit, he brought the attached property to sale and purchased it himself and obtained possession; but was dispossessed by the first defendant, who set up a mulgeni tenure under Ganapaya Urala. His suit is therefore for recovery of the land, and it has been dismissed on the ground that the first defendant is entitled to

possession as mulgenidar. It is found *inter alia* that the first defendant has remained in possession ever since the mulgeni tenure was created, and that the plaintiff's allegation that he obtained actual possession is not true.

The first question for decision in the Second Appeal is whether the first defendant is bound by the decision in the suit of 1900, in which it was held that Ganapaya Urala had no title. If he is so bound, the plaintiff's title cannot be questioned in this suit, and apart from any question of dispossession the plaintiff will be entitled to succeed on his title.

The question is whether the first defendant is a person who claims under Ganapaya Urala within the meaning of section 13 of the Code of Civil Procedure.

The ground of privity is stated by the learned author of Bigelow on Estoppel to be property and not personal relation (page 142, 5th edition), and this view is accepted by Mahmood J. in *Sita Ram* v. *Amir Begam*(1). The successor to or purchaser from a party becomes a privy only in respect of the interests and rights in property to which he has succeeded or which he has purchased.

And it is not to be supposed that the Civil Procedure Code contemplates the adjudication, between the parties to a suit, of interests or other rights, which are not theirs, and are not represented by them. Consequently though the words 'under whom they or any of them claim' in section 13 of the Code of Civil Procedure are wide, there seems to be no difficulty in the way of restricting them so as to bind the party to the subsequent suit by the decision in the former suit only in respect of interests represented by the party to the former suit at the time of the suit. Other interests with which he had parted before the suit and which he had ceased to represent could not properly be the subject of adjudication in the suit.

In an Irish case (*In re De Burgho's Estate*)(2), Madden J. lays down and explains the rule as follows:—"According to the clear principles of the law of Estoppel it is necessary in order to estop the objector, to show that he derived title by act or operation of law subsequent to the recovery of the judgment. If this is shown, it is reasonable that he should be estopped because his

(1) (1886) I.L.R., 8 All., 324 at p. 337. (2) (1896) 1 Ir. R., 274.

estate was represented at the time of the recovery of the judgment though not in his person."

The question then in each case is whether the interest in suit was represented in the former suit, by the party under whom the claimant holds in the second suit, and we apprehend that if it was so represented it does not matter whether it vested in the privy before or after the former suit. In *Soshi Bhusun Guha* v. *Gogan Chunder Shaha*(1), the learned Judges explain the law that a decision against a Hindu widow will conclude her husband's heirs on the ground that the widow represents the whole estate: and the same view is expressed by Mahmood J. in *Sita Ram* v. *Amir Begam*(2); and the ground on which this question was decided in favour of the mortgagee in those two cases as well as in *Bonomalee Nag* v. *Koylash Chunder Dey*(3), is that the mortgagor after the mortgage cannot represent the estate vested in the mortgagee. The test is whether the interest is represented and if it be possible that the party represents in the suit an interest already vested in some one else, that person will be a privy. Though the rule is stated in Bigelow on Estoppel (5th edition, page 142) with reference to the time at which the interest becomes that of the successor of or purchaser from the party, it is recognised by the learned author that there may be cases to which this consideration will not apply, and these he includes in what he calls 'holding subordinately.' "To make a man privy to an action he must have acquired an interest in the subject matter of the action either by inheritance or succession or purchase from a party subsequently to the action, or he must hold property subordinately" and as an instance of a subordinate holding he takes the case of landlord and tenant; "a lawful judgment," he says "which deprives the landlord of the estate, deprives the tenant, of necessity, of his subordinate right" (page 143).

Thus the view of the learned author would seem to be that the landlord necessarily represents the interest of the tenant in an action so far as that interest is subordinate.

We do not know of any English or Indian authority in support of this view; the rule that the interest, to be bound, must be

(1) (1895) I.L.R., 22 Calc., 364 at p. 372.
(2) (1886) I.L.R., 8 All., 324 at p. 337. (3) (1879) I.L.R., 4 Cal., 692.

acquired after the action, is supported by the English cases of *Doe dem Thomas Foster* v. *The Earl of Derby*(1), and *Mercantile Investment and General Trust Company* v. *River Plate Trust, Loan and Agency Company*(2), and many American cases are cited in support of it in the work we have quoted. In Hukm Chand on *res judicata* we find cited an American case in which it was held that a tenant of a defendant in ejectment who had acquired his lease before the commencement of the suit is not estopped as to his term by judgment in the suit against his lessor (page 185). This seems to take a view contrary to that of Dr. Bigelow but the case is not cited in the 5th edition of his work nor have we been able to obtain the report of it.

Neither of the English cases to which we have referred relates to landlord and tenant, but in the Irish case the title of the objector who was held not to be estopped was derived from a lease for lives renewable for ever. This may however be distinguishable from the case of ordinary tenancies from year to year or for years. In the present case it is not necessary for us to decide on the soundness of the view that a tenant may be represented by his landlord in so far as his holding is subordinate. It is contended that the mulgeni holder must be treated as a tenant, and be bound as such, but the mulgeni tenure is a permanent heritable tenure, alienable in some cases by the conditions of the mulgeni chit, but in all cases perpetual though subject to forfeiture in certain circumstances. The instrument in the present case is not before us but it is not suggested that it creates anything less than an ordinary mulgeni interest.

The lessor has when the interest is inalienable a reversion or a 'possibility of reverter' and a right to an annual rent, but he cannot determine the tenancy by notice nor will it be terminated by efflux of time. Consequently it cannot in our opinion be properly said that the mulgeni is an interest subordinate to that of the lessor. It is certainly greater than that of a simple mortgagee who has not the possession and who can be redeemed at any time, after the mortgage money is due and yet if *Sita Ram* v. *Amir Begam*(3) is right, the simple mortgagee is not estopped by a decision against the mortgagor in a suit instituted after the mortgage.

(1) (1834) 1 A. & E., 783 at p. 785. (2) (1894) L.R., 1 Ch., 578 at p. 595.
(3) (1886) I.L.R., 8 All., 324.

It seems to us that the lessor having alienated in perpetuity his right to possession, and having reserved to himself only a right to receive a rent cannot be said to have represented the interest of the mulgenidar in the suit between himself and the plaintiff.

It follows that the lower Courts were right in holding that the defence is not barred. It is then contended that the defendant is estopped in a different way. In the former suit he was a witness for Ganapaya Urala and he did not then or before the execution sale bring his mulgeni interest into Court. This conduct, if it is to create an estoppel, must be found to have misled the plaintiff. He must show that he purchased the property in the belief that the defendant had abandoned his right to defend his mulgeni tenure, for there is no doubt that he knew during the progress of the former suit that the mulgeni was set up. The instrument was filed in the suit (judgment exhibit E). There is no issue on this question but no doubt if it were shown that Ganapaya Urala in his suit was suing on behalf of the defendant—that the defendant was then the real plaintiff—the defendant might be bound, but we do not find that alleged anywhere.

We think this contention fails. Nor can the defendant rely on section 41 of the Transfer of Property Act: that question also was not raised by the defendant before the District Munsif and as Shesha Navada remained in possession until turned out by the 1st defendant himself, this section cannot be said to be applicable.

The remaining question is a question of fact. Had Ganapaya Urala any title to the land on which he gave the mulgeni? The District Munsif finds that he had, and if paragraph 5 of the Subordinate Judge's judgment can be read as a finding on this question, he must be taken to be of the same opinion. It does not however follow from the fact that Shesha Navada was not pressed by creditors, that he intended to sell all his property to his brother-in-law for Rs. 1,000. In the former suit there seems to have been evidence that the conveyance was put in Ganapaya's name to deter others from lending and that this was done at the instance of Shesha Navada's family. That evidence is not evidence in this case, but we mention it to show that the object of a sham conveyance is not necessarily confined to the provision of a shield against present creditors.

We cannot therefore accept paragraph 5 of the Subordinate Judge's judgment as a finding that Ganapaya had title in June 1899, and we must call upon the District Judge of South Canara for a finding on the first of the issues settled by the District Munsif in the light of the above observations.

The finding should be submitted in six weeks and seven days will be allowed for filing objections.

[The District Judge found the mulgeni a real transaction and the appeal was dismissed.]

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim.

SRINIVASA AIYANGAR (PETITIONER), RESPONDENT,

v.

KANTHIMATHI AMMAL (RESPONDENT), RESPONDENT.*

1910. January 17, 18.

Civil Procedure Code, Act XIV of 1882, s. 295—Rateable distribution under several decrees: "Same judgment-debtor"—Decree against judgment-debtor; Subsequent decree against his legal representatives to be satisfied out of his estate.

A obtained a decree against one Maruthamuthu Pillai; subsequently, *B* obtained a decree against the legal representatives of Maruthamuthu Pillai and his estate in their hands. *B* applied under section 295, Civil Procedure Code, to share rateably in the proceeds of property sold in execution of *A*'s decree:

Held, that B was not entitled to do so. *Govind Abaji Jakhadi* v. *Mahoniraj Vinayak Jakhadi*, [(1901) I.L.R., 25 Bom., 494] followed.

When a decree is obtained against the legal representatives of a deceased person, they are the judgment-debtors. *Kaliappan Servaikaran* v. *Varadarajulu* [(1909) 19 M.L.J., 651], referred to.

PETITION under section 622 of the Code of Civil Procedure of 1882, praying the High Court to revise the order of N. Sundara Aiyar, District Munsif of Tiruvadi, in Execution Application No. 454 of 1907 in Original Suit No. 479 of 1898.

The respondent obtained a decree in Original Suit No. 479 of 1898 against one Maruthamuthu Pillai and, in execution, attached a house. He obtained leave under section 294, Civil Procedure Code, to bid at the sale of the house and set off the purchase money against the decree amount, and purchased the property on 27th

* Civil Revision Petition No. 563 of 1907.

ABDUR RAHIM, J.

SRINIVASA AIYANGAR v. KANTIMATHI AMMAL.

February 1907 for Rs. 370. The purchase money was set off against the decree amount. After the death of Maruthamuthu Pillai, the petitioner filed S.C. No. 895 of 1903 against his sons and obtained a decree against the assets of the family and in execution of his decree attached the same house on 9th December 1905.

The District Munsif, following 25 Bom., 494, dismissed the application.

The petitioner applied to the High Court under section 622.

G. S. Ramachandra Ayyar for petitioner.

A. Krishnasawmy Ayyar for respondent.

JUDGMENT.—The question is whether the judgment-debtors of the petitioner and the respondent are the same within the meaning of section 295, Civil Procedure Code. The persons against whom the petitioner obtained his decree are the sons of one Maruthamuthu Pillai and the decree is to be satisfied out of the assets of the family in their hands, and the person against whom the respondent obtained her decree is Maruthamuthu Pillai himself. The Munsif has rightly held that the decision in *Govind A[illegible] Jakhadi* v. *Mohoniraj Vinayak Jakhadi*(1) covers the question and is opposed to the petitioner's contention. And it seems to me that that ruling is in accordance with the langua[illegible] of section 295, Civil Procedure Code. The fact that the decrees are to be realised out of the family property is not decisive of the question against whom the decrees are made. And as has been pointed in *Kaliappan Servaikaran* v. *Varadarajulu*(2), when a decree is obtained against the legal representatives of a deceased person, the legal representatives are the judgment-debtors and not the estate of the deceased.

This petition is dismissed with costs.

A Letters Patent Appeal No. 18 of 1910 against the ab[illegible] judgment was preferred with the result that the judgment Abdur Rahim, J., was affirmed.

(1) (1901) I.L.R., 25 Bom., 494.

(2) (1909) 19 M.L.J., 651.