JUDGES OF THE HIGH COURT.

1st January—31st December 1911.

CHIEF JUSTICE.

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

PUISNE JUDGES.

The Hon'ble Sir R. S. Benson, *Kt.* (*On leave from* 17*th July to* 17*th October* 1911.)

The Hon'ble Mr. J. E. P. Wallis. (*On leave from* 17*th July to* 3*rd November* 1911.)

The Hon'ble Mr. L. C. Miller. (*On leave throughout the year.*)

The Hon'ble Mr. J. H. Munro. (*On leave from* 17*th July* 1911.) (*Retired on* 8*th November* 1911.)

The Hon'ble Mr. C. Sankaran-Nair, C.I.E. (*On leave from* 16*th July to* 14*th August* 1911.)

The Hon'ble Mr. Abdur Rahim.

The Hon'ble Mr. V. Krishnaswami Aiyar. (*Resigned,* 16*th January* 1911.)

The Hon'ble Mr. P. R. Sundara Aiyar. (*Assumed charge on* 17*th January* 1911.)

The Hon'ble Mr. W. B. Ayling. (*Offg. throughout the year.*)

The Hon'ble Mr. J. H. Bakewell. (*Offg. from* 17*th July to* 3*rd November* 1911 *and the end of the year.*)

The Hon'ble Mr. C. G. Spencer. (*Offg. from* 17*th July* 1911.)

The Hon'ble Mr. W. W. Phillips. (*Offg. from* 17*th July to* 17*th October* 1911.)

ADVOCATE-GENERAL.

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

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When the ejman of an Aliyasantana family in the discharge of his duties as ejman not only neglects the interests of the family but takes advantage of his position to secure benefits for his children at the expense of the other members of the family, the Courts will be justified in removing such ejman. When unjustifiable alienations of family property are made, the ejman although not a party to such alienations will be liable to be removed, if, in a suit brought to set aside such alienations for the benefit of the family, he sides with the defendants and seeks to support such alienations.

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CAUSE OF ACTION.—*Right of vendor to sue purchaser for default in paying creditors as agreed in the sale:*

A vendor has a cause of action against the purchaser, when the latter commits default in paying the creditors of the vendor, as directed in the sale deed. It is not necessary to maintain such a suit that the vendor should show that he has sustained damage at the date of suit. *Dorasinga Thevar* v. *Arunachallam Chetty*, [(1900) I.L.R., 23 Mad., 441], followed. *Dorasamy Thevan* v. *Lashmana Chetty*, [(1904) 14 M.L.J., 285], not approved.

Ansur Subba Nayudu v. *Bathula Bee Bee Sahiba* ... ... 34 Mad., 479

CAUSES OF ACTION.—*See* "RES JUDICATA" 97

CHARITABLE TRUST.—*The Madras Endowments and Escheats Regulation VII of 1817—The Madras Religious Endowments Act X of 1863—The Madras Local Boards Act V of 1884, s. 51—Religious Endowments Act—Powers of Board of Revenue and Taluq Board to appoint new trustee—Non-dismissal of old trustee:*

Regulation VII of 1817 and Act XX of 1863 are applicable to endowments made after the Regulation as well as to prior endowments. The Board of Revenue has no power to ignore the rights of a person lawfully in office as trustee and to appoint another person in his place without dismissing him. In this respect there is no difference between a hereditary and a non-hereditary trustee who is equally entitled to a freehold office. The Board of Revenue is entitled under section 51 of Act V of 1884 to make over to a local body not only its power of superintendence but also the management of any endowment. *The Chairman, Municipal Council, Rajahmundry* v. *Susurla Venkateswarlu*, [(1908) I.L.R., 31 Mad., 111], followed. *Nilayathakshi Ammal* v. *Taluk Board of Mayavaram*, [(1910) 20 M.L.J., 885], followed.

Venkatachala Pillai v. *The Taluq Board, Saidapet* ... ... 34 Mad., 375

CHARITABLE TRUSTS, TRUSTEES OF.—*When act of majority will be binding—Estoppel—Suit by some of several trustees, when sustainable—Misjoinder—Form of decree:*

The rule that in the case of charitable trusts, the act of the majority will be binding on the minority only applies when such act is done after full opportunity given for mutual discussion by all the members. When the act is done after mutual discussion when the minority had an opportunity to record their dissent it will be the act of the whole body; otherwise it will be the act of the majority alone and will not bind the minority. *Teramath* v. *Lakshmi*, [(1883) I.L.R., 6 Mad., 270], referred to. *Wilkinson* v. *Mallin*, [2 Tyrwhit, 544], referred to. A company or body of persons will be estopped from questioning the validity of an act done by some only of such body or company only when such persons are held out as clothed with authority to do the act. Where such persons have not unlimited power to act for the body but only the right to act within certain limits, the stranger entering into the transaction has to find within such limits the power to transact. Where the remedial right does not accrue until the majority have after consultation signified their will, an action by some or the majority of the trustees, without consulting the others, will not be maintainable. When the right to the relief claimed has accrued to the joint trustees, the institution of a suit by some only without having consulted the remaining trustees, even where they have not perversely refused to join cannot be a ground for dismissing the suit. Although the interests of the co-trustees is joint and indivisible, it is fully represented when they are all on the record on one side or the other. *Peria Karuppan* v. *Valayutham Chetti*, [(1906) I.L.R., 29 Mad., 302], referred to. One trustee can sue for redemption without consulting the other trustees or making them co-plaintiffs. Such misjoinder is not

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fatal to the suit. *Kurattole Edamana* v. *Unni Kannan*, [(1903) I.L.R., 26 Mad., 649], referred to. The proper decree in such a case would be to order the trust property to be restored to all for the benefit of the *cestui qui trust*.

Kunhan v. *Moorthi* ... ... 34 Mad., 406

CITY MUNICIPAL ACT (MADRAS), III OF 1904, ss. 121, 125, 172 and 177—*Right of appeal—Scope of section, assessment, finality of order of, when no objection made within 15 days:*

Petitioner's name appeared in the classification made under section 121, Madras City Municipal Act of 1904, and he was served with a notice to pay profession tax under section 125 of the Act. He did not pay the tax nor did he apply for revision within fifteen days of the notice:—*Held*, that under section 177 the assessment was final and that no appeal lay. Profession tax is a matter within the scope of section 172. The first clause of section 172 of the Act of 1904 is wider than the corresponding clause of section 190 of Act I of 1884. Section 172 of the Act of 1904 must be construed to mean that all complaints against any tax or toll leviable under Part IV and all applications for revision in respect of any such tax or toll are cognisable by the President and two Commissioners. It should not be read so as to limit the complaints and the applications for revision as to the question of classification. *Muthusawmy Ayyar, J., in Davies* v. *President of the Madras Municipal Commission*, [(1891) I.L.R., 14 Mad., 140 at p. 144], not followed. *Municipal Council of Cocanada* v. *The Standard Life Assurance Company*, [(1901) I.L.R., 24 Mad., 205], distinguished.

Veeraraghavelu v. *The President of the Corporation of Madras* ... ... 34 Mad., 130

CIVIL PROCEDURE CODE, ACT XIV OF 1882, s. 244—*Suit by party or representative against auction purchaser to raise question within section not maintainable—Auction purchaser as such not representative of decree-holder or of the judgment-debtor:*

A suit by a party to a suit as his representative against an auction purchaser raising questions which, as between the parties, must be decided in execution under section 244 of the Code, is not sustainable. The prohibition is not based on the ground that the auction purchaser is the representative of the decree-holder. The auction purchaser is not such representative. *Manickka Odayan* v. *Rajagopala Pillai*, [(1907) I.L.R., 30 Mad., 507], not approved. *Per* WALLIS, J.—The prohibition is based on the general intention of the Legislature as gathered from the section. *Per* KRISHNASWAMI AYYAR, J.—A party to the execution proceedings can impeach a sale only by an application to set it aside; and where the sale not being so impeached, is confirmed, the possession of the auction purchaser cannot be disturbed by suit. The true ground for the prohibition is not that section 244 bars the suit as the auction purchaser is the representative of the decree-holder, but that section 244 being a bar to setting aside the sale except by a proceeding between the parties, the suit against the purchaser is not maintainable until it is so set aside. A stranger purchaser at an auction sale in execution of a money decree is not the representative of the decree-holder or of the judgment-debtor.

Nadamuni Narayana Iyengar v. *Veerabhadra Pillai* ... ... 34 Mad., 417

——— ———, s. 273—*Civil Rules of Practice, Rule 184—Mortgagee of mortgage decree entitled to sell mortgaged property by executing the mortgage decree—Effect of s. 273 on sale of mortgage decree—Pledge of mortgage decree, validity of:*

A mortgaged certain properties to *B* who sued on his mortgage and obtained the usual decree directing payment and sale in default. *B* mortgaged the decree to *C* who sued *B* in the Court which passed the decree mortgaged and obtained decree directing the sale of the decree obtained by *B* against *A*. *C* became the purchaser of the decree at the

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auction and applied for execution of the decree as the transferee thereof: *Held*, that C's application was sustainable and neither section 273 of the Civil Procedure Code nor Rule 184 of the Civil Rules of Practice debarred him from doing so. *Per* CHIEF JUSTICE.—The interest mortgaged to C included the right which B had to sell in default of payment. No order for sale of the decree obtained by B was necessary to enable C to execute his decree and neither section 273 nor Rule 124 applied. *Per* ABDUR RAHIM, J.—For the purpose of section 273 of the Civil Procedure Code a decree on a mortgage is a money decree and the section by implication prohibits the sale of such decree when attached. Such prohibition is not however based upon any grounds of public policy so as to render the sale an absolute nullity. Section 273 merely lays down a rule of procedure and it cannot be so construed as to interfere further than is necessarily called for by its language with the substantive rights conferred upon the creditor by section 285 of the Code or with the right of alienation recognised by section 232 of the Code. Section 273 has no application where attachment of the decree is not asked for. Section 232 of the Code recognises the validity of pledges of decrees and it must be within the competence of a Court, in the exercise of its general power of enforcing contract to order the sale of the decree pledged.

Subbaraya Routhu v. *Kuppuswami Aiyangar* ... ... 34 Mad., 442

3. ——————————, ss. 361, 582.—*Abatement of appeal on death of defendant-respondent—Actio personalis moritur cum persona—Application of rule to appeal by plaintiff—Costs—*

In a personal action for an injunction a decree was given for the defendant with costs. Plaintiffs appealed. During the pendency of the appeal, the defendants-respondent died: *Held*, that the right to prosecute the appeal against the respondent's legal representative does not survive to the appellants. The rule *actio personalis moritur cum persona* is not interfered with merely because the person injured incurred in his lifetime some expenditure of money in consequence of the personal injury. *Pulling* v. *Great Eastern Railway Company*, [(1882) 9 Q.B.D., 110], approved. *Kishna Behary Sen* v. *The Corporation of Calcutta*, [(1904) I.L.R., 31 Calc., 405], approved. This rule applies as against the estate of a deceased-respondent. *Paraman Chetty* v. *Sundararaja Naick*, [(1903) I.L.R., 26 Mad., 499], distinguished. If an action fails what is incidental fails also and if an appeal abates as regards an injunction sought for it abates as regards the costs incurred by the appellant as a consequence of the dismissal of his suit. An appellant cannot be allowed to show that the decree refusing the injunction was wrong for the mere purpose of getting rid of the direction as to costs.

Joisam Tiruvengadachariar v. *Swami Iyengar* ... ... 34 Mad., 76

4. ——————————, s. 462.—*When leave of Court not obtained, compromise not binding on minor—Hardship to other party on ground for upholding compromise—Minor not bound to return any benefit under compromise before it is set aside—Joint contract, liability on:*

A compromise entered into on behalf of a minor without obtaining leave of the Court under section 462 of the Code of 1882, is unenforceable against the minor. It cannot be treated as binding upon him on the ground that its being set aside would work hardship on the other party. It is also no ground for not setting it aside that is impossible to place the parties in the position in which they were when the compromise was effected. The withdrawal from the suit by the other party cannot be considered as service rendered to the minor, for which the minor ought to pay compensation before the compromise is set aside. *Amar Singh* v. *Narain Singh*, [(1898) I.L.R., 20 All., 98], not followed. The fact that a joint contract is not enforceable against one of the parties does not absolve the other party from liability.

Setpuram Sahib v. *Vesonta Rao Ananda Rao Dhybar* ... ... 34 Mad., 314

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5. ——————————, s. 591—*Appeal ostensibly in part but solely with reference to interlocutory application dismissed—No necessity to appeal separately from every interlocutory order:*

An interlocutory application by a plaintiff in a suit to amend his plaint was refused and his suit decreed for part only of his claim. His appeal in that suit was directed solely against the refusal to amend: *Held*, that the appeal was directed against the decree in the suit within the meaning of section 591 of the Code of Civil Procedure, Act XIV of 1882, though the only reason for the appeal was the erroneous decision in regard to the interlocutory order. *Sher Singh* v. *Diwan Singh*, [(1900) I.L.R., 22 All., 366], not followed. *Sheo Nath Singh* v. *Ram Din Singh*, [(1896) I.L.R., 18 All., 19 at p. 22], not followed. *Maharajah Moheswur Singh* v. *The Bengal Government*, [(1859) 7 M.I.A., 283, at 302], relied on.

Rajah Dhamara Kumara Thimma Nayanian v. *Bukkapatam Venkatacharlu* ... ... 34 Mad., 228

CIVIL PROCEDURE CODE (ACT V OF 1908), s. 47, Order XXI, Rules 95, 98—*Application by purchaser at Court sale for delivery of possession against a purchaser of attached property subsequent to attachment maintainable under Order XXI, Rule 98*—Res judicata—*Erroneous decision in one execution proceeding that no appeal lay not* Res judicata *in a subsequent proceeding:*

A decree-holder who had purchased properties in execution of his decree and who was obstructed by a purchaser from the judgment-debtor after attachment, applied to the Court under Order XXI, Rule 95, and obtained an order for delivery of possession. An appeal by the purchaser against the order was dismissed on the ground that no appeal lay as he claimed in his own right and not on behalf of the judgment-debtor. The auction purchaser being further resisted in attempting to take delivery applied under Order XXI, Rule 98, for delivery and for commitment of the obstructing purchaser: *Held*, that the application under Rule 98 was maintainable, as the resisting purchaser was the representative of the judgment-debtor within the meaning of section 47 of the new Civil Procedure Code: *Held*, also that the erroneous appellate order in the previous proceeding that no appeal lay did not operate as *res judicata*.

Kuppana Kavundan v. *Kumara Kavundan* ... ... 34 Mad., 450

CONTRACT—*Suit for damages for breach of contract in not supplying railway sleepers according to contract—Specification of Railway Company as to dimensions and quality of sleepers—Implied warranty where agents had knowledge of purpose for which the sleepers were required—Stipulation that "passing" of sleepers was to be by manufacturer, a party to contract—Requirements in such a case—Insufficiency of means taken to make sleepers conform with the contract—"Passing" of sleepers not reliable:*

In this case the respondent was the transferee of contracts entered into by one Iyer (1) with the Madras Railway Company to supply them with 1,500 sleepers, and (2) with the appellants through their agents at Madras to purchase from them 1,500 sleepers to enable him, as he stated to the appellants' agents, to carry out his contract with the Madras Railway Company the basis of which was a specification of the Railway Company's requirements in the matters of dimensions and quality. The contract with the appellants through their agents was contained in letters which passed between the parties, and was never embodied in a formal instrument. In one of the letters written by the agents to Iyer it was stipulated that "the passing of our Moulmein or Rangoon friends the Bombay-Burmah Trading Corporation" (the appellants) "is as usual final as regards both measurement and quality." On the transfer of the contracts to the respondent a formal agreement was drawn up between him and the Madras Railway Company and duly executed by both, and in it the description of the sleepers to be supplied was practically identical with that in the specification of the Railway Company, and the stipulation as to the "passing" of the sleepers was again insisted upon in the correspondence between the appellants' agents and the respondent: In a suit by the respondent for damages in consequence of the rejection by

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the Railway Company of a quantity of the sleepers as not being in accordance with the contract nor fit for the purpose for which they were required, one of the questions raised was whether Iyer had ever given a copy of the specification of the Railway Company to the appellants' agents and so made it the basis of his contract with the appellants. As to this the First Court found that he did so, and the Appellate Court came to a contrary conclusion: *Held*, that it was unnecessary to decide the question, first, because their Lordships concurred with the opinion of the Court of Appeal that "the evidence showed that the specification merely contained an enumeration of the qualities of a good sleeper usually insisted on by railway authorities": secondly because the appellants having through their agents been fully informed of the purpose for which Iyer purchased the sleepers from them must be taken to have impliedly warranted that they were reasonably fit for that purpose; and thirdly because their Lordships thought that a sleeper the qualities of which were inferior to those "of a good sleeper as usually insisted on by railway authorities" could not well be considered a sleeper of the dimensions specified reasonably fit for use by the Madras Railway Company; and the point was therefore irrelevant. Another question was whether the main defence of the appellants that they had not contracted to supply the sleepers in accordance with the specification of the Railway Company but according to the stipulation as to the "passing" of the sleepers in the contract between themselves and Iyer which was confirmed by them on transfer of the contract to the respondent, was maintainable. On this point the Courts below also differed, the first Court deciding in favour of the appellants, and the Court of appeal in favour of the respondent: *Held*, that on the true construction of the stipulation as to "passing" it must have been contemplated that there was some standard with which those sleepers should be compared, which at the lowest must have been the standard set up expressly or impliedly by the contract between the parties, which was the specification or at least the requirement that the sleepers were reasonably fit, as sleepers of the dimensions described, for use by the Madras Railway Company so that the right conferred upon the appellants by the stipulation amounted merely to the right to determine by and through the skilled and experienced persons whom they should necessarily employ for the purpose, acting honestly and impartially according to the best of their judgment whether the goods supplied were in conformity with the requirements of the contract under which they were so supplied. The real defence therefore rested upon the alleged fact that the sleepers were "passed" by the two expert persons employed for the purpose in the impartial exercises of their judgment. They may have acted honestly, as the first Court thought they did; but the evidence showed that they never approached the question they had to determine, namely, the conformity of the sleepers supplied with the contract under which they were supplied. They merely determined that the sleepers were fit to be sent out as the manufacture of their employers; and there was not therefore any "passing" of the sleepers within the meaning of the contract.

Bombay-Burmah Trading Corporation, Limited v. *Aga Muhomad Khaleel Shirazi* ... . 34 Mad., 453

CONTRACT ACT IX OF 1872, s. 63—*Release conditional on a future event valid—Evidence Act, s. 95—Evidence aliunde admissible to prove claim released:*

It was not the intention of the Legislature in enacting section 63 of the Contract Act to depart from the English law, under which releases contingent on the happening of a future event are valid. Such releases are valid under the Contract Act. Unlike the English law which requires consideration in the case of releases not under seal, the Contract Act requires no consideration in the case of releases. When a deed of release is silent as to the claim released, evidence *aliunde* is admissible under section 95 of the Evidence Act to show what claim was intended to be released.

Mathew Henry Abraham v. *The Lodge "Good Will" No. 465, Bellary.* 34 Mad., 156

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CONTRACT ACT, ss. 70, 222:—*See* "LIMITATION ACT, SCHED. II, ARTS. 61, 63, 116, 120" 167

CONTRACT ACT, ss. 231 and 232:—*See* "IMMOVEABLE PROPERTY" 143

COUNTER-CLAIMS BY DEFENDANT AGAINST PLAINTIFFS INDIVIDUALLY—*Original Side Rule No. 47—English Supreme Court Rules Order XIX, rule 3, Construction of:*

Where two or more plaintiffs sue for a joint claim, a defendant may set up counter-claims against the plaintiffs individually. The Court has a discretion under rule 47 of the Original Side rules in such a case to decline to allow the counter-claims to be set up on the ground of inconvenience.

Ramanadan Chetty v. *Abdul Karim Sahib* ... ... 34 Mad., 226

CRIMINAL INTERCOURSE—*See* "MAINTENANCE" 68

CRIMINAL PROCEDURE CODE (ACT V OF 1898), s. 103—*Evidence of search apart from search list—Evidence Act I of 1872, s. 91—"Matter required by law to be reduced to the form of a document:*

When a search has been conducted under section 102, Criminal Procedure Code, evidence can be given regarding things seized in the course of the search and regarding the places in which they were found in addition to the evidence of the list which the law directs to be drawn up relating to the particulars of the property found. The words in section 91, Indian Evidence Act I of 1872 "any matter required by law to be reduced to the form of a document" could not have been intended by the legislature to mean observations of physical facts which under the ordinary law has to be proved by the testimony in Court.

Solai Naik v. *Emperor* ... ... 34 Mad., 349

2. ——————————, **s. 110**—*Evidence of general repute inadmissible to prove charge under section 117:*

Where a person is solely charged under section 110, clause (*f*), Criminal Procedure Code, Act V of 1898, evidence of general repute is inadmissible to prove that he is a desperate and dangerous character. A provision of law which is an exception to the general rules of evidence must be only applied to the cases to which it is confined by the legislature. No argument can therefore be deduced from the admissibility of evidence of general repute under section 117, Criminal Procedure Code.

Muthu Pillai v. *Emperor* ... ... 34 Mad., 255

3. ——————————, **s. 145**—*Possession Title, proof of—Evidence:*

Evidence of title is admissible in an inquiry under section 145 of the Code of Criminal Procedure (Act V of 1898) to enable the Court to decide the question of actual possession, but proof of title is not proof of actual possession.

Panaganti Parthasarathy Nayanim v. *Pallikappu Venkatasami Reddy* ... 34 Mad., 138

4. ——————————, **ss. 177 and 242**—*Bond to keep the Peace—Enquiry, sufficiency of:*

A Magistrate proceeding under section 117, Criminal Procedure Code (Act V of 1898), as nearly as practicable in the same way as under section 242, Criminal Procedure Code, must state to the accused the particulars of the matter against them and ask them if they can show cause why they should not be required to execute bonds: *Held*, that the question "are you willing to execute the bonds required or do you wish for further inquiry" answered by a statement that the accused would execute bonds is not a sufficient compliance with section 117.

Palaniappa Asary v. *Emperor* ... ... 34 Mad., 139

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5. ——————————————, s. 195—*Sanction to prosecute—Jurisdiction—Subordination of Courts—Transfer of case out of local jurisdiction, power to :*

A petition asking for sanction to prosecute for certain offences under section 195 (b) and (c), Criminal Procedure Code, Act V of 1898, should not be tranferred to a court to which the court before which the petition for sanction was pending is not subordinate, as the sanction of such a Court would be ineffective. The High Court cannot transfer a case under section 110, Criminal Procedure Code, to any Magistrate other than one within whose local jurisdiction the person is found against whom proceedings are instituted. In the matter of the petition of *Amar Singh*, [(1894) I.L.R., 16 All., 9]:—*Held*, that the same principle applies to section 195, Criminal Procedure Code.

Ekambaraswara Iyer v. *Veerabadra Thevan* ... ... 34 Mad., 186

6. ——————————————, ss. 247 and 403—*Autrefois Acquit—Acquittal under s. 248 bars further proceedings :*

Where a case was disposed of under section 147, Criminal Procedure Code, the complainant and accused both being absent, the order under section 247 operates as a bar to further proceedings. The provision in section 403, Criminal Procedure Code, that a fresh trial will not be barred unless the accused has in the first case been "tried" does not limit the effect of an order of acquittal under section 247, Criminal Procedure Code.

In the matter of Guggilapu Paddaya of Palakot ... ... 34 Mad., 253

7. ——————————————, s. 423(b) (2)—*Alteration of finding under—Penal Code, Act XLV of 1860, s. 325—Conviction under, may be altered to conviction under s. 144—Appellate Court, power of :*

Under section 423 (b) (2), Criminal Procedure Code, the Appellate Court may alter the finding maintaining the sentence and there is nothing to restrict the finding which may be altered to a finding of conviction. A conviction under section 325, Indian Penal Code, may be altered by the Appellate Court into a conviction under section 147, Indian Penal Code, the sentence under section 325 being maintained. *Abhi Misser* v. *Lakshmi Narain*, [(1900) I.L.R., 27 Calc., 566], distinguished.

Appanna v. *Pithani Mahalakshmi* ... ... 34 Mad., 545

8. ——————————————, s. 517—*Delivery of property under—Order of delivery of property on joint receipt—Validity of such order :*

On the discharge of an accused person on a charge of theft of articles admittedly found in possession of that person, on the ground that the accused had a *bonâ fide* belief in a claim of right to their possession, that person cannot claim return of the articles under section 517, Criminal Procedure Code, as a matter of course. Under section 517, Criminal Procedure Code, even where a party is charged with theft and that charge is dismissed or the party is discharged, an order can be made for the delivery of the subject matter of the alleged theft to some party other than the party in whose possession the property was found at the date of the alleged theft. *Kuppammal* v. *Ramaswamy Udayan*, [Crl. Rn. C. No. 477 of 1905 (unreported), followed. Property, part of which is joint family property and part the self-acquisition of an undivided member of the family may rightly be handed by the Court to the manager of the undivided family and the undivided member on their joint receipt. *Chalakonda Alasami* v. *Chalakonda Ratnachalam* [(1864) 2 M.H.C.R., 56], distinguished.

Kanaga Sabai v. *Emperor* ... ... 34 Mad., 94

DAMAGE:—*See* "SURVEYS AND BOUNDARIES ACT, s. 12" 108

DEBT, HYPOTHECATION OF—HYPOTHECATE OF DEBT HAS THE RIGHT TO SUE FOR THE DEBT HYPOTHECATED—*Transfer of Property Act, IV of 1882, s. 134 :*

The holder of a charge on a debt due to his debtor is a transferee of an actionable claim and entitled to recover the debt from the transferor's

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debtor. Section 134 of the Transfer of Property Act shows that the mortgagee is a transferee and entitled to sue in his own name for the recovery of the original debt. Where the original creditor is added as a party, the chargeholder, though not entitled to the whole amount, may recover the amount.

Ramasami Pillai v. *Muthu Chetti* ... ... 34 Mad., 53

DISTRICT MAGISTRATE, CIVIL AND MILITARY STATION, BANGALORE—*Power of, to try European British subjects :*

Proviso 4 to Notification 1688 I.A., Government of India, dated 4th October 1898, does not deprive the District Magistrate for the Civil and Military Station of Bangalore of jurisdiction to take cognizance of offences committed by European British subjects with the station.

The Public Prosecutor, Bangalore v. *Private J. Marchant* ... ... 34 Mad., 346

DWELLING:—*See* "JURISDICTION" 257

EASEMENT—EASEMENT ACT, V OF 1882, ss. 38, 47—*Drain a continuous easement—Mere non-user does not extinguish continuous easement under s. 38 47 of the Act :*

A drain from one land to another is a continuous easement within the Easement Act. Where such a right of easement by drainage has been granted but was not possessed or enjoyed for more than twenty years from the date of grant but no obstruction to such use existed more than three years prior to the institution of the suit, such non-user without anything more, does not extinguish the right under section 38 or section 47 of the Easement Act. The non-user without anything more is not an implied release or abandonment of the right. The period of twenty years of non-enjoyment which will extinguish the right under section 47 begins when the enjoyment was obstructed by the servient owner or rendered impossible by the dominant owner.

Mintakindy Parvatamma v. *Lanka Sanyasi* ... ... 34 Mad., 487

EJECTION—*Inamdar—Right of, to eject tenants—Presumption of such right :*

There is no presumption that an inamdar has a right to eject persons in possession of inam lands. He must prove such a right.

Maddu Yerrayya v. *Yadulla Kangali Naidu* ... ... 34 Mad., 246

EJECTMENT:—*See* "LANDLORD AND TENANT" 161

ENQUIRY:—*See* "CRIMINAL PROCEDURE CODE, ss. 117, 242" 139

EQUITY OF REDEMPTION:—*See* "MORTGAGE" 115

ESTOPPEL:—*See* "CHARITABLE TRUSTS" 406

ESTOPPEL:—*See* "JURISDICTION" 257

EVIDENCE—*Irregularity in taking under s. 360, Criminal Procedure Code (Act V of 1898)—Perjury—Prosecution of witness for, on deposition irregularly taken—Effect of irregularity :*

Where a deposition has been read over to a witness in Court and has been admitted by him to be correct in the presence of the Judge, the fact that another witness was being examined at the time is no defence to a prosecution of the deponent for giving false evidence in the deposition so read over. *Kamachinathan Chetty* v. *Emperor*, [(1905) I.L.R., 28 Mad., 308], commented on. Though a deposition so recorded might invalidate the conviction of the accused in the case in which the deposition was so recorded, the deponent having admitted its correctness may be properly convicted of perjury thereon. *Singiri Erudu* v. *Empress*, [Crl. R.C. No. 453 of 1894 (unreported); (II Weir's Crl. Rul., 435)], distinguished.

Bogra v. *Emperor* ... ... 34 Mad., 141

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EVIDENCE :—*See* " CRIMINAL PROCEDURE CODE, s. 145 "... 138

EVIDENCE ACT, I OF 1872, s. 91 :—*See* " CRIMINAL PROCEDURE CODE " ... 349

EVIDENCE ACT, s. 95 :—*See* " CONTRACT ACT, s. 63 " 156

EXECUTOR, LIABILITY OF :—*See* " JURISDICTION " 258

FAMILY DEBT INCURRED BY HINDU WIDOW :—*Sale of absolute estate in satisfaction of—Legality of sale—Registration Act XVI of 1864—Interest—Reasonableness of* :

A simple money decree was passed when the Registration Act XVI of 1864 was in force for a debt incurred by a Hindu widow on account of legal necessity :—*Held*, the absolute estate in the properties was liable to be sold in satisfaction of the decree. If the foundation of the decree be a debt of the character, for which the widow could have bound the entire interest, it is sufficiently clear, as the result of Privy Council decisions, that even if the decree is based on the widow's contract, and does not give a charge on the husband's estate, and the reversioners had not been made parties to the suit or execution proceedings the decree-holder would be entitled to have the entire estate sold, and if in fact the entire estate was sold and bought by the purchaser, the reversioners could not defeat the purchaser's title to the property. It must depend on the circumstances in which a loan is incurred whether a provision for compound interest agreed to be paid by a Hindu widow is reasonable or not.

Veerabadra Aiyar v. *Marudaga Nachiar* ... ... 34 Mad., 188

FAMILY NECESSITY :—*See* " HINDU LAW " 422

FIDUCIARY RELATIONSHIP :—*See* " BANKER AND CUSTOMER " 128

FORM OF DECREE :—*See* " CHARITABLE TRUSTS " 406

FRAUD :—*See* " IMMOVEABLE PROPERTY " 143

GENERAL ACCOUNT :—*See* " PARTNERSHIP " 112

GIFT :—*See* " HINDU LAW " 287

GIFT :—*See* " JOINT TENANCY " 80

GOVERNMENT IRRIGATION SOURCE, WHAT IS :—*See* " THE MADRAS IRRIGATION CESS ACT, s. 2" 366

GOVERNMENT, LIABILITY OF FOR NOT REPAIRING IRRIGATION WORKS—*No duty in Government to repair irrigation works* :

In India, the Government is under no obligation with regard to each individual ryot to repair irrigation works whenever they require repair. *Madras Railway Company* v. *Zamindar of Carvetnagaram*, [(1874) L.R., 1 I.A., 364], distinguished. The rule derivable from English cases is that where statutory powers have been conferred and statutory duties imposed on persons or corporations, no liability for nonfeasance in regard to individuals arises, in the absence of such liability under the common law, merely because such duty is imposed. The statute must impose the liability expressly or by clear implication. *Sankara Vadivelu Pillai* v. *Secretary of State for India*, [(1905) I.L.R., 28 Mad., 72], referred to. The right and obligations of Government in regard to irrigation works in this country have to be ascertained from unrecorded custom and practice ; and no custom or practice, recorded or unrecorded, gives the ryot, in case of non-repair, compensation measured by the value of the crops lost by defects in irrigation works commanding his land arising from such non-repair. There is no contract between a ryot and the Government, by which the latter is bound to maintain a supply of water for the irrigation of lands belonging to the former. The irrigation rights of

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ryotwari owners are not rights *personam*, but rather partake of the nature of rights *in rem*. *Chinnoppa Mudaliar* v. *Sikka Naiken*, [(1901) I.L.R., 24 Mad., 36], doubted.

Secretary of State for India v. *Muthuveerama Reddy* ... ... 34 Mad., 82

HEREDITARY VILLAGE OFFICES ACT (MADRAS) III OF 1895, s. 3—*'Other' offices, meaning of* :

The words 'other hereditary village offices' in clause 3 of section 3, Madras Act III of 1895, do not mean offices of a description different from those referred to in clauses (1) and (2) of the section but offices other than those in the localities dealt with by those clauses. A suit for the recovery of the office of karnam in an inam village falls within clause (3) and not clause (1) of section 3 of the Act and is not cognisable by the civil courts.

Audirazu Veerayya v. *Audirazu Sangayya* ... ... 34 Mad., 177

HINDU LAW—*Absolute estate—Defeasance—Absolute estate cut down to life estate* :

By a razinama filed in Court it was agreed that certain properties should be held and enjoyed in common by *R* and *P* and that in the event of *Y* becoming issueless the entire properties should belong to *P*. *R* having subsequently sold the properties to *L*, died issueless :—*Held*, that the alienation by *R* in favour of *L* was invalid beyond the lifetime of *R*. *Bhoobun Mohini Debya* v. *Hurrish Chunder Chowdry*, [(1878) 5 I.A., 133], relied on. *Sreematty Kristoromoney Dosse* v. *Maharajah Nerendro Krishna Bahadur*, [(1888) 16 I.A., 40], relied on.

Lakshminarayana Nainar v. *Valliammal* ... ... 43 Mad., 250

2.——————, *Gift of land by daughter for deceased father's spiritual benefits—When valid* :

A Hindu widow who succeeded to the property of her deceased father made a gift of a very small portion of that property at the time of performing her father's sraddha ceremony on the occasion of a peculiarly holy event among Hindus :—*Held*, that the gift was in accordance with Hindu ideas as regards the daughter's duty in connection with the performance of a father's sraddha on such an occasion and cannot be impeached by the reversioners. It cannot be laid down as a rule that to justify the alienation the expenditure should be for a spiritual *necessity*. It is sufficient if the gift or expenditure have reference to the spiritual needs of the father or husband whose property is taken.

Vuppuluri Tattayya v. *Garimilla Ramakrishnamma* ... ... 34 Mad., 288

3.——————— *Joint family, manager of—For what purposes managing member may contract debts binding on co-parceners—Family necessity—Marriage of son a necessary purpose for which manager may bind joint family* :

The marriage of a member of the co-parcenary is a family purpose ; and where it is reasonably necessary on the part of a prudent manager to borrow money for such purpose, the transaction will bind the co-parceners whether they are Sudras or belong to the twice-born classes. Marriage is one of the necessary samskaras or religious rites, in the case of Sudras, as well as the twice-born classes. The necessity, which will justify an alienation by the manager is not to be understood in the sense of what is absolutely indispensable but what according to the notions of a Hindu family would be regarded as reasonable and proper. *Govindarazulu Narasimham* v. *Devara Bhotla Venkata Narasayya*, [(1904) I.L.R., 27 Mad., 209], dissented from. The ceremonies for the performance of which immoveable properties can be alienated by the manager do not include only those for the mere performance of which forfeiture of caste is the penalty.

Kameswara Sastri v. *Veeracharlu* ... ... 34 Mad., 422

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4. ——————*Illegitimate son, share of one partition with legitimate sons after death of father—Illegitimate son taken one half of the share of the legitimate son—Marriage, proof necessary to establish :*

The fact that a woman was living under the control and protection of a man, who generally lived with her and acknowledged her children as his will raise a strong presumption that she is the wife of that man. This presumption will however be rebutted by proof of facts which show that no marriage could have taken place. Where relations and castemen who would have been present at the marriage if it had taken place are not called as witnesses, and persons who would have been invited have received no invitation the presumption will be that no marriage has taken place. When after a man's death, a partition of his property is effected between his legitimate and illegitimate sons, the illegitimate son takes one-half of what the legitimate son actually takes and not one-half of what a legitimate son in his place will get. *Kasaree* v. *Samardhan*, (5 N.W.P.H.C., 94), followed.

Chellammal v. *Ranganatham Pillai* ... ... 34 Mad., 277

5. ——————*Partition—Alienee from co-parcener may sue for partition at that co-parcener's share only :*

When certain items of family properties are conveyed by one of two co-parceners of an Hindu family to a stranger for purposes not binding on the family, the alienee from the other co-parcener of his share in the said properties may, without instituting a general suit for partition of the entire family property, maintain an action for the partition of his share in the said items.

Iburamsa Rowthan v. *Thirumalai Muthuveera Theruvenkatasami Naick*. 34 Mad., 269

6. ——————*Property granted to owner of office when partible—Conduct of parties in determining nature of property—Acquisition of property by holder of office—Charities, devolution of right to manage—Grant, construction of :*

When property is granted to the holder of an office, but the grant does not state that it was given for the maintenance of the office or to the grantee as such holder, the grant will be deemed to be a personal grant and will be ordinary partible property. The conduct of a person who deals with property as if it belonged to himself and his undivided co-parceners will be strong and cogent evidence that the property belongs to the co-parcenery. The recognition by Government and public officers of such property as ordinary partible property will be strong evidence of its partibility. It is competent to holders of offices to acquire properties for the benefit of themselves and their descendants and there is no presumption that such acquisitions are for the benefit of the office, where it is not shown that such properties were treated as attached to the office. The right of management of family properties devoted to charities ordinarily descends to the heirs of the donor except in the few cases where the office is descendible to a single heir. According to well established usage and custom, the enjoyment of the office of manager is divided between the different members or branches of the divided family. *Ramanathan Chetty* v. *Murugappa Chetty*, [(1904) I.L.R., 27 Mad., 192], referred to.

Sethuramaswamiar v. *Meruswamiar* ... ... 34 Mad. 470

——————*Succession among Nambudris in Malabar—Self-acquired property of Nambudri Brahman does not pass to the undivided family, but to his heirs under Hindu law :*

Nambudri Brahmans are governed by Hindu Law, except in so far as it is shown to have been modified by usage or custom having the force of law, the probable origin of the special usage being either some doctrine of Hindu Law as it stood at the date of their settlement in Malabar, though now obsolete or some Marumakkatayam usage. The Hindu Law applicable is that laid down in the Mitakshara. The self-acquisition of a Nambudri Brahman passes to his heirs under the Mitakshara Law and

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not to the undivided family to which he belongs. No marumakkatayam usage has influenced the family law of Nambudris in this respect and no doctrine of ancient Hindu Law denied the right of the son to succeed to the separate property of his father.

Vishnu Nambudri v. *Akkamma* ... ... 34 Mad., 649

——————*Suit by transferee of a portion of a joint tenancy for partition of such portion, maintainability of—Limitation Act XV of 1877, sched. II, art. 144—Adverse possession, burden of proving, in a suit for partition :*

The transferee of a portion of a joint tenancy can maintain a suit for partition of such portion when such partition will not be attended with much inconvenience to the other sharers. *Ramasamy Chetti* v. *Alagirisamy Chetti*, [(1904) I.L.R., 27 Mad., 361], not followed. Where in such a suit by the transferee, it is alleged that the right of the transferor to claim a share has become barred by exclusion for more than twelve years from enjoyment, the article of the Limitation Act applicable is article 144 and the burden will be on the defendant to show that the sharer was, in denial of his title, excluded from enjoyment of his share.

Harikristna Chowdary v. *Venkatalakshmi Narayana* ... ... 34 Mad., 402

9. ——————*Trustees of temple, power of, to grant permanent lease of trust property :*

The grant of a permanent lease of temple property by the trustee is *primâ facie* in excess of the powers of such trustee. Special circumstances of necessity may justify such alienation. *Maharanee Shibessource Debia* v. *Mothooranath Acharjo*, [(1869) 13 M.I.A., 270], followed. *Narasimhachari* v. *Gopala Iyengar*, [(1905) I.L.R., 28 Mad., 391], referred to. There is no distinction in this respect between a religious institution like a temple and a charitable foundation. The powers of the trustee of a temple are analogous to those of the manager of an infant heir. *Hanuman Pershad's case* referred to. *Konwyur Doorga Nath Roy* v. *Ramachunder Sen*, [(1876) 4 I.A., 52], referred to. The requirements of daily worship, of buildings suitable for the carrying out of such worship, and of performance of festivals are among the purposes for which the trustee of a temple may alienate the corpus, in the absence of other reasonable means of providing for such needs. In the case of such alienations, the alienee will be protected, if after proper enquiries he is satisfied of the existence of such necessity.

Sreemuth Devasikamoney Pandarasannadhi v. *Palaniappa Chettiar* ... 34 Mad., 535

LEGITIMATE SON :—*See* "HINDU LAW" 277

MOVEABLE PROPERTY—*Sale of, in Court Auction—Fraud, sale vitiated by—Vendee benamidar of purchaser—Suit to cancel sale—Who can sue—Contract Act, ss.* 231 *and* 232 :

Where a sale of property is vitiated by fraud on the part of the vendor, the person who brought the property at Court auction though only a benamidar can maintain an action to cancel the sale. *Pether Perumal Chetty* v. *Muniandy Servai*, [(1908) I.L.R., 35 Calc., 551], distinguished. A benami transaction does not vest any title to immoveable property, the subject of such transaction, in the benamidar, and therefore such a person cannot maintain a suit which is based on title, namely, a suit in ejectment. But where an agent of an undisclosed principal enters into a contract for the purchase of land and the land is conveyed to him in pursuance of the contract he acquires rights and liabilities under the contract (see sections 231 and 232, Indian Contract Act, IX of 1872) and can sue in respect thereof.

Sree Raja Datla Venkata Suryanarayana Jagapathiraju v. *Goluguri Bapiraju* ... ... 34 Mad., 143.

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INCORPOREAL RIGHTS, ENJOYMENT OF, FOR LESS THAN THE STATUTORY PERIOD—*Person in such enjoyment entitled to protection against trespassers:*

It is well settled law that a trespasser, in enjoyment of land for less than the statutory period, is entitled to be maintained in possession against all persons except the true owner. The same principle is applicable to incorporeal rights, such as rights to light and water-courses. A person in enjoyment of a water-course for less than 20 years is entitled to protection in such enjoyment against persons who have no right to such water-course.

Kondapa Rajam Naidu v. *Devarakonda Suryanarayan* ... ... 34 Mad., 173

INDIAN DIVORCE ACT IV OF 1869, ss. 16 and 17—*Decree of dissolution of marriage-Recission of, by High Court—Withdrawal of petition on coming up for confirmation—English Procedure:*

A decree of dissolution of marriage passed by a District Court under section 14 of the Indian Divorce Act may be rescinded by the High Court at the request of the decree-holder when it comes up for confirmation under section 17. The High Court has jurisdiction to rescind the decree of the District Court and allow the petition to be withdrawn. There is nothing in the Divorce Act which requires a distinction to be drawn between sections 16 and 17 with reference to the power of the Court to rescind a decree where the relations of husband and wife have been resumed before the decree has been confirmed. The power "to make such order as to the Court seems fit" is not limited to cases where further enquiry has been ordered. The analogy of English procedure whereby a petitioner withdrawing his petition the Court may set aside the decree *nisi* may be invoked in construing the Indian Divorce Act.

William Dare v. *Belle Donna Igdaliot Dare George Wheeler* ... 34 Mad., 339

INJUNCTION, GRANTING OF:—*See* "THE MADRAS IRRIGATION CESS ACT" ... 366

INSOLVENCY—*Banker and Customer—Money held by banker in suspense account—Fiduciary relationship:*

Certain moneys were held by A & Co., bankers, in suspense on the claimant's account. Pending negotiations as to its investment the bankers failed:—*Held per* MILLER and MUNRO, JJ. (ABDUR RAHIM, dissenting). That the money was not held in a fiduciary capacity and the relationship of banker and customer existed between the parties. *Per* MILLER, J.—When a man pays money into a bank, whether he is a customer or not the presumption in the absence of other evidence will be that he pays the money in to be held by the banker as bankers ordinarily hold the moneys of their customers. *Official assignee* v. *Smith*, [(1909) I.L.R., 32 Mad., 68], followed. Per ABDUL RAHIM, J.—Money held by a banker to a suspense account does not amount to payment to the banker. *Commercial Bank of Australia* v. *Official Assignee of the Estate of Wilson & Co.*, [(1893) A.C. 181], followed.

Official Assignee of Madras v. *Milapparangvur Sarvajina Sahaya Nidhi.* 34 Mad., 125

INSOLVENCY ACT, ss. 7, 27, 49—*Salary earned by insolvent after vesting order and before discharge vests in Official Assignee, who however must get an order under section 27:*

The earnings of an insolvent, including salary, after his insolvency and before his discharge vest in the Official Assignee under section 7 of the Insolvency Act. The effect of section 27 of the Act is not to cut down the operation of section 7 but to require the Official Assignee before obtaining payment of any salary due to insolvent to obtain an order of Court as to the amount necessary for the maintenance of the insolvent. A judgment-creditor of the insolvent who is aware of the insolvency and whose judgment debt is included in the schedule, cannot attach such salary without giving the Official Assignee an opportunity of obtaining an order under section 27. The insolvent debtor has the right to object to such attachment as it is open to him to show that property attached as his belongs to another.

Ranganatha Rao v. *Anonda Chariar* ... ... 34 Mad., 183

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INSOLVENCY IN FOREIGN JURISDICTION—*Effect of in other jurisdictions—Discharge of debts—Burden of proof:*

Insolvency does not of itself operate as a discharge of debts in all jurisdictions. In the absence of authority that insolvency does so operate in a particular jurisdiction the Court is not entitled to assume in favour of a defendant that the debt is discharged by his insolvency in that jurisdiction.

Rangaswamy Padayachi v. *Narayanaswami Padayachi* ... ... 34 Mad., 247

INSOLVENCY IN PRESIDENCY TOWN—APPEAL UNDER THE LETTERS PATENT, s. 15—*Indian Insolvency Act* 11 & 12 *Vict., Ch.* 21—*High Court Act, capacity,* 24 & 25 *Vict., Ch.* 104—*Banker and customer, relationship of—Fiduciary money held in:*

A further appeal lies under section 15 of the Letters Patent from the judgment of two Judges of the High Court who differ in opinion in an appeal from the Commissioner in Insolvency. Under section 11 of the High Court Act, 24 and 25 Vict., Ch. 104, the Indian Insolvency Act, section 73, is not applicable to the High Court it being inconsistent with section 15 of the Letters Patent. A customer instructed his banker to purchase a Government promissory note with money standing to his credit with the banker. Before doing so the banker failed. On a motion by the customer to have his amount paid in full:—*Held per* MILLER, J.—A mere direction by a customer to a banker to apply money at credit of the former's account in a particular way does not alter the relationship between banker and customer. *Per* MUNRO, J. (dissenting from his judgment in the same case reported in I.L.R., 33 Mad., at p. 146). The bare undertaking of the banker to purchase a note could not have the effect of transfering the ownership of the sum of money necessary for the purchase from the banker to the customer.

Official Assignee of Madras v. *Lupprian* ... ... 34 Mad., 121

INTEREST, RIGHT TO CLAIM, TILL PAYMENT OR LEGAL TENDER—*Tender or agreement to waive tender must be of an ascertained sum—Valid tender must be unconditional:*

At common law, where interest is payable by the terms of a contract it runs ordinarily up to the date of payment. A valid tender must be an unconditional offer to pay a specific and ascertained sum. An offer to pay such amount as may be found due on a settlement of accounts if the payee would execute an indemnity bond in accordance with law is not a valid tender. There cannot be a tender or an agreement to waive tender of an unascertained sum. *Garuda Reddi* v. *Gudi Janakayya Garu*, [(1862) 1 M.H.C.R., 124], distinguished. *Pandurang Krishnaji and another* v. *Dadhabhoy Noweroji*, [(1902) I.L.R., 26 Bom., 643], distinguished.

Lal Batcha Sahib v. *Arcot Narainaswami Mudaliar* ... ... 34 Mad., 320

JOINT AND ACQUIRED PROPERTY:—*See* "JURISDICTION" 257

JOINT CONTRACT:—*See* "CIVIL PROCEDURE CODE (ACT XIV OF 1882), s. 462" 314

JOINT FAMILY, MANAGER OF:—*See* "HINDU LAW" 422

JOINT TENANCY, PRESUMPTION OF, WHERE NO WORDS USED—*Gift—Donor guardian for donees—Management handed over on different dates, effect of—Transfer of Property Act, s.* 45:

Where there are no words in an instrument of gift of property to several persons indicating an intention to create tenancies in common there is a presumption that the donees hold the property as joint tenants and not as tenants in common. Indian Succession Act, section 93, illustration, relied on. Differences in dates of handing over the management of the property by the donor to the several donees creates no presumption in favour of a tenancy in common, the property having vested on the same

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date. *Navroji Manockji Wadia* v. *Perozbai*, [(1899) I.L.R., 23 Bom., 80], referred to. Section 45, Transfer of Property Act, has no application to gifts.

Arakal Joseph Gabriel v. *Domingo Inas* ... ... 34 Mad., 80

JUDGMENT, BINDING NATURE OF, ON SUCCEEDING JUDGE—*Partition of property between co-widows may be effected orally :*

Where a Judge on appeal decides certain points and remands the case, his decision is binding on his successor before whom the case comes up again on appeal from the judgment on remand. There is nothing in the Transfer of Property Act to prevent co-widows effecting an absolute division of property orally.

Latchumammal v. *Gangammal* ... ... 34 Mad., 72

JURISDICTION—LETTERS PATENT, HIGH COURT, cl. 12—*"Dwelling" within the jurisdiction of the Court—Executor, Liability of—Repudiation of will—Executor and trustee setting up adverse title to property disposed of by will—Estoppel—Removal of trustee and executor from office—Joint and acquired property :*

This was a suit on the Original Side of the High Court by three of the executors and trustees of a will against the fourth executor and trustee (who was the son of the testator) for the removal of the defendant from his office and for administration of the estate by the Court. Probate had been granted to the executors by the High Court at Madras, and the assets realised under the grant had come into the possession of the defendant who subsequently repudiated the will and alleging that the property of the testator was joint claimed in this suit to be entitled to the estate by survivorships. The defendant was domiciled and resided in the State of Mysore, but some months previously to the institution of the suit he left his house there in charge of a servant, and hired a house in Madras to which he brought his wife and family, and apprenticed himself for a year to a vakil of the High Court with a view to become in due course enrolled as a vakil himself. He was in Madras on 30th April 1901 when the plaint was filed, but left on 31st before the summons was served. The First Court made a decree removing the defendant from his office as executor and trustee which was affirmed by the High Court, and both Courts decided that the cause of action arose partly within the jurisdiction of the Court, and that the Court could therefore entertain the suit :—*Held* (affirming the decision of the High Court) that the defendant was at the time the suit was brought "dwelling" within the jurisdiction within clause 12 of the Letters Patent of the High Court :—*Held*, also that no person who has accepted the position of a trustee and has acquired property in that capacity can be permitted to assert an adverse title on his own behalf until he has obtained a proper discharge from the trust with which he has clothed himself. On the question whether the property dealt with by the will was joint or acquired, their Lordships of the Judicial Committee also agreed with the Courts below that on the evidence it was self-acquired and that the testator therefore had power to dispose of it as he had done in the will.

Srinivasa Moorthy v. *Venkata Varada Aiyangar* ... ... 34 Mad., 257

JUSTICES OF THE PEACE POWERS OF, IN TRIALS OF EUROPEAN BRITISH SUBJECTS—

The powers of Magistrates of the first class who are Justices of the Peace and European British subjects are the powers referred to in section 36 of the Code of Criminal Procedure of 1898 as 'hereinafter conferred upon them and specified in the third schedule' and styled 'ordinary powers.' They do not include powers with which by virtue of section 37 of the Code a Magistrate of the first class may be invested by the authorities mentioned therein.

Logan v. *Romer* ... ... 34 Mad., 343

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LANDLORD AND TENANT—*Lease before Transfer of Property Act IV of 1882, forfeiture of—Suit for ejectment by landlord, maintainability of, without subsequent act evincing intention to forfeit—Waiver—Claim for rent in suit for ejectment does not amount to waiver :*

Under the law applicable to leases before the Transfer of Property Act, forfeiture is incurred when the denial of title occurs; any subsequent act of the landlord, electing to take advantage of the forfeiture, is not a condition precedent to the right of action for ejectment. The bringing by the landlord of a suit for ejectment is simply a mode of manifesting his election. Where a tenant, holding under a lease prior to the Transfer of Property Act, denies the title of his landlord, the landlord can maintain a suit for ejectment, without having done, prior to the suit, any act evincing his intention to determine the lease. A claim for rent in the suit for ejectment will not amount to a waiver of the forfeiture. The election to forfeit is complete and irrevocable when the suit for ejectment is instituted. *Venkatramana Bhatta* v. *Govindaraya*, [(1908) I.L.R., 31 Mad., 403], considered.

Padmanabhaya v. *Ranga* ... ... 34 Mad., 161

2. ——————— *Mulgenitenure—Revenue assessment, who to pay—Revenue Recovery Act II of 1864, ss. 1 and 35—Principles apart from Act :*

Under section 35, Revenue Recovery Act, a mulgenidar who pays revenue due on land held by him as a mulgeni tenant is entitled to recover the same from his landlord, the mulgar, by deducting the amounts so paid from any rent then or afterwards due from him to the mulgar. The fact that the mulgar's revenue assessment has been increased by Government does not make him the less liable to pay the whole assessment, although the amount so to be paid may be in excess of or out of proportion to the rent to be received by him. To hold otherwise would be to deprive the mulgenidar of the right secured to him by section 35 of the Revenue Recovery Act. *Per* BENSON, J.—Apart however from the Revenue Recovery Act which thus indirectly and as it were unintentionally imposes the whole burden on the pattadar it cannot be held that where an increased revenue assessment has not been contemplated in the mulgeni chit either the mulgar or the mulgenidar is bound to pay the whole of the increase in assessment imposed by Government. Assessment is a burden imposed by Government on the land and where the rent has been fixed by contract and the imposition of a higher assessment by Government is a matter outside the terms of the contract altogether and is not provided for in it either expressly or impliedly, it ought in accordance with principle, to be shared by the mulgar and the mulgenidar in proportion to the benefit which each derives from the land.

Vidyapurna Thirthaswami v. *Uggannu* ... ... 34 Mad., 231

LEASE :—*See* "SURVEYS AND BOUNDARIES ACT, s. 12" 108

2. ——— *Tarward—Lease by senior member alone—Validity of :*

A lease by the senior member of a tarward alone is valid. *Koroth Amman Kutti* v. *Perungottil Appu Nambiar*, [(1906) I.L.R., 29 Mad., 322], explained and distinguished.

Chakkantavida Chakkan Abdulla v. *Thazhath Cheekkootti* ... 34 Mad., 245

LEGAL PRACTITIONERS' ACT XVIII OF 1879, s. 13 (*f*)—*Interpretation of clause—Words "other reasonable cause" explained*—Ejusdem generis :

The words "for any other reasonable cause" in clause (*f*) of section 13 of Act XVIII of 1879 (Legal Practitioners' Act) include general misconduct and are not restricted to professional misconduct. Where two legal practitioners were the President and a Director respectively of a so-called Provident Society which was in no sense a Provident Society but a means of furnishing profit to the Directors by enabling those who so desired to gamble in the lives of parties who were willing to become

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"applicante" to the Society :—*Held*, that there was "reasonable cause" under section 13 (*f*) for an order being made against the legal practitioners. *Per* MILLER, J.—The principle of *ejusdem generis* cannot be applied to the words "any other reasonable cause" since the genus "professional misconduct" is not large enough to include the case of section 12 (where a pleader may be suspended or dismissed for having committed a criminal offence implying a defect of character which unfits him to be a pleader. *Tillmanns & Co.* v. *Knutsford (Ltd.)*, [(1908) 2 K.B., 385], followed. The intention of the Legislature was to give to the High Court powers of control over pleaders and mukhtars as extensive as those which are given by the Letters Patent, section 10, over advocates and vakils. *Per* KRISHNASWAMI AYYAR, J.—Clause (*f*) of section 13 is not confined to professional misconduct but may be interpreted so as to include any dishonest of dishonourable conduct whether or not in discharge of professional duty. It is difficult to limit clause (*f*) to professional misconduct, because clause (*b*) deals with "grossly improper conduct" in the discharge of professional duty and it is not possible to name any species of professional misconduct which does not fall within clause (*b*) itself. The fact that the Legislature has restricted the power of Subordinate Courts under section 14 of the Act is no reason for fettering the power of the High Court. In the matter of the petition of *Ghalab Khan Mukhtar*, [7 B.L.R., 179], approved.

In the Matter of the Second-grade Pleaders ... ... 34 Mad., 28

LETTERS PATENT, cl. 12 :—*See* "JURISDICTION" 257

LIMITATION—*If one of several joint trustees barred, the others also barred—Agreement between joint owners or trustees, effect of:*

Two joint trustees *A* and *B* entered into an agreement, which recited that the families of *A* and *B* were entitled to the management of the trust and further provided that *A's* right shall after his death be exercised by his heirs and *B's* right shall after his death be exercised by his heirs :—*Held*, that the effect of this agreement was to constitute the heirs of *A* and *B* joint trustees and not to create a right in severally between the two branches. Where an adult joint trustee takes no steps to protect the trust and his right to take steps becomes time barred, the rights of other joint trustees, even though minors become time barred.

Thiyagaraja Pillai v. *Ratnasabapathi Pillai* ... ... 34 Mad., 284

LIMITATION ACT XV OF 1877, ss. 6, 12—*Appeals under Indian Forest Act V of 1882—In calculating period of limitation for appeals under the Indian Forest Act, time for obtaining copy of judgment not to be excluded:*

The provision in section 12 of the Limitation Act of 1877 that in computing the period of limitation prescribed for an appeal the time requisite for obtaining a copy of the order appealed against should be excluded does not apply to appeals under section 10 of the Madras Forest Act, 1882. The express power given to the Governor in Council by section 10 of the Forest Act to extend the time for appeal under this section shows that the Legislature did not intend that the general provisions of the Limitation Act should apply to such cases. The Madras Forest Act is a special and local enactment and the application of section 12 of the Limitation Act to appeals under the Act affects the period prescribed by that Act, within the meaning of section 6 of the Limitation Act. The provisions of section 6 of the Limitation Act exclude the applicability of section 12 of the Act in the case of appeals under section 10 of the Madras Forest Act. *Reference under the Madras Forest Act*, 1882, [(1887) I.L.R., 10 Mad., 210], dissented from. *Veeramma* v. *Abbiah*, [1895) I.L.R., 18 Mad., 99], followed.

Vattakulakaran Sowdakar Abu Backer Sahib v. *The Secretary of State for India in Council* ... ... 34 Mad., 505

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2. ——————, **s. 19**—*Acknowledgment of debt by Collector or Deputy Collector as agent for Court of Wards saves limitation under—Regulation V of 1804, s. 2, Collector's powers under—Court of Wards, power of:*

Under Regulation V of 1804 as amended by Madras Act IV of 1899 the duties of the Court of Wards are not limited to the education of the minor but include the due preservation of the estate. The Court of Wards has power to make an acknowledgment of a debt which would bind the ward and give a new starting point for limitation within the meaning of the Indian Limitation Act IX of 1877, section 19. By the power of delegation given in section 2 of Regulation V of 1804 the Collector has power to give such an acknowledgment as agent of the Court of Wards. *Suryanarayana* v. *Narendra Thatraz*, [(1895) I.L.R., 19 Mad., 255], distinguished. *Beti Maharani* v. *The Collector of Etwah*, [(1895) I.L.R., 17 All., 198], commented on. No distinction can be drawn between the powers of a Collector and those of Deputy Collector.

Kondamodalu Linga Reddi v. *Alluri Sarvarvarayudu* ... ... 34 Mad., 221

3. ——————, **sched. II, art. 11**—*Civil Procedure Code, Act XIV of 1882, ss. 278, 281, 283—Article 11 of the Limitation Act not applicable where judgment-debtor no party to proceedings under s. 278 of the Civil Procedure Code:*

Where, in a claim proceeding under section 278 of the Civil Procedure Code the judgment-debtor has not appeared and there has been no adjudication between him and the claimant, the period of limitation prescribed by article 11 of schedule II of the Limitation Act will not apply to a suit brought by the defeated claimant to establish his right against the judgment-debtor.

Sadaya Pillai v. *Amurthathachy* ... ... 34 Mad., 583

4. ——————, **sched. II, art. 35**—*Where, after demand and refusal difference are made up, time will not run until there is a fresh demand and refusal—Agreement between husband and wife, providing for future separation how far valid under Hindu and English law—The Madras Civil Courts Act III of 1873, s. 16:*

Where after demand by the husband and refusal by the wife to return to cohabitation, the parties make up their differences, limitation will not run under article 35 of schedule II of the Limitation Act of 1877 until there is a fresh demand and refusal. *A*, a Hindu Brahmin, after refusal by his wife *B* to return, brought a suit for restitution of conjugal rights in 1903. The suit terminated in a compromise between *A* and *B* in July 1904, by which it was agreed that *B* should return and live with *A* and that if in any time thereafter she should desire to live apart from *A*, she was to be paid Rs. 350 by *A*. *B* never returned to live with *A*, who on 6th July 1907, brought a suit for restitution alleging a demand and refusal in February 1907 :—*Held*, that the suit was not barred under article 35 of schedule II of the Limitation Act and that the demand and refusal prior to 1903 did not furnish the starting point for limitation :—*Held*, also that the agreement between *A* and *B* in July 1904, providing for a future separation was invalid. It was forbidden by the Hindu Law, which ought, under section 16 of Madras Act III of 1873, to be applied in determining the martial obligations between the parties. *Tekat Mon Mohini Jemadat* v. *Basanta Kumar Sing*, [(1901) I.L.R., 28 Calc., 751], referred to. Such agreement must also be considered as opposed to public policy and unenforceable. *Mherally* v. *Sakerkhanoobai*, [(1907) 7 Bom. L.R., 602), referred to. Even under the English law, the agreement, providing for a future separation was invalid and would not operate as a bar to a suit for restitution of conjugal rights.

Krishna Aiyar v. *Balammal* ... ... 34 Mad., 398

——————————, arts. 89, 109—*Article 109 not applicable where profits not received by defendant—Claim for mesne profits when plaintiff kept out of possession is a suit for damages and falls within art. 39—Judgment for possession, effect of:*

A suit for mesne profits by a plaintiff who had been kept out of possession by the defendant, does not, for purposes of limitation fall within article 109 of schedule II of the Limitation Act, when no profits have been actually received by defendant. Such a suit is one for damages for trespass on immoveable property and falls under article 39 of schedule II. *Abbas v. Fassuh-ud-din* (I.L.R., 24 Calc., 463), not followed. A judgment for possession against a defendant must be deemed to decide that the defendant was in possession at least at the date judgment.

Ramasami Reddi v. Authi Lakshmi Ammal ... ... 34 Mad., 502

——————————, arts. 61, 83, 116, 120—*Contract Act IX of 1872, ss. 70, 222—Suit by agent against principal to recover moneys spent by him falls under art. 61 of Sch. II of the Limitation Act and not under art. 116 or 120:*

The duty of the principal under section 222 of the Contract Act to indemnify the agent is an obligation imposed by law and is attached to the relation of principal and agent constituted by act of parties. Where a registered contract of agency does not provide for such indemnity, such obligation cannot be treated as a term or part of such contract and a suit by the agent for recovering moneys spent by him on account of his principal will not for purposes of limitation fall within article 116 of schedule II of the Indian Limitation Act. Article 83 of the Limitation Act will not apply; and even if it did, limitation will begin to run from the date of such payment and not from the termination of the agency. The fact that the agent has under section 217 a right of retainer out of sums received on account of his principal and a right of lien under section 222 will not postpone the right of action until the termination of the agency. The right of the agent to recover is conferred by section 70 of the Contract Act and there is nothing to prevent his making his claim immediately after he expended his own moneys. That article applicable to such cases is article 61 of schedule II of the Limitation Act. This article is not confined to cases where the defendant is under a legal liability to make the payment but is also applicable to cases falling under section 70 of the Contract Act.

Kandaswami Pillai v. Avayambal ... ... 34 Mad., 167

7. ——————————, art. 85—*Mutual account, test of:*

Where the course of dealing between *A* and *B* was that *A* should finance *B* and that *B* should keep *A* secured in respect of such advances by consignments of coffee of a value equal to his indebtedness, the account between *A* and *B* though current and open is not "mutual" within the meaning of article 85 of schedule II of the Limitation Act. Although the balance may shift from one side to the other, such shifting balance is not conclusive as a test of *mutuality*. Payments made on account by one party and credited by the other whether in money or goods do not render the account mutual. There must be independent obligations on both sides, to make the account mutual. *Hirada Basappa v. Gadiji Muddappa*, [(1871) 6 M.H.C.R., 142], referred to.

Shivi Gowda v. Fernandes ... ... 34 Mad., 513

8. ——————————, art. 110—*When arrear becomes due—Limitation runs under art. 110 only from date when rent is ascertained by proceedings under Rent Recovery Act:*

In the case of rents recoverable under the provisions of the Rent Recovery Act, such rents become ascertained only when they have been ascertained by means of the procedure provided by the Act. In a suit brought by the tenants against their landlord for a declaration that the latter was not entitled to vary the terms of previous pattas, judgment in favour of the tenants was given by the High Court in August 1902. Prior to that date the landlord had instituted Summary Suits under the Rent Recovery Act against the tenants to enforce acceptance of pattas by them in respect of the same lands and the decision in those cases was given by the Sub-Collector in May 1904. The landlord tendered pattas as directed in the Summary Suits and brought suits for rent within three years from the date of the summary decisions but more than three years from the date of the High Court judgment:—*Held*, in the circumstances, that the rent was ascertained and the arrears became due within the meaning of article 110 of schedule II of the Limitation the date of the judgment in the Summary Suits and not on the date of the Act on judgment of the High Court. *Arunachalam Chettiar v. Kader Rowthen*, [(1906) I.L.R., 29 Mad., 556], distinguished. *Rangayya Appa Rao v. Bobba Sriramulu*, [(1904) I.L.R., 27 Mad., 143], referred to.

Syed Gulam Ghouse Sha Sahib v. Shunmugam Pillai ... ... 34 Mad., 438

9. ——————————, arts. 120, 123, 144—*Period of Limitation applicable to suit by Muhammadan to recover his share of his deceased wife's estate:*

Article 123 of schedule II of the Limitation Act of 1877 applies only when the suit is for a share of an estate which it is the legal duty of the defendant to distribute. *Umardaras Ali Khan v. Walayat Ali Khan*, [(1897) I.L.R., 19 All., 169], followed. Where a Muhammadan dies intestate his estate at once vests in his heirs as tenants in common and there is no one charged by law with its distribution. In a suit by one of the heirs to recover his share, article 123 of the Limitation Act does not apply. *Kosmi v. Ayishamma*, [(1892) I.L.R., 15 Mad., 60], dissented from. Article 144 will apply in the case of immoveables and article 120 when the property sought to be recovered is moveable.

Khadersa Hajee Bappu v. Pathen Veettil Ayissa Ummah ... .. 34 Mad., 511

10. ——————————, arts. 120, 144—*Suit by Muhammadan for partition of immoveable property governed by art. 144 and not 120:*

Where a Muhammadan sues for partition of moveables and immoveables, his claim as regards immoveables falls within article 144 and not 120 of schedule II of the Limitation Act.

Noordeen Sahib v. Ibrahim Sahib ... ... 34 Mad., 74

11. ——————————, art. 144—
See "HINDU LAW" 402

LIMITATION ACT IX OF 1908, s. 3, art. 177—
See "APPEAL, ABATEMENT OF" 292

MADRAS BOARD OF REVENUE STANDING ORDERS, EDITION 1900, CHAPTER I, APPENDIX I, SECTION D, Rules 2 and 3—"*Full water-rate*," *meaning of:*

The words "full water-rate" in rule 2 of the Standing Orders of the Madras Board of Revenue, Chapter I, Appendix I, Section D (Edition 1900, p. 91) mean full water-rate in respect of wet cultivation and not full water-rate in respect of the crop actually raised.

The Secretary of State for India in Council v. Subba Row of Kurnool ... 34 Mad., 438

MADRAS CIVIL COURTS ACT, s. 16:—*See* "LIMITATION ACT, SCHED. II, ART. 35" 98

MADRAS FOREST ACT, ss. 3, 16, 25:—*See* "POSSESSION, NATURE OF" ... 353

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MADRAS IRRIGATION CESS ACT, VII OF 1865—MADRAS ACT II, 1864— *'Defaulter,' who is—Person liable to pay cess under Act, VII of 1865—The Zamindar and not the tenant in occupation liable:*

Where water-cess is leviable on zamindari land under the provisions of Madras Act VII of 1865, the person bound to pay such cess is the zamindar and not the tenant in occupation of such land. *Nynappan Servai* v. *Secretary of State*, [(1910) M.W.N., 322], dissented from. *Subramanya Chetty* v. *Mahalingasami Sivan*, [(1910) I.L.R., 33 Mad., 41], followed. The zamindar is the proprietor and landholder within the meaning of Act II of 1864. He is the defaulter whose right and interest passes by the sale under section 39 of the Act. The security for the public revenue and for the cess which is recoverable as such revenue is the full proprietary right and not the right of the tenant.

Kottilinga Settu Royer, Zamindar of Urkad v. *Sahasranama Iyer* ... 34 Mad., 520

2. ——————————————*Inam lands irrigated by water coming from Government source—Water-cess liable to be levied on, where inamdar has no option to refuse use—Phrase "used for the purpose of irrigation," meaning of:*

Certain dry inam lands were submerged by water flowing from a Government source and by reason thereof the inamdar was compelled to raise wet crops with the help of the water which he enclosed in his adjoining land out of the flood water: *Held* that under Madras Act VII of 1865, he was liable to pay water-cess. Madras Act VII of 1865 is not based upon any theory of the ownership of the bed of a tank or water course being the foundation of a right to use the water free of charge. The fact that before irrigating the inamdar's lands the water had flowed through two-fifths of a sheet of water included in the inam does not make it any the less water from a Government source. *Held further*, the fact that rain water had got mixed with the flood water is no ground for getting rid of the liability. *Secretary of State for India in Council* v. *Perumal Pillai*, [(1901) I.L.R., 24 Mad., 279] distinguished. *Maria Susai Mudali* v. *The Secretary of State for India in Council*, [(1904) 14 M.L.J., 350], distinguished.

The Secretary of State for India v. *Swami Naratheeswarar* ... ... 34 Mad., 20

——————————————, s. 2—*Conditions necessary to entitle Government to levy water-cess—Government irrigation source, what is—Engagement, nature of, to be implied from title-deed—Extent of water right, how ascertained—Cultivation of larger area without increase of water not liable to cess—Injunction, granting of:*

The essential conditions for the levy of water-cess under Madras Act VII of 1865 are—(A) The irrigation must be effected by means of the water of a river, steam, tank or channel or work belonging to or constructed by Government. (B) If the water from such a source is received by indirect flow or used after storage in an intermediate reservoir, the irrigation must, in the opinion of the Collector (subject to the control of the Board of Revenue and Government) be beneficial to and sufficient for the requirement of the crops. (C) The charge must not be contrary to any engagement between the landholder and Government whereby the latter is entitled to irrigation free of charge. Where water from two hills—one belonging to Government and the other to a private party—combine and flow in a channel between Government and private lands and through Government and private lands alternately and is afterwards drawn for irrigation through channels owned by private parties, such irrigation is effected by means of water drawn from a Government source within the meaning of section 2 of Act VII of 1865. *Uralam Proprietrix* v. *The Secretary of State for India*, [(1911) I.L.R., 34 Mad., 295], followed. Where Government waters mingle with those of another stream, the combined water must be treated as Government water and the fact that it is drawn for use through private channels is immaterial. The question whether the irrigation is beneficial and sufficient must be decided by the Collector and his decision, when not impeached by the Board of Revenue or Government cannot be questioned by

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the Civil Courts. The only undertaking which may be implied from a grant of land by Government is an undertaking to supply water free of charge to the extent of the accustomed flow at the time of the grant. Where the quantity of the customary flow cannot be ascertained, the area irrigated will be presumed to be the measure of the quantity of water used at the time of the grant. Where a larger area is irrigated subsequent to the grant, it will be open to the landholder to show that the increase is not due to the use of a larger quantity of water but to a more economical use of it, in which case no cess can be levied for the increased extent. *Maria Susai Mudaliar* v. *The Secretary of State for India*, [(1904) 14 M.L.J., 1350], referred to. An injunction ought not to be granted when there are no sufficient data for determining whether an infringement of it has taken place.

The Secretary of State for India v. *Ambalavana Pandara Sannadhi* ... 34 Mad., 366

4. ——————————————, s. 2—*Ownership of bed of channel—Owner of channel bed not on that account alone entitled to water free of cess—Engagement to supply water free of charge, how proved—Nature of engagement to be inferred from permanent settlement—Act III of 1905, s. 2—Stream what is—Voluntary payment—Money paid on a decree and under Act II of 1864 not voluntary:*

Where in a grant by Government of land, no reservation is made of channel beds and nothing is proved to show that the Government must have intended to reserve them and it is shown that the grantee exercised full control over the channel, it must be presumed that the bed of the channel was included in the grant. The ownership of the bed will not however carry with it the right to use the water of the channel free of charge under Act VII of 1865. If water from a Government channel or river is distributed through channels provided by a private person, such irrigation is not free of cess. Section 2 of Act III of 1905 is declaratory; and effect must be given to the clear declaration, without confining its operation to the matter of encroachments on land. The channel or river is the flowing body of water. Under section 2 of Act III of 1905 where it is not shown to belong to a private person, it belongs to Government although private persons may be proprietors of the bed. The riparian proprietors have easement rights, but they are not on that account owners of the channel; and they cannot use water which belongs to Government free of cess in the absence of an engagement with Government to that effect. The abstention of Government from charging water-cess for a number of years, and the fact that the Government and the zamindar apportioned the cost of the upkeep of the channel according to the extent of zamindari and ryotwari land under it, do not raise a presumption of any such engagement. The only engagement which can be inferred from the Permanent Settlement is that the peshkash being fixed with reference to the area of land then under irrigation no further charge for the use of water should be made in respect of the area. The burden of proving that any kind of crop is exempt from water-cess lies on the zamindar. *Maria Susai Mudaliar* v. *The Secretary of State for India in Council*, [(1904) 14 M.L.J., 354]. Where capacity to grow a second crop is taken into account in fixing the peshkash, no separate charge can be made for the second crop. Money paid on a demand by Government and enforceable by attachment under Act II of 1864 is not a voluntary payment.

Kandukuri Mahalakshmamma Garu v. *Secretary of State for India* ... 34 Mad., 29

MADRAS LOCAL BOARDS ACT, ACT V OF 1884, s. 51—*Taluk Board taking over management of charity not bound to keep account accessible to all persons, when they take the place of trustees who are under an obligation to do so—Power of Taluk Board to transfer management—Madras Regulation VII of 1817, ss. 2, 3, 5, 7, 8, 13—Under s. 51 of Act V of 1884, the Taluk Board is vested with powers of supervision and management and not with the power of appointing trustees conferred on the Board of Revenue:*

Where a Taluk Board under section 51 of Madras Act V of 1884 takes the place of trustees appointed by a will, which directs the trustees to keep accounts accessible to all persons, such Board will not in the absence

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of a charge of mismanagement be under an obligation to keep such accounts. The management being transferred by a special law to a statutory body, we must look to that law and not to the will to determine the duties incidental to such management. The Board is not bound to give insdection of accounts when no charge of mismanagement is made. The Taluk Board which has taken over the management under section 51 of the Act cannot appoint an independent trustee so as to divest itself of the duty of management. The power and duties of the Board of Revenue which devolve on the Taluk Board under section 51 of the Act do not include the power to appoint trustees vested in the Board under section 13 of Regulation VII of 1817.

Nelayathakshi Ammal v. *The Taluk Board, Mayavaram* ... ... 34 Mad., 333

MADRAS LOCAL BOARDS ACT, s. 51:—*See* "CHARITABLE TRUST" 375

MADRAS RELIGIOUS ENDOWMENTS ACT X OF 1865:—*See* "CHARITABLE TRUST" 375

MUHAMADAN LAW—*Wakf—Performance of feteha, when a valid object of wakf—Wakf when illusory—Rule to be adopted when one of the purposes of the wakf fails—Provision for heirs invalid as a wakf—Validity of direction to accumulate in a wakf:*

The performance of feteha (distribution of alms to the poor accompanied with prayers for the welfare of the souls of deceased persons) which so far as it involves the expenditure of any money, consists in feeding the poor, is a valid object of *wakf*. A gift for the benefit of a man's own family or descendants will not be valid as a *wakf*; and a gift, really for such a purpose, though ostensibly one for valid charitable purposes will be bad as only an illusory wakf. It can be no objection to validity of a wakf that some provision is made for the donor's family provided such provisions are not inconsistent with the gift being one substantially for charity. If, however, such provisions in a deed purporting to be by way of wakf exhausts the bulk of the income or to last for an indefinite period, the wakf will be bad as illusory. The fact that the donor did not direct the proportions in which the income should be divided between the charities and his heirs, who were appointed trustees will not raise the presumption that he intended the heirs to take the whole. It must be presumed that he intended the charities and his heirs to benefit equally. Where a donor mentions several purposes as objects of charity and one of such purposes fails, then, if a general intention can be gathered of dedicating the property to charity, the entire property will be devoted to the lawful objects, if any, mentioned in the deed and in the absence of any such to the poor, whether or not any definite portion of the income has been set apart for the purpose which fails. A gift by way of wakf partly for valid charitable purposes and partly for the donor's heirs will not be void because the latter is not a legal purpose of a wakf. The wakf will be valid and the whole income will be devoted for the valid purposes. A provision for accumulation which will enure solely for the benefit of charitable purposes will not be bad as offending the law of perpetuities.

Ramanadhan Chettier v. *Vada Levvai Marakayar* ... ... 34 Mad., 11

MAINTENANCE—*Right of offspring of illegitimate son of a married woman to, from the joint family property of the survivors of the putative father—Criminal intercourse, effect of, on right to maintenance:*

The offspring of the intercourse of a man with his concubine who was a married woman is entitled to maintenance against the surviving members of the joint Hindu family to which the father belonged and who have taken his share by survivorship. *Cheroturya Ran Murdun Syn* v. *Sohul Purhulad Syn*, [(1857) 7 M.I.A., 18], followed, and *Muthusawmy Jagavera Yettappa Naicker* v. *Venkateswara Yettaya*, [(1868) 12 M.I.A., 203, followed. There is no distinction between the right of the illegitimate son of an unmarried woman to maintenance out of the estate of the putative father

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and that of the offspring of an adulterous intercourse. *Venkatachella Chetty* v. *Parvatham*, [(1874) 8 M.H.C.R., 134 at p. 143], followed. *Viravamuthindiyan* v. *Singaravelu*, [(1876) I.L.R., 1 Mad., 306], followed. *Kuppa* v. *Singaravelu*, [(1876) I.L.R., 8 Mad., 325. followed. *Rahi* v. *Govinda Valad Tefa*, [(1876) I.L.R., 1 Bom., 97], followed. The offspring of a criminal intercourse should not be deprived of maintenance on the ground of the criminal origin of its being. *Vedanayaga Mudaliar* v. *Vedammai*, [(1904) I.L.R., 27 Mad., 951], distinguished.

Subramania Mudali v. *Valu* ... ... 34 Mad., 68

2. ———*Widow's right to transferable property—Right not one falling within s. 6, Transfer of Property Act—Validity of transaction not governed conclusively by Act, Civil Procedure Code, s. 226—Contract Act, IX of 1872, s. 16—Undue influence:*

A right to future maintenance is not an interest in property restricted in its enjoyment to the owner personally within the meaning of paragraph (*d*) of section 6 of the Transfer of Property Act neither is it property within the enabling words of section 6 of that Act. The fact that the transfer of such an interest is not recognised by the Transfer of Property Act is not conclusive on the question of its validity. Where the amount payable is subsequently fixed by agreement or by decree a transfer of such an interest may be valid. Urgent need of money on the part of a borrower does not of itself place the lender in a position to "dominate his will" within section 16 of the Contract Act. Nor on the other hand will the fact that the borrower acted under advice preclude her asking for relief on the ground of undue influence. Where the executant of a document was a poor widow who entered into a contract with a money-lender to enable her to establish her right to maintenance:—*Held*, that under sub-section 3 of section 10 of the Contract Act the burden is on the plaintiff to prove that the contract was not induced by undue influence.

Ranee Annapurni Nachiar v. *Swaminatha Chettiar* ... ... 34 Mad., 7

MALABAR COMPENSATION FOR TENANTS IMPROVEMENTS ACT (MADRAS) ACT I OF 1900, ss. 5, 6, 9 to 18, 19—*Contract to claim compensation according to custom, no special contract within the meaning of s. 19—Tenant can claim higher rates under the Act in spite of contract before Act prescribing a lesser rate:*

Where under a contract entered into in 1872, the tenant has agreed to accept compensation for improvements according to local custom, such undertaking by the tenant is not a special contract within the meaning of section 19 of Madras Act 1 of 1900 which will debar the tenant from claiming under section 5 compensation as provided in sections 6–18. *Kerala Varmah Valia Rajah* v. *Ramuni*, [(1893) 3 M.L.J., 51], referred to. Section 19 of Act I of 1900 deals only with contracts limiting the right to make improvements and claim compensation. A mere contract regulating the rates of compensation whether before or after the first day of January 1886 is not touched by section 19. Where there is such a contract, the tenant, if the contract rates are lower than the rates provided in the Act, can claim the latter rates under section 5; and if the contract rates are higher, he can claim such rates notwithstanding section 6 of the Act.

Kozhitot Sreemana á Vikraman v. *Chundayil Ananta Patter* ... ... 34 Mad., 61

MARRIAGE:—*See* "HINDU LAW" 277

MARUMAKATAYAM LAW—*Tarwad is the heir to the property of a deceased member subject to the liability to discharge debts of deceased—Devolution of property, acquired by or for benefit of Tavazhi—Survivorship—Property acquired by individual member, Devolution of:*

Coparcenary exists among the members of an undivided Malabar Tarwad. Where therefore one of the members dies, the Tarwad is the heir to the property of deceased, subject to the liability to discharge the

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debts of the deceased member. *Ryappan Nambiar* v. *Kelukurup*, [(1882) I.L.R., 4 Mad., 150], referred to. Where property is acquired for the benefit of the Tavazhi, the incidents of such property will depend on the constitution of the Tavazhi. If the Tavazhi forms a distinct branch from the main Tarwad with separate properties and has its own karnavan, it will, in law, form a Tarwad and the incident of Tarwad property will attach to it. None of the members will have an alienable interest in such property and it cannot be attached in execution of a decree against any of the members. *Kanath Puthen Vittul Tavazhi* v. *Narayanan*, [(1905) I.L.R., 28 Mad., 182 at pp. 189, 190], referred to. If, however, the members of the Tavazhi have not separated from the main branch by taking their share of Tarwad property or renouncing their interest therein, the mere acquisition of such property will not make them a separate Tarwad and the karnavan of the main Tarwad will retain all his rights and obligations towards them. The property will be the separate property of the Tavazhi and not Tarwad property and the incident of impartibility, which attaches to Tarwad property, will not attach to it. The interest of each member will be the same as in an ordinary Hindu family and will be liable to be attached and sold. If, however, any member dies without his interest being alienated in his life-time, his interest lapses to the other members and it cannot be sold. *Kunhachumma* v. *Kuttimammi Hajee*, [(1893) I.L.R., 16 Mad., 201], referred to. If property is acquired solely for the benefit of two members of a Tavazhi, they must be treated as tenants in common. They cannot be treated as a separate branch and on the death of one, the share will pass to the heir of the deceased, which according to the preponderance of authority, will be the Tarwad. The principle of joint tenancy is unknown to Hindu Law except in the case of the members of an undivided Hindu family. *Jogeswar Narain Deo* v. *Ramachendra Dutt*, [(1896) I.L.R., 23 Calc., 670], referred to.

Ummanga v. *Appadorai Patter* ... ... 34 Mad., 387

MISJOINDER:—*See* "CHARITABLE TRUSTS" 406

MISJOINDER OF CAUSES OF ACTION—*Persons whose separate rights have been infringed by a single act of another cannot join in one suit—Course to be adopted when there is a misjoinder of causes of action—Civil Procedure Code, Act V of* 1908, *s.* 99:

Where the separate right of each of several persons is affected by a single act of another person, each of such persons has a separate cause of action against such other person and they cannot bring a suit jointly against such other person. *Smurthwaite* v. *Hannay*, [(1894) A.C., 494], referred to. Where there has been a misjoinder of cause of action, which has prejudiced the defendant on the merits and no objection to such misjoinder was taken in the written statement or at the settlement of issues, the provisions of section 99 of the Civil Procedure Code Act V of 1908 will apply and the ends of justice will be sufficiently met by findings in the case of each separately, instead of dismissing the suit.

Aiyavu Muppan v. *Vellaya Nadan* ... ... 34 Mad., 55

MORTGAGEE—*Mortgagor out of possession—Equity of redemption—Gift of, in moiety of mortgaged property—Transfer of Property Act, ss.* 60, 74 *and* 91—*English Conveyancing and Law of Property Act, s.* 15:

The discharge of a mortgage merely enlarges the security of a subsequent encumbrancer or adds to the interest of the owner of the equity of redemption. Where *A* is the owner of the equity of redemption in a moiety of certain property under a gift, though the right to possession was outstanding in the mortgagee at the date of the gift, *A* is entitled to possession of the moiety on the discharge of the mortgage. Transfer of Property Act, sections 60, 74, 91, discussed and compared with the English Conveyancing and Law of Property Act, section 15.

Ponnammal v. *Kalithitha Mudali* ... ... 34 Mad., 115

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MORTGAGE DEED, MISTAKE OF FACT IN—*Knowledge of mistake by second mortgagee—Notice—Specific Relief Act I of* 1877, *s.* 31:

A second mortgagee who has advanced money with the knowledge of a mutual mistake of fact between the mortgagor and the first mortgagee as to the subject-matter of the first mortgage has notice of that mistake of fact and cannot plead that he has acquired his rights in good faith under section 31, Specific Relief Act. Where a plaint alleges a mutual mistake of fact extrinsic evidence of such mistake is admissible although no rectification thereof is prayed for. *Karuppa Goundan* alias *Thoppala Goundan* v. *Periyathambi Goundan*, [(1907) I.L.R., 30 Mad., 397], followed.

Mahadeva Aiyar v. *Gopala Aiyar* ... ... 34 Mad., 51

MORTGAGEE OF UNDIVIDED SHARE—*Effect of subsequent partition—Mortgage takes effect on substituted share:*

A mortgagee of an undivided share in common property or of one of the joint properties before partition from one of the sharers is only entitled to proceed against the substituted property which falls to the share of the mortgagor at the partition unless the partition has been unfair or in fraud of the mortgagee.

Muthia Raja v. *Appala Raja* ... ... 34 Mad., 175

MORTGAGE, SUBROGATION OF—*Undertaking to pay subsequent incumbrance rebuts presumption of intention to keep alive prior mortgage:*

Where property subject to two mortgages is sold and the purchaser who undertook to pay off both the mortgages with the purchase money, discharges the prior mortgage, only, he cannot, as against the subsequent mortgagee claim to stand in the shoes of the prior mortgagee. His right to use the prior mortgage as a shield is based on a presumed intention to keep alive the prior mortgage for his own benefit and such presumption is rebutted when he undertakes to discharge both the mortgages.

Govindasami Tevan v. *Dorasami Pillai* ... ... 34 Mad., 119

MUHAMMADAN LAW—*Guardian, powers of—Agreement not to divide* spes successionis *validity of—Agreement for management, effect of, on outstanding kanom interest:*

A, a Muhammadan father, with children, some of whom were minors executed a settlement, whereby he gave *B* one of his adult children the right of managing all his properties during his, *B's*, lifetime. The deed also provided that there was to be no division of *A's* properties during the life-time of *B*. The deed was signed by all the adult children, and by *A* on his own behalf and as guardian of his minor children. One of the properties mentioned in the deed was outstanding on kanom at the date of the deed. After *A's* death *C*, one of his adult children who had signed the deed, redeemed the kanom. *B* sued to recover possession of the property, on the ground that under the deed, he was entitled to the exclusive management thereof for his life:—*Held*, that *C* was entitled to redeem the kanom and that *B* had only a right to sue for partition of the property. Although agreements between co-owners not to divide for a reasonable time are valid, such agreements are not valid when they relate to mere *spes successionis*. The property outstanding on kanom at the date of the deed was then a mere *spes successionis* and the agreement was invalid in respect of such property. The agreement was not binding on the minor sons of *A*. Under the Muhammadan Law, the acts of a guardian will bind the ward only when urgent necessity or clear benefit to the ward are shown.

Thottoli Kotilan Aliyumma v. *Kunhammad* ... ... 34 Mad., 527

MULGENI TENURE:—*See* "LANDLORD AND TENANT" 231

PARTITION:—*See* "HINDU LAW" 368

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PARTNERSHIP—*Partner whose remedy for general account is barred may sue to recover share of item received after dissolution:*

A partner whose remedy against his co-partner for a general account is barred, can recover his share of a particular item of assets received after the dissolution of the partnership, if it be open to the defendant co-partner to ask the Court to take accounts with a view to show that the plaintiff had received more than his share in the partnership assets. *Sokkanadha Vanni Mundar* v. *Sokkanadha Vanni Mundar*, [(1905) I.L.R., 28 Mad., 344], followed.

Thiruvengada Mudaliar v. *Sadagopa Mudaliar* ... ... 34 Mad., 112

PENAL CODE, ACT XLV OF 1860, ss. 296, 39—*Public worship, disturbance of—"Voluntarily," meaning of:*

It is not necessary for the purpose of section 296, Indian Penal Code, that the accused should have an active intention to disturb religious worship. It is sufficient, if knowing they were likely to disturb it by their music they took the risk and did actually cause disturbance. It is an offence under section 296, Indian Penal Code, to pass a mosque with music so as to disturb religious worship carried on during hours notified therefor. Section 79, Penal Code, cannot be pleaded in such a case. *Muthial Chetti* v. *Bapan Saib*, [(1878) I.L.R., 2 Mad., 140], followed. *Sundaram* v. *The Queen* and *Ponnusawmy* v. *The Queen*, [(1883) I.L.R., 6 Mad., 203], followed.

The Public Prosecutor v. *Sanku Seethiah* ... ... 34 Mad., 92

2.——————————, s. 339—*Wrongful restraint, what necessary to constitute:*

The accused placed a lock on the outer door of complainant's house intending to prevent and thereby preventing his ingress:—*Held*, that the offence of wrongful restraint was established although the accused were not physically present to enforce the obstruction. There is nothing in section 339, Criminal Procedure Code, which requires the physical presence of the obstructor at the moment of prevention.

Arumugakadar v. *Emperor* ... ... 34 Mad., 547

POSSESSION:—*See* "CRIMINAL PROCEDURE CODE, s. 145" 138

POSSESSION, NATURE OF, NECESSARY TO PROVE LOST GRANT OR TITLE BY ADVERSE POSSESSION—THE MADRAS FOREST ACT V OF 1882, ss. 3, 16, 25—*Notification under s. 25 of reservation made before the Act extinguishes all rights existing at time of reservation:*

Whether enjoyment is set up as the basis of a title by prescription or as evidence on which a lost grant should be presumed, the same characteristics will be necessary. Acts done on parts of a tract of land will only be evidence of possession of the whole where the said tract of land possesses a defined boundary. *Sivasubramanya* v. *Secretary of State for India*, [(1886) I.L.R., 9 Mad., 285 at pp. 304 and 305], referred to. The intention of the legislature in enacting section 25 of the Madras Forest Act is to place all forests reserved by executive order prior to the introduction of the Act on precisely the same footing as reserves subsequently constituted in accordance with the provisions of the Act. The intention was that the notification under section 25 should operate in exactly the same manner as one under section 16 to which section 17 is a mere corollary. The further inquiry provided for in section 25 is purely discretionary with Government. Where a reservation made prior to the Act is notified under section 25 of the Act, such notification extinguishes any right existing at the time of reservation whether the lands were within section 3 of the Act, at the disposal of Government or not at the time of reservation. Where the reservation is made under section 16, the section provides a mode of redress to the party, while section 25 gives none as the further inquiry provided therein is merely discretionary with the Government.

ubramania Pillai v. *The Secretary of State for India* ... . 34 Mad., 353

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PRESCRIPTION, PROOF OF ACQUISITION OF TITLE BY—*Acts necessary to prove prescriptive right as trustee of tank—Such right not acquired by acts of conservancy, maintaining and repairing, etc.:*

A prescriptive right as trustee of a tank, the common property of a village, cannot be acquired by performing acts of conservancy, clearing and maintaining the tank, building flights of steps, sluices, etc., enjoying the fruits of trees in the bund, selling withered trees and similar acts. *Muthayya* v. *Sivaraman*, [(1883) I.L.R., 6 Mad., 229], followed. *Sivaraman Chetty* v. *Muthayyan Chetty*, [(1889) I.L.R., 12 Mad., 241 at p. 248], followed.

Karuthan Chetty v. *Kalimuthan* ... ... 34 Mad., 323

PROBATE, APPLICATION FOR—*Party entitled to object to grant—Attaching creditor has interest sufficient to oppose grant:*

Where an application is made for the grant of probate of the will of *A* a judgment creditor of *A's* son who in execution has attached the son's interest in the property of his deceased father, has an interest sufficient to justify him in opposing the grant.

Arakal Bastian Ansap v. *Narayana Aiyar* ... ... 33 Mad., 405

PROVINCIAL SMALL CAUSE COURTS ACT IX OF 1887, s. 1 (f)—*Security on application for order to set aside ex-parte decree—Limitation Act XV of 1877, Schd. II, art. 164—Notice under s. 248, Civil Procedure Code, Act XIV of 1882—Execution of process:*

When security is not deposited under section 17 of Act IX of 1887, until after the application to set aside the *ex-parte* decree is disposed of, the hearing of the application must be held to have been barred. But where no objection is taken on this ground at the hearing, the High Court will not set aside the order in revision. *Ramaswami* v. *Kurisu*, [(1890) I.L.R., 13 Mad., 178], explained. A process is executed when notice under section 248, Civil Procedure Code (Act XIV of 1882), has been served and limitation under schedule II, article 164 of the Indian Limitation Act will run from the date of service of such notice. *Bimola Soonduree Dasee* v. *Kalee Kishen Meojoomdar*, [(1874) 22 W.R., 5], followed.

Suryanarayana v. *Ramamma* ... ... 34 Mad., 88

RATABLE DISTRIBUTION—*Application for, not considered to be application for execution—Attachment before judgment is not application for execution—Decree-holder—No right to ratable distribution unless he has applied for execution:*

Only a decree-holder who has applied for execution can claim a right to ratable distribution. Such a right is not conferred upon a plaintiff who has merely obtained an attachment before judgment and has not applied for execution under section 230, Civil Procedure Code. *Amara Veerayya* v. *Annamala Chetty, Pichayya and others*, [(1908) I.L.R., 31 Mad., 502], overruled. An attachment before judgment is in no sense an application for execution. A mere application for ratable distribution which does not comply the requirements of section 235 in form or substance cannot be considered to be an application for execution within the scope of section 295, Civil Procedure Code. *Sewdut Roy* v. *Sree Canto Maity*, [(1906) I.L.R., 33 Calc., 638], distinguished. *Palonji Shapurji Mistry* v. *Edward Vaughan Jordan*, [(1888) I.L.R., 12 Bom., 400], followed.

Arunachellam Chettiar v. *Haji Sheek Meera Rowther* ... ... 34 Mad., 24

REGISTRATION ACT III OF 1877, ss. 3, 17—*Document creating right to benefits to arise out of land compulsorily registrable—Evidence, such document not admissible in, if unregistered—Possession under such document only:*

First defendant obtained possession of certain lands under an unregistered instrument which gave him the right to apportion future rents (over Rs. 100 in value) towards an antecedent debt due to him:—*Held*, that the instrument created a right to benefits to arise out of land and was compulsorily registrable under section 17, Indian Registration Act.

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Venkaje Babaji Naik v. *Shidramapa Bilapa Desai*, [(1895) 19 Bom., 663], followed. *Misri Lal* v. *Mozhar Hussain*, [(1886) 13 Calc., 262], distinguished. *Bansidhar* v. *Sant Lal*, [(1888) 10 All., 133], distinguished. Such a document if not registered cannot be admitted in evidence. Where defendant's possession arose only out of such an unregistered document he cannot otherwise prove that he was not a trespasser.

Mangalaswami v. *Subbia Pillai* ... ... 34 Mad., 64

——————————, s. 17, cl, (*d*)—*Reservation of annual rent not necessary to bring the document within proviso to clause (d) of s. 17:*

In order to exempt a lease from Registration under the proviso to clause (*d*) of section 17 of the Registration Act, it is not necessary that an annual rent should be reserved. The proviso simply means that if an annual rent is reserved, it should not exceed fifty rupees.

Venkatasami Chetti v. *Suppa Pillai* ... ... 34 Mad., 90

RELIGIOUS ENDOWMENTS ACT XX OF 1863, ss. 7, 10—*Constitution of Committee under—Validity of acts done by incomplete committee:*

One of a committee of three members appointed under section 7 of Act XX of 1863 (Religious Endowments Act) died and the vacancy thus caused was not filled up in accordance with section 10 of the Act. The remaining two members purported to perform the functions of the committee:—*Held*, that the remaining two members cannot be said to be a committee at all and cannot perform any of the functions of the original committee. *Per* THE CHIEF JUSTICE.—Sections 7 and 10 of the Act are imperative or obligatory and not merely directory. The law governing corporate bodies with regard to the capacity of the members of the corporate bodies to act is not applicable to the case of the statutory body appointed under section 7 of the Religious Endowments Act. *The King* v. *Bellringer*, (4 T.R., 810 and 100 Eng. Rep. 1315), distinguished. *Per* ABDUR RAHIM, J.—The intention of the Legislature is that a committee appointed under the Act shall not consist of less than the number originally appointed. *Anantanarayana Ayyar v. Kuttalam Pillai*, [(1899) I.L.R., 22 Mad., 481], distinguished.

Santhalva v. *Manjanna Shetty* ... ... 34 Mad., 1

RENT RECOVERY ACT (MADRAS) VIII OF 1865—*Tenant, who is—Transfer puts an end to holding without notice to landlord—Tenant at the beginning of fasli is tenant for the fasli, notwithstanding subsequent transfer:*

A transfer of the holding by the tenant puts an end to the tenancy without notice to the landlord, unless the tenant under certain circumstances is estopped from denying its continuance. There is nothing in the Rent Recovery Act to warrant a contrary view. A tenant who is a tenant at the beginning of the fasli continues to be the tenant for the fasli, notwithstanding a subsequent transfer of the holding, and is liable to be proceeded against under the Rent Recovery Act.

Ramasawmi Ayyangar v. *Shunmugam Pillai* ... ... 34 Mad., 179

REPUDIATION OF WILL:—*See* "JURISDICTION" 257

RES JUDICATA—*Cause of action, how to be determined—Civil Procedure Code, Act XIV of 1882, s. 103—Bar of suit under s. 158—Scope of:*

The plaintiff in the present suit sued one Srinivasa Aiyar in Original Suit No. 7 of 1892 for on the ground that he was prevented from entering on his property and prayed for an injunction restraining the said Srinivasa Aiyar from obstructing plaintiff. In the present suit plaintiff sued the successors in title of Srinivasa Aiyar alleging that Srinivasa Aiyar wrongfully got into possession prior to his filing Original Suit No. 7 of 1892 and prayed for a declaration of title and possession:—*Held*, that the present suit was barred as *res judicata*. Where the causes of action are substantially the same, the form in which they are stated or the difference in the frame of the relief will not affect the question. *Haji Hasam Ibrahim* v. *Mancharam Kaliandas*, [(1879) I.L.R., 3 Bom., 147], followed. *Jibanti*

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Nathkhan v. *Shib Nath Chakerbatty* [(1882) I.L.R., 8 Calc., 819], distinguished. A Court is not precluded from comparing the issues in the two cases and from considering what the plaintiff had to prove or undertook to prove in either case, in considering whether the causes of action are identical. *Chand Kour* v. *Partab Sing*, [(1889) I.L.R., 16 Calc., 98], explained. Where in a suit at an adjourned hearing neither the plaintiff nor his pleader appears, the case may be dealt with under section 158 of the Civil Procedure Code, 1882. There is nothing in the language of that section which precludes its application to such a case. *Srimant Sagajirao* v. *Smith*, [(1896) I.L.R., 20 Bom., 736], dissented from.

Naganada Aiyar v. *Krishnamurti Aiyar* ... ... 34 Mad., 97

RES JUDICATA:—*See* "CIVIL PROCEDURE CODE (ACT V OF 1998), s. 47, ORDER XXI, RULES 95, 98" 450

REVENUE RECOVERY ACT (MADRAS) II OF 1884, ss. 2, 5, 42—*Provisions of s. 42 not confined to land on which the arrears become due—Land mortgaged by defaulter does not cease to be his property:*

Land belonging to the defaulter does not, because mortgaged by him, cease to be his property within the meaning of section 5 of Act II of 1864. There is nothing in section 2 or 5 to restrict the land that may be sold thereunder to the land in which the arrears of revenue have accrued. When therefore land belonging to the defaulter is sold for arrears accruing due on other lands belonging to him, the sale under section 42 of the Act is free of all encumbrances.

The Secretary of State for India v. *Pisipati Sankaraya* ... ... 34 Mad., 493

STREAM, WHAT IS.—*See* "THE MADRAS IRRIGATION CESS ACT, s. 2" ... 295

SUCCESSION ACT X OF 1865, ss. 190, 191 and 239—ACT VII OF 1901—*Grant of letters does not vest property of deceased in the administrator as from the date of death—Heirs of intestate Native Christian entitled to deal with their shares until grant of letters:*

The effect of section 191 of the Indian Succession Act is not to vest the property of the deceased in the administrator as from the date of death. Subsequent to the passing of Act VII of 1901, which made sections 190 and 239 of the Succession Act inapplicable to Native Christians, the heirs of intestate Native Christians, have the power to deal with their shares in the property of the deceased until the grant of administration and their transactions in respect of such shares will not be made invalid by the subsequent grant. The property of the deceased vests in the administrator only at the time of the grant, though for certain purposes the grant may relate back to the death of the deceased.

Antony Cruz Gonzolves v. *Makie Boopalrayan* ... ... 34 Mad., 395

SURVEYS AND BOUNDARIES ACT IV OF 1897, s. 12—*Lease—Land with shifting boundaries—Damages—Lessee, rights of:*

Where the boundaries of land to be leased are of a shifting character, the prospective lessee is entitled to rely upon the area stated in the lease and to be put into possession of an area which approximates to that which is mentioned in the lease. *Raja Durga Prasad Singh* v. *Rajendra Narain Bagchi*, [(1909) 10 C.L.J., 570], applied. Where the lessor is unable to put the lessee into possession of the area stipulated in the lease, he is liable to compensate the lessee by way of damages. Where the alteration to the land takes place after the lessee has been put into possession, the rule would be different.

Pemmarazu Venkiah v. *The Secretary of State for India* ... .. 34 Mad., 108

SURVEY AND BOUNDARIES ACT (MADRAS), ACT IV OF 1897, ss. 13, 24, 25—*"Date of decision" for purposes of limitation is the date when it is communicated to the parties:*

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The starting point of limitation for an appeal by way of a suit against a final decision under section 24 of Act I of 1897 is the 'date of decision' under section 13. The date of the decision is the date when the decision is passed; and the decision cannot be said to be 'passed' until it is in some way pronounced or published under such circumstances that the parties affected by it have a reasonable opportunity of knowing what it contains. Till then though it may be written, signed and dated, it is only the decision which the officer intends to pass. It does not however follow that in all cases the decision under section 24 must be considered to be passed on the day on which the information required by the section reaches the party to whom it has to be given. The officer may give the parties sufficient notice of the day on which he will pass his decision, to enable them, if they choose, to be present and hear his decision; and limitation will commence from such date, if the decision is announced, though the parties may not be present. That is the date of communication though the parties may not care to listen. If, however, the decision is published by sending copies to the parties, the date of communication will be different. It will not necessarily be the date in which the copy actually comes into the hands of the party.

Secretary of State for India in Council v. *Gopisetti Narayanaswami Naidu* ... ... 34 Mad., 151

SURVIVORSHIP:—*See* "MARUMAKATAYAM LAW" 387

SUSPENSE ACCOUNT:—*See* "INSOLVENCY" 125

TENDER:—*See* "INTEREST" 320

TENANT:—*See* "RENT RECOVERY ACT" 179

TITLE, PROOF OF:—*See* "CRIMINAL PROCEDURE CODE, s. 145" 138

TRANSFER OF PROPERTY ACT IV OF 1882—*Vendee's right to possession against unpaid vendor—Vendor only entitled to Statutory charge:*

The provisions of the Transfer of Property Act that the vendee after conveyance is entitled to possession and that the vendor has a statutory charge on the property for unpaid purchase money are clear and it is not competent to the Courts in a suit for possession by the vendee, to pass a decree for possession conditional on the vendee paying the balance of the purchase money. *Baij Nath Singh* v. *Paltu*, [(1908) I.L.R., 30 All., 125], not followed.

Velayutha Chetty v. *Govindasamy Naiken* ... ... 34 Mad., 543

TRANSFER OF PROPERTY ACT IV OF 1882, s. 43—*Benefit of section can be claimed only by person who has acted on the erroneous representation of another:*

The benefit of section 43 of the Transfer of Property Act can be claimed only where the person claiming such benefit has acted on the erroneous representation of the party whose subsequently acquired interest he claims. An undivided Hindu father had two sons *A* and *B*. *A*, who was entitled only to one-third of the family property, mortgaged one-half of it to *C*, who knew that *A* was entitled only to one-third and did not bargain and pay for a half share. Subsequently *A's* father died and *A* having become entitled to a half share, *C* sued on his mortgage seeking to make *A's* half share liable:—*Held*, that he could enforce his mortgage only against the one-third share which belonged to *A* at time of mortgage.

Pandiri Bangaram v. *Karumoory Subbaraju* ... ... 34 Mad., 159

2. ——————————, s. 45;—*See* "JOINT TENANCY" ... 80

3. ——————————, ss. 60, 74, 91;—*See* "MORTGAGE" 115

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4. ——————————, s. 100—*Construction of document—Charge created where words though wide are definite:*

Where by a document 'the properties', of one of the parties are made liable and it appears on the construction of the document that the word 'properties' does not mean the properties of such party generally but certain specific properties, a charge will be created on such specific properties alone. A distinction must be drawn between wideness and indefiniteness of language. *Bheri Dorayya* v. *Moddi Patu Ramayya*, [(1881) I.L.R., 3 Mad., 35], considered.

Manickam Pillai v. *Audinarayana Pillai* ... ... 34 Mad., 47

5. ——————————, s. 134—*See* "DEBT, HYPOTHECATION OF" 53

UNASSESSED GOVERNMENT WASTE—*Right of pasture on, not to exclude owner's right to possession—Acts necessary to obtain prescriptive title:*

There are no statutory provisions in the Madras Presidency as in Bombay with reference to the grazing rights of villagers over adjoining Government waste. The right of pasture on unassessed waste cannot exclude the owner's right to possession and enjoyment of the property over which such a right may exist. *Ram Saran Singh* v. *Birgu Singh*, [(1897) I.L.R., 19 All., 172], referred to. *Secretary of State for India* v. *Mathmabhai*, [(1890) I.L.R., 14 Bom., 213 at p. 221], distinguished.

Gorijala Pitchi Naidu v. *Vallur Veeriah* ... ... 34 Mad., 58

VOLUNTARY PAYMENT:—*See* "MADRAS IRRIGATION CESS ACT, s. 2" ... 295

WAIVER:—*See* "LANDLORD AND TENANT" 161

WILL—*Executor acting under—Executor setting up adverse title—Estoppel:*

An executor under a will who has accepted the office of executor and acted as such is estopped thereby from setting up an adverse title to property disposed of by the will. *Srinivasa Moorthy* v. *Venkata Varada Ayyangar*, [(1906) I.L.R., 29 Mad., 239], followed. *Per* the CHIEF JUSTICE.—The fact that an executor has not taken out probate (at any rate where the law does not require him to do so) is immaterial. *Per* WALLIS, J.—An executor is not at liberty to set up an adverse title to property which has come to his hands as executor any more than a trustee is entitled to set up an adverse title to property which he has taken possession of as trustee. The plaintiff's position was altered by his looking on and not opposing the first defendant in the steps taken by the latter to get possession of the assets. The fact that an executor has not taken out probate is immaterial. *Per* MILLER, J. (dissenting).—It is not clear in this case as it was in *Srinivasa Moorthy* v. *Venkata Varada Ayyangar* [(1906) I.L.R., 29 Mad., 239], that the executor was let into possession under the will nor in this case was the plaintiff induced to alter his position; the principles of estoppel do not therefore apply.

Munisami Chetti v. *Maruthammal* ... ... 34 Mad., 211

THE

INDIAN LAW REPORTS,

Madras Series.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Abdur Rahim.

1919.
February 21.

SANTHALVA (PLAINTIFF), APPELLANT,

v.

MANJANNA SHETTY (DEFENDANT), RESPONDENT.*

Religious Endowments Act XX of 1863, ss. 7 and 10—Constitution of Committee under—Validity of acts done by incomplete committee.

One of a committee of three members appointed under section 7 of Act XX of 1863 (Religious Endowments Act) died and the vacancy thus caused was not filled up in accordance with section 10 of the Act. The remaining two members purported to perform the functions of the committee:

Held, that the remaining two members cannot be said to be a committee at all and cannot perform any of the functions of the original committee.

Per THE CHIEF JUSTICE.—Sections 7 and 10 of the Act are imperative or obligatory and not merely directory.

The law governing corporate bodies with regard to the capacity of the members of the corporate bodies to act is not applicable to the case of the statutory body appointed under section 7 of the Religious Endowments Act.

The King v. *Bellringer*, (4 T.R., 810 and 100 Eng. Rep., 1315), distinguished.

Per ABDUR RAHIM, J.—The intention of the legislature is that a committee appointed under the Act shall not consist of less than the number originally appointed.

Anantanarayana Ayyar v. *Kuttalam Pillai* [(1899) I.L.R., 22 Mad., 481], distinguished.

APPEAL against the decree of H. O. D. Harding, District Judge of South Canara, in Original Suit No. 24 of 1906.

* Appeal No. 65 of 1906.

WHITE, C.J., AND ABDUR RAHIM, J.

SANTHALVA v. MANJANNA SHETTY.

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

P. R. Sundara Ayyar and *B. Sitarama Rao* for appellant.

J. L. Rosario and *K. P. Madhava Rao* for respondent.

JUDGMENT (THE CHIEF JUSTICE).—The main question raised in this appeal is no doubt one of great importance and so far as we know, the question in this precise form has never come before the courts for determination. But as we had the benefits of hearing the question fully argued by Mr. Sundara Ayyar, and as we have made up our minds with regard to it, we do not think any advantage is to be gained by further consideration of the point. The question is whether the appointment of a trustee of a temple which is made by two members of a temple committee who purported to act on the committee, although they were only two out of the three trustees originally appointed there, there being only two members of the committee at the time the appointment was made, is good. The learned District Judge has held that it is not and I think that he is right. Section 7 of the Act of 1863 provides that "the Local Government" in certain circumstances, is once for all to appoint a committee to exercise the powers of the Board of Revenue and the local agents under the Regulations which were repeated by the Act. The section goes on to enact that the committee shall consist of three or more persons and subject to an exception shall perform all the duties imposed on the Board of Revenue and the local agents. Section 10 provides that whenever a vacancy occurs among the members of a committee so appointed a new member shall be elected to fill the vacancy by the persons interested. It enacts that the remaining members of the committee shall, as soon as possible, give public notice of the vacancy and shall fix a day which shall not be later than three months from the date of the vacancy for an election of a new member by the persons interested. The section further provides that if a vacancy is not filled up by such election within three months after it has occurred the Civil Court on the application of any person whatever, may appoint a person to fill the vacancy or may order that the vacancy be forthwith filled up by the remaining members of the committee, and if the order be not complied with, the Civil Court may appoint a member to fill the said vacancy. The effect of these two provisions, therefore, is that the surviving members must act so that the date of the election shall be fixed

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not later than three months from the date of the vacancy. If they do not so act their powers of election are gone, and then, unless the Civil Court takes proceedings on the application of somebody and appoints a person, there is no power to fill up the vacancy. Now the first point raised by Mr. Sundara Aiyar was this, the law required that the original committee appointed by the Local Government should consist of three members and he did not contend that an appointment by the Local Government, of a committee which consisted of less than three members would be a good exercise of the powers given them by the Act or would be a good appointment of a committee. But he argued when once we have an original appointment of three by the Local Government, then the fact that a vacancy is not filled up in pursuance of the provisions of section 10 does not incapacitate the surviving members from exercising the powers referred to in section 7 of the Act. In other words, he contended that so long as the original appointment of the committee consisted of three, the committee consisting of two of the surviving members was a good committee and could exercise the powers conferred by the Act. Now, the logical conclusion of that argument of course is, as Mr. Sundara Aiyar conceded, that a committee which had been reduced in number to one would be a body capable of discharging the powers conferred by the Act, and that is a somewhat startling proposition. It seems to me the question whether provisions of this sort are obligatory and imperative or are merely directory must be determined with reference to the words of the particular enactment or the particular settlement in which they occur. Mr. Sundara Aiyar has contended that the provisions are directory. It seems to me, in construing the two sections of the Act together, that they must be read as imperative or obligatory. Then Mr. Sundara Aiyar's second contention was that in this case we have an original appointment of three which is good and we have two surviving members and these two surviving members constitute the majority of the original three. He contended that inasmuch as if there had been three members still forming the committee a quorum of a meeting of two could exercise the powers of the committee, it followed that the two surviving members of the committee notwithstanding the fact that one is dead could exercise the powers given to the committee. I am not prepared to accept that contention. In support of it, Mr. Sundara

WHITE, C.J., AND ABDUR RAHIM, J.

SANTHALVA v. MANJANNA SHETTY.

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Aiyar referred to the principles of the law which governed the question of the validity of the acts done by the members of a corporate body and he referred us to the case of *The King* v. *Bellringer*(1). In that case it was held that "where a charter required that the major and common clerk for the time being and the common council for the time being, or the major part of them, should elect; and the common council was a definite body, consisting of 36, it was held that a majority of the whole member must meet to form an elective assembly; and that if the corporation be so reduced as that so many do not remain, no election can be had at all." All that was decided in that case was that in the case of a corporate body where the number of the corporators is so reduced that, having regard to the original number, a majority is not available, the corporation cannot act as a corporate body. Mr. Sundara Aiyar's proposition is the converse proposition that so long as there is a sufficient number of the corporators to form a majority of the corporators having regard to the original number of the corporators, then the surviving members can act as a corporate body and he says that for the purpose of determining the question raised in this appeal we must apply that principle to this case; he referred us to an observation made by the learned Judges who decided the case of *Anantanarayana Aiyar* v. *Kuttalam Pillai*(2). That was a case which arose under the Act now in question and the observation is as follows: "Though committees constituted under the Act are not strictly corporations there can be no doubt that, with reference to the matter in hand, such committees ought to be looked upon in the light of, and be governed by the rules applicable to, regular corporations." It is a guarded observation and it was made with reference to the matter in hand. Now what was the matter in hand? In that case a committee had been validly constituted under the Act of 1863 consisting of seven. A meeting was held, the committee, at the time the meeting was held, being a full and complete committee. At the meeting five were present and a resolution was unanimously passed that at future meetings three should form a quorum. A future meeting of the committee of which due notice had been given to all the members of the

(1) 4 T.R., 810; S.C., 100 Eng. Rep., 1315.
(2) (1899) I.L.R., 22 Mad., 481.

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committee was held and at that meeting three members of the committee attended and those three members duly passed a resolution and that resolution was held by the Court in the case of *Anantanarayana Aiyar* v. *Kuttalam Pillai*(1) binding on the committee. That was all that was decided in that case. It seems that there the learned Judges were dealing with a question of procedure; and what they meant to lay down was that on questions of procedure, the statutory committee appointed under the Act of 1863 must be deemed to have the same powers as a corporate body. I do not think the learned Judges intended to go beyond that. I certainly cannot accede to the suggestion that the law governing corporate bodies with regard to the capacity of the members of the corporate bodies to act which is laid down, amongst other places, in a passage in Bacon's Abridgment, Volume II, page 285, to which Mr. Sundara Ayyar, referred is applicable to the case of the statutory body appointed under the Act of 1863. With regard to this question I think the District Judge's decision is correct and I would dismiss this appeal with costs. It is not necessary for us to consider the other points raised in the appeal.

ABDUL RAHIM, J.—I quite agree in the judgment proposed by the learned Chief Justice. But as the question is one of importance and is not covered by any decision to which we have been referred, I think I ought to state my reasons. It seems to me that reading sections 7 and 10 of the Religious Endowments Act together, there can be very little doubt that the legislature requires that the committee which is vested with the power formerly exercised by the Board of Revenue should consist of the same number as were originally appointed by the Local Government. The Government, it is conceded, cannot appoint a committee consisting of less than three members. That I take it is clear from section 7. The section 10 says that whenever there is a vacancy in the committee, it is to be filled by an appointment made by the remaining members of the Committee, who are to take steps for this purpose within three months of the occurrence of the vacancy. If they fail to take such steps, the Civil Court is then empowered to make the appointment or to direct the Committee to make the appointment. There cannot thus be any doubt that the

(1) (1899) I.L.R., 22 Mad., 481.

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legislature contemplated that the original number of members must exist for the purpose of exercising the powers of the Committee under the Act. Great stress has been laid by Mr. Sundara Ayyar on the inconvenience that might be caused in the management of institutions if the surviving members of the Committee be held to be incompetent to act as the Committee during the pendency of the appointment. Supposing there would be some inconvenience, that, in itself, would not justify us in placing an interpretation upon the enacting provisions of the Act other than what is called for by their plain language. But it may be said that considering that the Committee are merely a supervising authority and as there is always to be a trustee or manager or superintendent to carry on the business of the institution, the inconvenience caused, if any, would not be considerable. The fact that the remaining members of the Committee are required to act with promptitude while it shows that the legislature was alive to the possibility of inconvenience arising in the interval also indicates the intention of the legislature to be that the committee shall not consist of less than the number originally appointed. We have been referred to the English rule relating to Corporations. But it appears to me that, so far as the present question is concerned, we cannot derive much help from the analogy of Corporations. The rule that has been referred to is that if the number of corporators does not fall below the majority of the original number of corporators, the corporation exists and can exercise the powers conferred on it by its charter. Reliance has also been placed on the case in *Ananthanarayana Aiyar* v. *Kuttam Pillai*(1) where it was decided that a quorum of three members fixed by a resolution of the Committee can exercise the powers of the Committee. This decision relates to a mere rule of procedure or the mode in which the Committee supporting it is constituted as required by the law, is to transact its business; but here the question is whether two members of a Committee which originally consisted of three members—the least number required by the law—but the vacancy in which has not been filled, can validly exercise the powers of the Committee. The two remaining members, as I read Act XX of 1863, cannot be said to be the Committee at all and the

(1) (1899) I.L.R., 22 Mad., 481.

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appointment by them of the plaintiff as the mokhessor or trustee must therefore be held to be invalid. The suit has been rightly dismissed and I agree that the appeal should be dismissed with costs.

APPELLATE CIVIL.

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

1910. January 7, 10. February 18.

RANEE ANNAPURNI NACHIAR (FIRST DEFENDANT), APPELLANT,

v.

SWAMINATHA CHETTIAR AND OTHERS (PLAINTIFFS Nos. 1 TO 3, DEFENDANTS Nos. 2, 3 AND 4 AND THE L.R. OF SECOND DEFENDANT), RESPONDENTS.*

Maintenance—Widow's right to transferable property—Right not one falling within s. 6, Transfer of Property Act—Validity of transaction not governed conclusively by Act—Civil Procedure Code, s. 266—Contract Act, IX of 1872, s. 16—Undue influence.

A right to future maintenance is not an interest in property restricted in its enjoyment to the owner personally within the meaning of paragraph (*d*) of section 6 of the Transfer of Property Act; either is it property within the enabling words of section 6 of that Act. The fact that the transfer of such an interest is not recognised by the Transfer of Property Act is not conclusive on the question of its validity. Where the amount payable is subsequently fixed by agreement or by decree a transfer of such an interest may be valid.

Urgent need of money on the part of a borrower does not of itself place the lender in a position to "dominate his will" within section 16 of the Contract Act. Nor on the other hand will the fact that the borrower acted under advice preclude her asking for relief on the ground of undue influence.

Where the executant of a document was a poor widow who entered into a contract with a money-lender to enable her to establish her right to maintenance: *Held* that under sub-section 3 of section 10 of the Contract Act the burden is on the plaintiff to prove that the contract was not induced by undue influence.

APPEAL against the decree of K. Ramanatha Aiyar, Subordinate Judge of Tinnevelly, in Original Suit No. 1 of 1907.

This suit was brought to recover the principal amount due under a bond for Rs. 1,500, under which the first defendant hypothecated to the plaintiffs all her claims to past and future maintenance, together with Rs. 4,322-2-3 for interest, in all

* Appeal No. 109 of 1908.

WHITE, C.J., AND MUNRO, J.

RANEE ANNAPURNI NACHIAR v. SWAMINATHA CHETTIAR.

Rs. 5,822-2-3. The plaintiffs asked for the appointment of a receiver to collect for them the amounts hypothecated and for a decree ordering the sale of the hypotheca in realization of the debt.

The first defendant admitted the execution of the bond but pleaded that it was obtained by the plaintiffs' agent by coercion and undue influence. She further contended that the hypothecation of her claim for future maintenance was illegal and unenforceable.

The second defendant claimed a similar right to that now claimed by the plaintiffs alleging that they had already obtained a decree with respect thereto.

Third and fourth defendants were *ex parte*. The Subordinate Judge passed a decree in favour of the plaintiffs for the sale of the hypotheca and against the first defendant personally for any balance that might be due after the sale.

He held with regard to the plea of coercion and undue influence that illustration (*d*) to section 16 of the Indian Contract Act applied to the case and that there was no undue influence.

He also held that the hypothecation by the first defendant of her claim to future maintenance was not illegal. Such a right not being a mere chance or contingency of succeeding to the property but one which was certain during first defendant's lifetime he held that it could not be said to fall under the exception clause (*a*) of section 6 of the Transfer of Property Act.

The Hon. The Advocate-General and *S. Gopalaswami Ayyangar* for appellant.

K. Srinivasa Ayyangar for respondents Nos. 1 to 3.

JUDGMENT.—Two points have been taken in this appeal (1) that a right to future maintenance is not transferable and that, consequently, the mortgage by the first defendant to the plaintiffs of her right to future maintenance is ineffective, and (2) that the contract was induced by undue influence.

As regards the first point, we are of opinion, that a right to future maintenance is not an interest in property restricted in its enjoyment to the owner personally within the meaning of paragraph (*d*) of section 6 of the Transfer of Property Act. Our attention was called to an observation in Shephard and Browne's Commentaries on the Transfer of Property Act, 6th edition, page 45, occurring in the notes to paragraph (*d*) where the learned authors observe that it seems clear that a widow's right to future maintenance cannot be made the subject of a sale or other transfer

WHITE, C.J., AND MUNRO, J.

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by her since it exists for her personal benefit only, and they further observe that it may be doubted whether she could lawfully transfer her interest in property allotted to her for her maintenance. In the two cases, however, which the learned authors cite with regard to the latter observation the question was one of the right of attachment with reference to the provisions of section 266 of the Code of Civil Procedure. We do not think that a right to future maintenance is property within the enabling words of section 6 of the Transfer of Property Act, or an interest in property restricted in its enjoyment to the owner personally within the meaning of paragraph (*d*) consequently, as it seems to us, this question must be considered apart from the provisions of the Transfer of Property Act. The fact that the transfer is not recognised by the Transfer of Property Act is not conclusive on the question of its validity. See *Palaniappa* v. *Lakshmanan and others*(1). As regards the cases there is, so far as we know, no authority on the point, except an observation in *Bhyrul Chunder Ghose and another* v. *Nubo Chunder Gooho and others*(2) where the question for determination was whether a widow's right to maintenance could be sold in execution of a decree, an observation by West, J., in *Narbada Bai* v. *Mahadeo Narayan Kashinath Narayan and Shama Bai*(3) citing 5 W.R., 111, *Mussamut Duloon Koonwur* v. *Sungum Singh and others*(4) and *Monessur Doss* v. *Maharaja Kishen Protab Shahee and another*(5) which were also cases of attachment. As regards the right to attach, the question is now governed by section 266 of the Code of Civil Procedure. The enactment in the Code of Civil Procedure that a right to future maintenance should not be liable to attachment is presumably based on grounds of public policy. Section 266 was enacted in the same year as the Transfer of Property Act. It may be that voluntary alienations of rights for future maintenance should be prohibited as well as the taking of such rights in execution. The legislature has not thought fit to prohibit them. We are not prepared to say that, at any rate where as here, the amount payable is subsequently fixed by agreement or by decree, a transfer of a widow's right to maintenance from her late husband's estate is inalienable.

(1) (1893) I.L.R., 16 Mad., 429 at p. 434.
(2) (1866) 5 W.R., 111.
(3) (1881) I.L.R., 5 Bom., 99 at p. 104.
(4) (1867) 7 W.R., 311.
(5) (1875) 23 W.R., 427.

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RANEE ANNAPURNI NACHIAR v. SWAMINATHA CHETTIAR.

As regards the second point, the question must be considered, not with reference to doctrines of equity, but with reference to the amended section 16 of the Contract Act only. See the judgment of the Privy Council in *Dhanipal Das and another* v. *Maneshar Baksh Singh*(1). In the case before us the rate of interest payable under the deed on the advance of Rs. 1,500 is 100 per cent. The principal and interest are to be repaid in a year, and in default of payment interest on principal and interest at compound rate 1 per cent. a month with 6 months' rests, is payable. The fact that the bargain was a hard one is of course no ground in itself for granting relief and urgent need of money on the part of the borrower does not of itself place the lender in a position to "*dominate his will*" within the meaning of section 16 of the Contract Act as amended in 1899. *See Sundar Koer* v. *Rai Sham Krishen*(2). The question is "were the relations between the parties such that one of the parties was in a position to dominate the will of another." We think "relations" means not only the personal relations but the circumstances in which the contract was entered into. Here we have a contract between a money-lender and a widow entered into for the purpose of enabling the widow to establish her right to maintenance. The widow's evidence, which does not seem to have been shaken in cross-examination, was that she was in a very poor state when she executed the document, and that her husband died 10 years before and that she had no means for maintenance in the interval. The transaction was no doubt completed though a vakil who, in a sense, may be said to have advised the widow, but the fact that she acted under advice does not, in our opinion, preclude her from asking for relief on the ground the contract was induced by undue influence, or the Court from exercising the jurisdiction given by section 19-A of the Contract Act. Although it is no longer open to us to deal with this case on equitable grounds, apart from the statute, the cases decided before the amendment of the Contract Act may be referred to as throwing light on the question as to what circumstances will give rise to relations which place one party to a contract in a position to dominate the will of the other party. We do not propose to discuss all the authorities cited in argument. We need only refer to the decisions of the Privy Council in *Raja Mohkam*

(1) (1906) I.L.R., 28 All., 570 at p. 583. (2) (1907) I.L.R., 34 Calc., 150 at p. 153.

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Singh and others v. *Raja Rup Singh and others*(1) before the amendment of the Contract Act and to *Manesher Bakhsh Singh* v. *Shadi Lal and others*(2) since the amendment of the Contract Act, where agreements were held to be not enforceable. The facts of the present case, it seems to us, raise a case for relief at least as strong as those in the cases to which we have referred.

We hold then, on the evidence, that the plaintiff was in a position to dominate the will of the defendant. We also hold that the bargain on the face of it and on the evidence was unconscionable. We think illustration (*c*) to section 16 of the Indian Contract Act applies and not illustration (*d*). Under sub-section 3 of the section the burden was on the plaintiff to prove that the contract was not induced by undue influence and in our opinion he failed to discharge it.

We modify the decree of the Subordinate Judge and give the plaintiff a decree for the amount of the advance with interest at 24 per cent. per annum from the date of the bond to the date fixed for payment and with further interest at 6 per cent. on the total amount due from the date fixed for payment to the date of payment. The mortgage will stand. Payment will be made within three months from this date.

The parties must pay their own costs throughout. We appoint a receiver by consent.

(1) (1893) I.L.R., 15 All., 352. (2) (1909) I.L.R., 31 All., 386.

APPELLATE CIVIL.

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

1909. November 15, 16. 1910. February 8.

MUTHUKANA ANA RAMANADHAM CHETTIAR (PLAINTIFF), APPELLANT,

v.

VADA LEVVAI MARAKAYAR AND OTHERS (DEFENDANTS Nos. 1 TO 5, AND 7 TO 11), RESPONDENTS.*

Mahomedan Law—Wakf—Performance of fateha, when a valid object of wakf—Wakf when illusory—Rule to be adopted when one of the purposes of the wakf fails—Provision for heirs invalid as a wakf—Validity of direction to accumulate in a wakf.

The performance of fateha (distribution of alms to the poor accompanied with prayers for the welfare of the souls of deceased persons) which so far as it involves the expenditure of any money, consists in feeding the poor, is a valid object of *wakf*.

A gift for the benefit of a man's own family or descendants will not be valid as a *wakf*; and a gift, really for such a purpose, though ostensibly one for valid charitable purposes will be bad as only an illusory wakf. It can be no objection to the validity of a wakf that some provision is made for the donor's family provided such provisions are not inconsistent with the gift being one substantially for charity. If, however, such provisions in a deed purporting to be by way of wakf exhausts the bulk of the income or are to last for an indefinite period, the *wakf* will be bad as illusory.

The fact that the donor did not direct the proportions in which the income should be divided between the charities and his heirs, who were appointed trustees will not raise the presumption that he intended the heirs to take the whole. It must be presumed that he intended the charities and his heirs to benefit equally.

Where a donor mentions several purposes as objects of charity and one of such purposes fails, then, if a general intencion can be gathered of dedicating the property to charity, the entire property will be devoted to the lawful objects, if any, mentioned in the deed and in the absence of any such to the poor, whether or not, any definite portion of the income has been set apart for the purpose which fails.

A gift by way of wakf partly for valid charitable purposes and partly for the donor's heirs will not be void because the latter is not a legal purpose of a wakf. The wakf will be valid and the whole income will be devoted for the valid purposes.

A provision for accumulation which will enure solely for the benefit of charitable purposes will not be bad as offending the law of perpetuities.

* Second Appeal No. 852 of 1906.

SECOND APPEAL against the decree of F. D. P. Oldfield, District Judge of Tanjore, in Appeal Suit No. 323 of 1901, presented against the decree of K. Ramachandra Aiyar, Subordinate Judge of Negapatam, in Original Suit No. 62 of 1898.

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

S. Srinivasa Ayyangar and *A. Nilakanta Ayyar* for appellant.

P. R. Sundara Ayyar for first and second respondents.

The Hon. Mr. *L. A. Govindaragava Ayyar* for first respondent.

JUDGMENT.—The question which arises in this Second appeal is whether the disposition of property contained in a document executed by two Mahomedans of the Hanafi sect, Ahmed Nayna Marakayar and Hussain Kuthu Sahib is valid according to Mahomedan Law. The deed Exhibit I begins with a recital that the property consisting of two villages of the total value of Rs. 20,000 is given for the purpose of charity and then states that out of the gross yields the melvaram, repairs, salaries for servants, maganam, and other important expenses are to be defrayed and the balance of the income is to be divided in three shares. From two shares out of the three shares of the income the Dharmakartas or trustees appointed by the deed and their successors are to take Rs. 10 per mensem as salary for discharging their duties and as regards the remainder of the two shares, the direction to the trustees is as follows:—"You should perform annually without failure the customary (not "the annual" as wrongly translated in the paper book), Pattah (meaning Fateha), Kuthum (meaning Khatam), etc., for our ancestors and for us after our decease. You should annually give in the month of Ramzan to the mesakins or the poor ojinam, *i.e.*, food, udumanam, *i.e.*, clothes, sadaka, meaning alms, jagath, etc. The surplus should be divided in equal shares once a year by our heirs or their sons, grandsons in existence from generation to generation inclusive of you." The third share of the income after paying the expenses is to be utilized in purchasing other immoveable property which is "to be added to the said charity properties and dealt with according to the above terms," and if in any year no immoveable property is bought with the one-third of the net income, the amount is to be added to the two-thirds and "divided according to the above particulars." Two sons of the two executants were appointed Dharmakartas or trustees of the deed and it is provided that their successors should be male members of the family not

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exceeding 3 in number; the heirs of the donors should be entitled to call upon the trustees to render proper account of the management and to remove such of the trustees as may be guilty of mismanagement and appoint competent men in their place. The Dharmakartas and the successors, the heirs, and the descendants are not to receive more than the shares allotted to them out of the income and they will not be entitled to alienate the properties nor will the properties be liable for their debts. Such is the tenor of the deed, but before considering the question how far the disposition is valid we ought to mention that as found by both the Courts below the two executants of the document at the time of its execution were in solvent circumstances and owned properties of considerable value besides the two villages and that the gift in question was not made to defeat creditors.

In the deed itself the word "wakf" does not occur, but as the entire scheme of the disposition is to "tie up" the property in perpetuity by prohibiting alienation of it, it can only be upheld if at all as a wakf. The Mahomedan Law recognizes another form of gift to charity called sadaqah, the only important distinction between it and wakf being that by sadaqah not only the beneficial interest but also the legal estate is passed to the particular charity to be held by the trustees appointed by the donor. In a wakf the legal estate or "ownership" is not vested in the Muttawalli or trustee but is so to speak transferred to God. The trustees or the beneficiaries of a wakf, therefore, are not authorised to alienate the wakf property unless especially authorised by the settlor or with the sanction of the Court in cases of necessity, and except in very especial circumstances the corpus of the dedicated property must be left intact and only the income can be devoted to the designated charitable purpose. On the other hand, when property is given by way of sadaqah to some charitable object, the corpus itself or its equivalent, if the trustees find it proper or necessary to sell the property given in sadaqah and to convert it into some other form of property, and not merely the income is to be devoted to that object. The question therefore is whether a valid wakf has been created by exhibit I.

One of the objections urged against its validity by the learned vakil for the appellant who as a judgment-creditor of the executants of exhibit I attached the property in execution of his decree is that pattah or fateha, one of the objects of the gift, is a superstitious use not countenanced by the Hanafi canon law. As found upon the evidence which agrees with the general practice prevalent among Mahomedans in India, the ceremony of fateha consists in distribution of alms to the poor, accompanied with prayers for the welfare of the souls of deceased persons, either the prophet or other saintly personages in Islamic history or the donor's own ancestors. One would require very clear authority for the proposition that rites like these are condemned by the Mahomedan religion as superstitious and we have not been referred to any such authority nor are we aware of any. Reliance is, however, placed on behalf of the appellant on the case of *Kaleloola Sahib* v. *Nuseerudeen Sahib*(1) but there the main object for which the property was dedicated was of a very different character. It was "for the daily, monthly, and annual expenses of the aforesaid mausoleum (the tomb of the donor's husband), such as lighting, frankincense, flowers and salaries of the repeaters of Koran and readers of benedictions, etc., as well as for the annual fateha ceremonies of the deceased and after my death for my annual fateha ceremony." So far as it can be gathered from the report, the fateha ceremonies and the reading of the Koran were to be performed at the tomb of the donor's husband and thus the learned judges say in their judgment "In the absence of an express authority showing that the dedication for ceremonies at a private tomb—and for that purpose only—is valid under the Mahomedan law, we do not think we ought to uphold the deed. It creates a perpetuity of the most useless description which would certainly be invalid under English Law" and in another part of their judgment they state that "the result of an investigation of the authorities seems to be that endowments purely for purposes like the present seem to be against the principles of Mahomedan law." We are not called upon in this case to determine how far the performance of ceremonies such as those mentioned in *Kalloola Sahib* v. *Nusurudeen Sahib*(1) is in accordance with a proper interpretation of the texts of Mahomedan law or with the spirit of Mahomedan religion, the general aim of which undoubtedly is to avoid even the semblance of all idolatrous and superstitious practices. On the other hand, the fact cannot be overlooked that for a very long time in India the custom has been largely prevalent

(1) (1895) I.L.R., 18 Mad., 201.

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of erecting mausoleums over the remains of men of reputed sanctity and for endowing property for their upkeep and for performance of religious ceremonies at such tombs, and such endowments have been recognised by the Courts as valid under the designation of durgahs, asthanas, khankabs, &c. It may be said, as is no doubt the opinion of Collins, C.J., and Parker, J., in Kaleloola Sahib's case, that the Courts should not extend their recognition to endowments in connection with tombs of persons other than saints; but at the same time it may be argued that no line of distinction can be drawn on grounds of Mahomedan religion between the two cases. It is not, however, necessary for us to express any decided opinion on the point raised in the case of *Kaliloola Sahib* v. *Nusurudeen Sahib*(1). We are of opinion that the performance of fatehas, which so far as it involves the expenditure of any money consists in feeding the poor, is a valid object of wakf.

The most material question is, is the wakf illusory within the meaning of the Privy Council rulings in *Mahomed Ahsanulla Chowdhry* v. *Amarchand Kundu*(2), and *Abul Fata Mahomed Ishak* v. *Rasamaya Dhurchowdhri*(3) and confirmed in a series of cases afterwards. The effect of the Privy Council decisions seems to be that wakf in Mahomedan law is a gift of property for charitable or pious purposes: that in this connection 'charitable,' 'pious,' or 'religious' purposes must be understood in their ordinary and natural meaning, *i.e.*, in the sense analagous to that of the English law. Aggrandisement of the donor's family or protection from poverty of the donor's descendants without any limit of time is not a charitable and pious purpose as contemplated by the Mahomedan law of wakfs; and a gift for the benefit of a man's own family, relatives or descendants is not charitable nor pious within the meaning of the law of wakfs. That a gift to charity would be deemed to be illusory if the provisions of the deed show that such gift is not to take effect, if at all, until after an indefinite period of time while those who are really meant to be benefited are the donor's relatives and descendants to the remotest degree; and that in such a case general expressions of piety and of charitable motives on the part of the

(1) (1895) I.L.R., 18 Mad., 201. (2) (1890) I.L.R., 17 Calc., 498.
(3) (1895) I.L.R., 22 Calc., 619.

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donor are to be treated as a mere cloak to hide the real nature of the transaction. But it is not an objection to the validity of a wakf that some provision is made in the deed of wakf for the benefit of the donor's family, provided such provisions are not inconsistent with the gift being one substantially for charity, and this question has to be decided in each case with reference to the terms of the particular deed. If the provisions for the donor's children and descendants in a deed purporting to be by way of wakf exhaust the bulk of the income and are to last for an unlimited period of time, such a wakf would undoubtedly be illusory. Nothing more definite can be deduced from the authorities. Is the gift to charity properly so called in this case, therefore, a mere make-believe? What is pointed to in support of this contention of the appellant are the provisions that the proportion of the income to be devoted to charitable purposes is not fixed so that the trustees are at liberty to devote only a nominal portion of the income to these purposes and thus make the bulk of the income available as surplus for the benefit of the heirs; that the donors intended this result is to be inferred from the fact that the trustees are to be appointed from among the heirs, and the heirs are authorized to call upon the trustees to render accounts, while outsiders are given no such authority. But we do not think that this is a fair interpretation to put on the deed. The intention, so far as it is expressed, apparently is that the charitable objects mentioned are, in the first place, to be benefited, and, if any surplus is left it is to be divided among the heirs whom also the donors, though no doubt wrongly, supposed to be proper objects of the gift. The non-ascertainment of the proportions in which the different objects are to be benefited leaves it to some extent to the discretion of the trustees to determine the amounts to be spent on each object. But does the discretion extend so far as to enable them not to give any portion of the income or merely a nominal amount to any particular object or objects mentioned. There is nothing in the deed which would justify us in saying that the trustees were meant to have such unfettered power; and the donors must therefore be presumed to have intended that the trustees should treat the different objects of the donors' bounty according to the rate provided by law in such cases, viz., by dividing the income equally among the several objects mentioned. We do not think that the provision for the selection of the

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trustees from among the heirs of the donors, which is an usual provision in deeds of endowment in this country and the fact that power is conferred on the heirs who are given an interest in the settlement to call for accounts from the trustees—not that members of the general public or the Court are excluded by anything in the deed from interference in case of mismanagement—are sufficient to indicate that the real intention of the donors was other than what is expressed. And we may say that in our opinion the salary provided for the Dharmakartas is not unreasonable and the direction to accumulate one-third of the income is intended for the benefit both of the charitable purposes mentioned as well as the heirs.

What then is the rule of Mahomedan law applicable to a case in which the donor mentions several purposes as objects of his bounty and one of those purposes fails? The rule is that if in such a case a general intention can be gathered of dedicating the property to charity the entire property is to be devoted to the lawful objects of wakf if any mentioned in the deed, and in the absence of any such object being specified, to the poor, whether a definite portion of the income has been set apart for the object which fails or not. The expression of a general charitable intention need not be in any particular form of words and in this connection it should be borne in mind that in the cases about to be cited from the writings of Mahomedan Jurists, the words 'wakf' and 'sadaqah' in their different grammatical forms are used merely because these phrases are in common vogue as denoting ideas of perpetuity and a general intention to give to charity. In its literal significance the word 'wakf' means 'detention' or 'tying up', and the word 'sadaqah' which is generally translated by English writers on Mahomedan law as 'charity' or a 'charitable purpose,' when used by the Mahomedan Jurists in the sense of the Mahomedan Canon Law, comprehends any act which is capable of conferring spiritual benefit on its doer if it is done in the hope of acquiring such spiritual benefit. In Fathul Qadir, a well known commentary on Hedayah and a work of great authority on all questions of Hanafi Law, it is laid down "A man makes a wakf for Zaid and the poor, and Zaid does not accept the gift, the wakf will be for the benefit of the poor; and similarly if it is for Zaid and Omar, and Omar refuses the gift, or it appears that he was dead, his share will go to the poor" and later on "if

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the donor says 'for the needy among my children' and he has but one needy child, then half the income will go to the child, and the other half to the poor" (*see* vol. V., pp. 451, 452 Egyptian edition). Qadhi Khan, a jurist of the highest authority, says in his Fatawa "If a man says, 'this house of mine is wakf by way of sadaqah or sadaqah by way of wakf' and no more, this is valid according to Abu Yusuf, Mahomad, Hilal-ul-munaaz (may God's blessings be on them), and it will be a wakf for the benefit of the poor" and further on "if he says 'this land of mine is sadaqah by way of wakf for A' it will be valid, and the gift must be construed as if the donor had said 'this is sadaqah by way of wakf for the poor', because the primary object of sadaqah is the poor but the produce will be for A so long as he lives; and similarly if he says 'this is sadaqah by way of wakf for B in perpetuity' or says 'for my children in perpetuity' the answer in that case also is the same" (*see* Qadhi Khan, vol. III. Bulaq Edition printed in the margin of Fatawa-Hindia on Alamgiri). In Bahrur Raiq, a book of accepted authority among Hanafis it is stated: "And if he says 'this land of mine is sadaqah by way of wakf upon Abdulla' and Abdulla does not accept the gift the wakf is valid and the produce will go to the poor." Then later on it is laid down: "and if he (*i.e.*, the donor) says it (*i.e.*, the wakf) is for Zaid and Omar as long as they shall live and after them for the poor and Zaid accepts the gift but Omar does not, then Zaid will have half the produce and the the other half will go to the poor" (*see* Bahrur Raiq, vol. V, p. 215, printed at the press). In Al-Isaaf, among the cases cited on this point are the following: "and if he (the donor) says 'it (*i.e.*, the wakf) is for my sons' and he has two sons or more the whole of the produce will be for them—and if he has only one son that son will be entitled to half the produce and the other half will be for the poor" and if he says 'it is for my sons' and he has daughters only or says it is for my daughters and he has sons only, the produce will go to the poor and they (*i.e.*, the sons in one case, and the daughters in the other) will get nothing" and if he says 'I have made this my land wakf for my child and the residue for the poor' and the child dies, Abul Kasim (a well known Hanafi Jurist) says the produce will be spent on the poor . . . "and if a man makes wakf for his children and descendants in perpetuity as long as the generations last, then after them for the poor and he has no child, the produce will go to the poor and if a child be born

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to him the produce will be given to the child and descendants and on their termination to the poor" (*see* Al Isaaq Egyptian edition pp. 96, 97 and 99). It would be easy to multiply cases from the original authorities in support of the principle which in our opinion governs this case, but we think it will be sufficient to quote one more passage, and that from Baillie's 'Digest of Hanafi Law' which as is well known is a compilation from Fatawa Alamgiri. It is laid down (see page 609, 2nd edition). "If a person should make his land a sadaqah appropriated—Mr. Baillie, it should be remembered, translates the word wakf as appropriation —for Abdulla and Zeyd, the produce is for both. When both die the whole is for the poor; and when one of them dies his half is for the poor. In like manner when a class of persons (Kowm) is named the produce is to be divided according to the number of heads; and if one of them dies, his share goes to the poor and the remainder to the survivors."

In the above cases the failure of the particular gift which then lapsed into the residue for the benefit of the poor or of the other objects mentioned in the deed was due either to the death of the individual for whom the benefit was intended or his refusal to accept the gift or to non-existence of the designated class. But it can make no difference in principle to what the failure is due, and the result must be the same where the gift to one of the objects mentioned in the deed fails by reason of its not being a proper object of such disposition of property. In the present case the benefaction intended for the heirs of the donors would fail because, according to Mahomedan law as applicable to British India, such a provision does not properly fall within the scope of wakf although the Mahomedan Jurists might have thought otherwise. We must therefore hold that the wakf is valid and the income of the property is to be devoted for the benefit of the objects mentioned in exhibit I other than 'the heirs' of the donors. We may also observe that as the gift under exhibit I should in our opinion be upheld as a valid wakf: the provision for accumulation which would thus enure solely for the benefit of charitable purposes cannot be said to offend against the law prohibiting perpetuities.

We dismiss the appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Krishnaswamy Ayyar.

1910. February 24.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL REPRESENTED BY THE COLLECTOR OF TINNEVELLY (DEFENDANT), APPELLANT,

v.

SWAMI NARATHEESWARAR THROUGH THE TRUSTEE CHELLAM PILLAI (PLAINTIFF), RESPONDENT.*

Madras Irrigation Cess Act, Act VII of 1865—Inam lands irrigated by water coming from Government source—Water-cess liable to be levied on, where inamdar has no option to refuse use—Phrase "used for the purpose of irrigation," meaning of.

Certain dry inam lands were submerged by water flowing from a Government source and by reason thereof the inamdar was compelled to raise wet crops with the help of the water which he enclosed in his adjoining land out of the flood water.

Held, that under Madras Act VII of 1865, he was liable to pay water-cess. Madras Act VII of 1865 is not based upon any theory of the ownership of the bed of a tank or water course being the foundation of a right to use the water free of charge. The fact that before irrigating the inamdar's lands the water had flowed through two-fifths of a sheet of water included in the inam does not make it any the less water from a Government source.

Held further, the fact that rain water had got mixed with the flood water is no ground for getting rid of the liability.

Secretary of State for India v. *Perumal Pillai*, [(1901) I.L.R., 24 Mad., 279], distinguished.

Maria Susai Mudali v. *The Secretary of State for India* [(1904) 14 M.L.J., 350], distinguished.

SECOND APPEAL against the decree of K. Ramanatha Aiyar, Sub-divisional Judge of Tinnevelly, in Appeal Suit No. 136 of 1907 presented against the decree of A. Annaswamy Aiyar, District Munsif of Srivaikuntam, in Original Suit No. 334 of 1904.

The facts are sufficiently stated in the judgment.

The Government Pleader for appellant.

The Hon. Mr. *T. V. Seshagiri Ayyar* for respondent.

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* Second Appeal No. 1019 of 1907.

BENSON AND KRISHNASWAMY AYYAR, JJ.

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JUDGMENT.—The dispute in this case relates to the right of Government to levy water-cess on 2 acres of inam land cultivated with the aid of water drawn from an alleged Government source. The plaintiff is the owner of an inam village and the lands which have been assessed with the water-cess have been classified as dry. The dry assessment constituted the inam. Two-fifths of a sheet of water known as taruvai was included in the inam. It is found by the Subordinate Judge on appeal that water from a Government source flows through the Mudalore odai into the part of the taruvai which belongs to Government and thence onwards into the deeper part belonging to the plaintiff. The taruvai receives its supply of water generally from direct rainfall; but in certain seasons and in certain years the odai water makes the taruvai overflow and submerge some of the dry lands of the inamdar. It is found that in fasli 1312, the plaintiff was compelled to make the best of the situation by raising wet crops on 2 acres of his dry land, which had become unfit for dry crops owing to the inundation, with the help of the water which he enclosed in his adjoining land out of the flood-water. The Subordinate Judge decreed the plaintiff's claim for refund of the assessment holding that the water which came through the plaintiff's portion of the taruvai was his water and he was not liable to be charged therefor.

It is argued by the Government Pleader on behalf of the Secretary of State for India that the plaintiff is liable under Act VII of 1865, because the water comes from a Government source and the plaintiff's lands have been irrigated thereby and that it is immaterial that after leaving the Government source, it has passed through the plaintiff's portion of the taruvai. There is no question in the case as regards property in the water. Madras Act VII of 1865 is not based upon any theory of the ownership of the bed of a tank or water-course being the foundation of a right to use the water free of charge. Section 1 of the Act specifies the conditions under which the cess is liable to be imposed. The water must come from a river, stream, channel, tank, or work belonging to or constructed by Government. This condition is satisfied in this case because three-fifths of the taruvai, the Mudalore odai, the Oorani beyond and the river which supplies it are all admittedly the property of the Government. The next condition is that the water from that source should from or through the

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adjoining land irrigate a land under cultivation or flow into a reservoir and be thereafter used for irrigating any land under cultivation. In this case water from the Government source flows through the two-fifths of the taruvai, which is the adjoining land. It does not matter to whom that land belongs. By flowing through the plaintiff's two-fifths of the taruvai it does not cease to be water from a Government source. That water has admittedly irrigated that plaintiff's 2 acres of dry inam land. It was first of all contended by Mr. Seshagiri Aiyar for the respondent that the water became the inamdar's by flowing through his portion of the taruvai. We need only answer this by saying that it has not ceased to be water from a Government source. He next relied upon the decisions in *Venkatappayya* v. *The Collector of Kistna*(1) and *Krishnayya* v. *Secretary of State for India*(2) which held that there could be no use for irrigation within the meaning of the section unless it was voluntary or, in other words, the person said to make use of it had an option to refuse it. It may be assumed that the same interpretation must be placed upon the phrase "used for purposes of irrigation" in clause (*a*) of the section after the amendment as was done before it. But Mr. Seshagiri Aiyar's argument overlooks the fact that the old section of Act VII of 1865 was amended in order to get rid of the effect of those decisions and that clause (*b*) creates a liability to assessment where the water from the Government source irrigates any land under cultivation and not merely "is used for purposes of irrigation". With or without the will of the person whose land benefits by the water, the water may irrigate the land. We must therefore overrule the argument based upon the employment of the word 'use' in the section. It was lastly urged that in the portion of the taruvai belonging to plaintiff there was the rain-water which had not come from a Government source, and although the flood-water from the Government source poured into the taruvai, it could not be said that the water from the Government source was used by the plaintiff for cultivation, while it was not shown that the rain-water in the taruvai was not sufficient for the cultivation which was carried on.

The overflowing of the taruvai in this case was the result of the flood and the flood was from the Government source.

(1) (1889) I.L.R., 12 Mad., 407. (2) (1896) I.L.R., 19 Mad., 24.

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Although the flood-water had got mixed with the rain-water in the taruvai itself, it could not be contended that no portion of the water which irrigated the land consisted of the water from the Government source. We cannot admit that there is any force in the argument that in order to render the plaintiff's land liable to assessment it is necessary that the whole of the water used should be from a Government source. All that the section requires is that water from a Government source should irrigate the land in question, and in the opinion of the Collector "the irrigation should be beneficial to and sufficient for the requirements of the crop." That other water has also been used is no ground for getting rid of the liability. The question as to the beneficial character of the water taken from the Government source and of its sufficiency are not for the Civil Court but for the Collector subject to the control of the Board of Revenue and of the Government. The Collector in this case having imposed the assessment and he not having been overruled by the higher revenue authorities, we think the plaintiff is clearly liable to pay the assessment.

A question was raised in the course of the argument as to the meaning of the word 'irrigation' (see Kinney on 'Irrigation', page 2), and whether in this case the plaintiff can be said to have irrigated his land with water from a Government source. Upon the facts found, however, it is clear that the water has irrigated the plaintiff's lands, in whatever sense that term is to be understood.

The Subordinate Judge has referred to the decision in *Secretary of State for India in Council* v. *Perumal Pillai*(1) and *Maria Susai Mudali* v. *The Secretary of State for India in Council*(2). They have obviously no application to the present case. There the proprietors were, by an engagement with the Government entitled to the water free of separate charge. The estates were permanently settled and the proprietors were entitled to make what use they pleased of the lands included in the settlement. The right to the water having existed at the date of the grant and the permanent settlement having been made so as to pass in the eye of the law all the rights which then existed they were not liable to be charged with any water-cess in respect of any

(1) (1901) I.L.R., 24 Mad., 279. (2) (1904) 14 M.L.J., 350.

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cultivation which they carried on with the aid of water to which they were entitled. Those decisions, therefore, do not touch the decision of the present case.

We must reverse the decrees of the Courts below and dismiss the suit with costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Krishnaswami Ayyar.

A. L. A. R. ARUNACHELLAM CHETTIAR (SECOND DEFENDANT), APPELLANT,

1910. February 22, 25.

v.

P. S. K. HAJI SHEEK MEERA ROWTHAR (PLAINTIFF), RESPONDENT.*

Ratable distribution, application for, not considered to be application for execution—Attachment before judgment is not application for execution—Decree holder—No right to ratable distribution unless he has applied for execution.

Only a decree holder who has applied for execution can claim a right to ratable distribution. Such a right is not conferred upon a plaintiff who has merely obtained an attachment before judgment and has not applied for execution under section 230, Civil Procedure Code.

Amara Veerayya v. *Annamalai Chetty, Pichayya*, [(1908) I.L.R., 31 Mad., 502], overruled.

An attachment before judgment is in no sense an application for execution.

A mere application for ratable distribution which does not comply with the requirements of section 235 in form or substance cannot be considered to be an application for execution within the scope of section 295, Civil Procedure Code.

Sewdut Roy v. *Sree Canto Maity*, [(1906) I.L.R., 33 Calc., 638], distinguished.

Pallonji Shapurji Mistry v. *Edward Vaughan Jordan*, [(1888) I.L.R., 12 Bom., 400], followed.

SECOND APPEAL against the decree of C. G. Spencer, District Judge of Tinnevelly, in Appeal Suit No. 158 of 1907, presented against the decree of V. K. Desikachariar, District Munsif of Tinnevelly, in Original Suit No. 272 of 1906.

The second defendant in this suit obtained an attachment before judgment of certain moveables in Original Suit No. 701 of

* Second Appeal No. 543 of 1908.

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1904, and a decree in that suit but did not apply for execution thereof. While this attachment was in force the moveables were sold in execution in Original Suit No. 681 of 1905 on the 10th March 1905. The sale was not finally concluded until 1st April 1905. On 11th March 1905, the second defendant applied for ratable distribution of the sale proceeds in regard to his decree debt in Original Suit No. 701 of 1904 in the Munsif's Court which was allowed. This suit was instituted for a declaration that the second defendant was not entitled to any ratable distribution in respect of his decree debt in Original Suit No. 701 of 1904 and to recover from him the ratable share so received by him.

S. Srinivasa Ayyangar for appellant.

S. V. Padmanabha Ayyangar for *C. R. Tiruvenkata Chariar* for respondent.

JUDGMENT.—The second defendant who is the appellant before us claims ratable distribution out of moneys realised in execution of the decree in Original Suit No. 681 of 1904 on the file of the District Munsif of Tinnevelly. In execution of that decree certain moveable properties which belonged to the ninth and tenth defendants were sold. The second defendant who had instituted Original Suit No. 701 of 1904 attached the same properties before judgment. The sale was held on the 10th March 1905, but the proceeds were realised on various days up to the 1st of April. The second defendant applied for ratable distribution on the 11th March 1905. His application having been allowed the present suit is instituted by other decree holders against the same judgment-debtor, who raise the question as to the second defendant's right to ratable distribution. We may assume, notwithstanding the fact that the sale was held on the day previous to the date of the application for ratable distribution, if that application could be regarded as an application for execution within the meaning of section 295, that it would entitle the applicant to ratable distribution, as the moneys were, as a matter of fact, realised on various dates subsequent to the second defendant's application for ratable distribution; see *Ramanathan Chettiar* v. *Subramania Sastrial and five others*(1). But there is no authority for the view that a mere application for ratable distribution is an application for execution as contemplated by section 295. On the other hand, it has been held that it is

(1) (1903) I.L.R., 26 Mad., 139.

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not; see *Ramjus Agarwala* v. *Guru Charan Sen*(1). Section 230 of the Code provides for an application for execution and section 235 specifies the form and contents of that application. The mere application for ratable distribution therefore which does not comply with the requirements of section 235 in form or substance cannot be treated as the sort of application for execution falling within the scope of section 295.

It is next argued that the attachment before judgment presupposes an application for execution because section 490 of the Code provides that it shall not be necessary to reattach the property in execution of the decree where it had been attached before judgment. Section 295 gives the right to ratable distribution only to those who have prior to the realisation applied for execution of decrees for money against the same judgment-debtor. An attachment before judgment of certain property is in no sense an application for execution. It is impossible without specific language justifying it to create a fiction that an attachment before judgment is equivalent to an application for execution of a decree. Section 490 which gives validity and effect to the attachment before judgment even after decree for certain purposes does not give rise to the implication that that attachment was made on a constructive application for execution of a decree that had not been passed. There is no magic in the word "reattach" to be found in section 490. The attachment before judgment is a fact. It does not die with the decree, and all that the section provides is that when there is a subsisting attachment it is unnecessary to make a second attachment. The section does not make the application to execute the decree a *second* application to execute it because it says reattachment is unnecessary. Suppose other property of the judgment-debtor is sold and the proceeds realised, can the decree-holder who has attached before judgment a different property, claim ratable distribution out of the proceeds as one who had applied for execution before realisation? We think the answer must be in the negative. The rights to ratable distribution is conferred upon every decree-holder who has applied for execution, whether the relief claimed by him is the arrest of the judgment-debtor or the attachment and sale of any property or the sale of property already attached before judgment. We find

(1) (1909) II Cal., L.J., 69.

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no warrant for supposing that such a right is conferred upon a plaintiff who has not applied for execution but has merely obtained an attachment before judgment. The subsisting attachment before judgment has its use in invalidating alienations by the judgment-debtor and dispensing with the need of a further attachment before sale without necessitating the fiction after a decree is passed that there was a pre-existing application for execution. Rule XI, Order 38 of the new Code, which amplifies the language of section 490 by stating that an application for reattachment of the property shall not be necessary upon an application for execution appears to us to render manifest the intention of the Legislature even under the old Code as regards the necessity for an application for execution even though the property had been attached before judgment. We must therefore regard section 490 as in no way giving countenance to the view that an attachment before judgment presupposes an application for execution. Reliance was placed on the decision of Mr. Justice Abdur Rahim in *Amara Veerayya* v. *Annamalai Chetty, Pichayya and others*(1). If the foregoing reasoning be correct, it follows that we are unable to accept that decision as sound. The learned Judge appears to have been impressed with the view that but for the conclusion he arrived at "a large class of cases would, for no apparent valid reason, be excluded from the application of the very equitable provisions of section 295." To our minds this does not appear to be a cogent argument, for section 295 gives the right to ratable distribution only to decree-holders who have applied for execution. We cannot on any ground of equity include within that language persons who have only applied for attachment before judgment. This may be a technical view. But we think we are bound to construe the Code according to its language. The decision of Mr. Justice Scott in *Pallonji Shapurji Mistry* v. *Edward Vaughan Jordan*(2) seems to us to be exactly in point, and his reasoning altogether commends itself to us. He held that by attachment before judgment, the attaching creditor did not qualify himself for ratable distribution, though he added he came to that conclusion with reluctance. The decision of Mr. Justice Woodroffe in *Sewdut Roy* v. *Sree Canto Maity*(3) proceeds on reasoning which supports our

(1) (1908) I.L.R., 31 Mad., 502. (2) (1888) I.L.R., 12 Bom., 400.
(3) (1906) I.L.R., 33 Cal., 639.

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conclusion. By the consent of the rival decree-holder which is more than once referred to in the judgment, the learned Judge allowed ratable distribution to the creditor who attached and had also the property sold, it being perishable, before judgment. But he expressly points out that the attachment was not in execution and that the sale-proceeds were not realised in execution, so that section 295 itself had no application. For the reasons we have already given, we must hold that the second appeal fails and we dismiss it with costs.

APPELLATE CIVIL.

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

IN THE MATTER OF THE SECOND-GRADE PLEADERS*

1910. April 4, 5, 19.

Legal Practitioners' Act XVIII of 1879, s. 13 (f)—Interpretation of clause—Words "other reasonable cause" explained—Ejusdem generis.

The words "for any other reasonable cause" in clause (*f*) of section 13 of Act XVIII of 1879 (Legal Practitioners' Act) include general misconduct and are not restricted to professional misconduct.

Where two legal practitioners were the President and a Director respectively of a so-called Provident Society which was in no sense a Provident Society but a means of furnishing profit to the Directors by enabling those who so desired to gamble in the lives of parties who were willing to become "applicants" to the Society:

Held, that there was "reasonable cause" under section 13 (*f*) for an order being made against the legal practitioners.

Per MILLER, J.—The principle of *ejusdem generis* cannot be applied to the words "any other reasonable cause" since the genus "professional misconduct" is not large enough to include the case of section 12 (where a pleader may be suspended or dismissed for having committed a criminal offence implying a defect of character which unfits him to be a pleader.

Tillmanas & Co. v. *Knutsford (Limited)*, [(1908) 2 K.B., 385], followed.

The intention of the Legislature was to give to the High Court powers of control over pleaders and mukhtars as extensive as those which are given by the Letters Patent, section 10, over advocates and vakils.

Per KRISHNASWAMI AYYAR, J.—Clause (*f*) of section 13 is not confined to professional misconduct but may be interpreted so as to include any dishonest or dishonourable conduct whether or not in discharge of professional duty.

* Case taken up under section 13 of Act XVIII of 1879.

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It is difficult to limit clause (*f*) to professional misconduct, because clause (*b*) deals with "grossly improper conduct" in the discharge of professional duty and it is not possible to name any species of professional misconduct which does not fall within clause (*b*) itself.

The fact that the Legislature has restricted the power of Subordinate Courts under section 14 of the Act is no reason for fettering the power of the High Court.

In the matter of the petition of *Ghalab Khan Mukhtar*, [(1871) [7 B.L.R., 179], approved.

THE facts necessary for the purpose of this report are sufficiently stated in the judgments.

J. L. Rosario for Pleadership Examination Board.

The Hon. Mr. *T. V. Seshagiri Ayyar* for the Vakils Association.

T. Rangachariar for Second-grade Pleader Choragudi Venkatadri.

T. R. Ramachandra Ayyar for the Hon. Mr. *L. A. Govindaraghava Ayyar* for Oruganti Venkatasubba Rao.

ORDERS (The Chief Justice).—In these proceedings, two second-grade pleaders have been called upon to show cause why they should not be suspended or dismissed by reason of their conduct in having joined the Board of Directors of the 'Circars Provident Fund Limited of Bapatla' and in connection with the affairs of that company.

The company is now in liquidation. One of the pleaders was the President of the company (I will refer to him as 'the President'). The other was a Director (I will refer to him as 'the Director'). Criminal proceedings were taken against the two pleaders in connection with the affairs of the company and they were convicted of criminal breach of trust by the Sessions Judge of Guntúr. On appeal, these convictions were set aside. There can, I think, be no question that the convictions could not be upheld. In appropriating to their own use the sums of money which formed the subject-matter of the charge of criminal breach of trust, the President and the Director did not exceed the rights which they had conferred upon themselves by the articles of association. In law the company would seem to have consisted only of the seven signatories to the memorandum of association.

The *modus operandi* of the company is described in the judgment of Abdur Rahim, J., setting aside the convictions in these terms. "The fund of the company was to consist of subscriptions

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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:—

	A.	P.
Reserve fund	2	0
Guarantee fund up to Rs. 5,000	0	6
Charity fund	0	6
Commission to agents	2	0

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 subcription 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 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

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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." The learned Judge observes: "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." Benson, J., said: "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".

In law, as I have said, the company consisted of the president and the six directors, the seven signatories to the memorandum of association. These parties by the articles of association made due provision for lining their own pockets so long as the company continued to do business.

It seems clear from the description of the *modus operandi* of the company to which I have referred and from the facts that the subscriptions were limited to 53 months, that the so-called reserve and guarantee funds were wholly insufficient, and that the company's guarantee by which the liability of the company was limited was altogether illusory, that sooner or later the company was bound to find itself in a position in which it could not fulfil its obligations. The prospectus states that "the gain resulting from increase in the number of subscribers is to the starters and not to the subscribers," but it seems to me that the only thing which could have kept the company alive for any substantial period would have been a large increase in the number of subscribers each year.

So far as the subscribers were concerned, the undertaking was a gambling transaction and the prospects of its success were in direct ratio to the badness of the life insured. If any intelligent person invested his money in the concern, he can only have done so in the hope that the life which he had got insured in his favour was sufficiently bad to warrant the expectation that the company would outlast the life. Lives were 'insured', if one can use such an expression, without regard to the age or health

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of the insured person and without any suggestion of an insurable interest in the party in whose favour the insurance was effected. The prospectus of the company as a business statement is ridiculous. The memorandum of association contains statements which are misleading, if not false. In paragraph No. 2, it is stated that the number of the subscribers of the company shall for the present be 400. Presumably this statement is made for the purpose of section 37 of the Indian Companies Act, 1882, which requires that the number of members with which the company proposes to be registered should be stated. But the subscribers here mentioned are not members of the company. They are the parties who are to have the benefit of the death of the insured persons or 'applicants'. The reference to the number of subscribers being 400 would seem to have been made either with the intention to mislead, or under a misapprehension of the requirements of the law.

Paragraph No. 3 of the memorandum of association is false. The object of the company is not, as stated, to afford to the subscribers an opportunity of making some provision for their families or friends at their death, but to enable the 'subscriber' to benefit by the death of an 'applicant'. A reference to definitions 2 and 3 in the articles of association makes this clear.

The excuse put forward by the president was that he had no knowledge of the working of the fund and that he only consented to act on the undertaking that the business should be managed by the sixth accused in the criminal proceedings. This cannot be accepted as an excuse. The value of the president as a figure-head—assuming he was merely a figure-head—lay in the fact that he was a pleader and it was no doubt expected that this fact would help towards inspiring confidence in the public. If I took the view that the president had associated himself with this company with the intention of swindling the public, there would, in my opinion, be no alternative but to suspend him from practice altogether, notwithstanding the fact that the criminal proceedings against him had proved abortive. At any rate, for the purpose of the question now before us, I prefer to deal with this case on the footing that the president and the director did not intend to cheat the public but that they knew or must be taken to have known that this so called provident society was in no sense a provident

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society, and in no sense an undertaking for the purpose of life insurance in the ordinary acceptation of the term, but that it was a means of furnishing profit to the directors by enabling those who so desired to gamble in the lives of parties who were willing to become 'applicants' to the society. The action of the president and the director in associating themselves with such a company as directors to my mind is 'reasonable cause' for an order being made under section 13 of the Legal Practitioners Act. As regards the question of law which has been argued before us as to the construction of section 13 (*f*), I adhere to the view which I took in *In the matter of a First-grade pleader*(1). In my opinion, in the case of the president an order of suspension should be made. I think we may take into consideration the fact that he has undergone a substantial term of imprisonment under the conviction which was set aside on appeal to this Court. I think we may also take into consideration the fact that in this presidency at any rate so called provident societies of the class we have had before us, are by no means uncommon, and that up to now, this Court had not had occasion to mark its sense of the conduct of legal practitioners, who whilst keeping within the letter of the law, as it now stands, avail themselves of the law to work what are really gambling undertakings under the guise of limited companies which purport to be promoted for provident or life assurance purposes.

I would suspend the president Choragudi Venkatadri Pantulu Garu for three months from this date.

As regards the director, his excuse is he merely lent his name. He received about Rs. 175 as profits in the first year, but he resigned in the second year without claiming any profits. He has been put to heavy expense in the Criminal Proceedings. I think his conduct in joining the company without sufficient enquiry was foolish and reckless, but in all the circumstances, I do not think we are called upon to make any order of suspension in his case.

Miller, J.—The point of law is not without difficulty but on the whole I am able to accept the conclusion that we have jurisdiction to make an order in this case.

(1) (1901) I.L.R., 24 Mad., 17.

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In the first place, it is not clear to me that we ought not to read sections 12 and 13 together as containing the enumeration of the cases in which orders may be made for the suspension or removal of a pleader. If we do that, section 13 (*f*), which closes the enumeration with the general words "for any other reasonable cause," can be interpreted on the principle of *ejusdem generis* only if we find that the specifically enumerated cases can all be included in one genus or category (*Tillmanns & Co.* v. *S.S. Knutsford, Limited*(1)). The genus, professional misconduct, is not large enough to include the case of section 12 and we must seek for something larger, *e.g.*, misconduct generally, this would include the cases before us.

If as is suggested by section 14, the case of section 13 (*a*) is not a case of misconduct, it is difficult to apply the *ejusdem generis* principle at all. But, in either case, the present cases are within the Act. If I am wrong in this view, still, it seems to me pretty clear that the intention of the legislature was to give to the High Court power of control over pleaders and mukhtars equivalent to those which are given by the Letters Patent; it seems unreasonable to suppose that the powers over the inferior classes of practitioners are intended to be less extensive than those given over the superior classes, unless there is reason, and none is suggested, to think that the powers given by section 10 of the Letters Patent were deemed to be too large. I think the use in section 13 (*f*) of the same words as are used in the same connection in section 10 of the Letters Patent is a strong indication that they were intended to have the same extent, and if that is so it is unnecessary to call in any rule of construction to enable us to arrive at the meaning of the legislature. If we give to the words "for any other reasonable cause" the widest meaning they can bear in section 13, we cannot, I think, give them a meaning which is wider having regard to the scope and purpose of the Act, than was intended by the legislature.

The *ejusdem generis* principle is applied in construing a statute when you have a word which may have a general meaning wider than that which was intended by the legislature (per Lord Halsbury in *Ystradyfodwg and Pontypridd Main Sewerage Board*

(1) (1908) 2 K.B., 385.

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v. *Bensted*(1), but I do not think that is so here. Ghose, J., in *Le Mesurier* v. *Wajid Hossain*(2) seems to hold himself constrained by the form in which the statute is framed to hold that the legislature did not intend to give to the High Court the power which he considers is a power which ought to be given; but I do not think the form of the statute is a very safe guide in this matter. It is easy to imagine reasons why the legislature in framing sections 12 and 13 of the Act of 1879 may have thought it well to give some enumeration of causes justifying the suspension or removal of a pleader although the Letters Patent contain no such enumeration, but it is not easy, and the form of the statute does not compel us, to hold that the intention was to give the High Court less extensive power over pleaders than over advocates and vakils.

I think too there is much to be said for Mr. Rosario's contention that clauses (*a*) to (*e*) notably (*b*) of section 13 exhaust the genus, professional misconduct, and consequently the words in clause (*f*) must be referred to a more extensive genus. I think we have jurisdiction to make an order in this case and on the merits I agree with the order proposed by the learned Chief Justice.

KRISHNASWAMI AYYAR, J.—Choragudi Venkatadri and another, both pleaders of the second grade, were convicted of criminal breaches of trust by the Sessions Judge of Guntúr and acquitted on appeal by this Court. Notices were issued to them to show cause why they should not be dealt with under section 13 of the Legal Practitioners Act. They have appeared by their vakils. The first question raised for consideration is whether clause (*f*) of section 13 is confined to professional misconduct or may be interpreted so as to include any dishonest or dishonourable conduct whether or not in the discharge of professional duty. It must be admitted that the question is not free from difficulty. But having given to the matter my best consideration I feel no hesitation in expressing my agreement with the learned Chief Justice. The question was considered in this Court in *In the matter of a pleader*(3). The

(1) (1907) A.C. at page 268. (2) (1902) I.L.R., 29 Calc., 890.
(3) (1903) I.L.R., 26 Mad., 448.

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Chief Justice and Moore, J., expressed their concurrence in the view of the majority of the Calcutta High Court in *In the matter of Purna Chunder Pal Mukhtar*(1) where it was held that the words "for any other reasonable cause" in clause (*f*) should not be given a restricted interpretation confining it to professional misconduct on the doctrine of *ejusdem generis*. The Calcutta Court reaffirmed its view after a more elaborate consideration in *Le Mesurier* v. *Wajid Hossain*(2) in Full Bench, Ghose, J., dissenting. In *In re Ganapathi Sastri* and *Krishnaswami Ayyar*(3), the same view was taken by the Chief Justice and Benson, J., though having regard to the conclusion they arrived at upon the facts it was unnecessary to decide the point. Miller, J., and Sankaran Nair, J., however, reserved their opinion. Reference was made to several other cases in the course of the argument, but they have no bearing on the question under consideration. The decisions in *In re Wallace*(4), in *In the matter of a first grade pleader*(5), and in *In re a pleader*(6) turn upon the ground that a pleader acting as a suitor and using disrespectful language towards it or guilty of contempt of Court is properly dealt with as a suitor and not as a legal practitioner. They do not help us in determining the meaning of clause (*f*) of section 13 of the Act. The decision in *In re quarry*(7) on which some reliance was placed by the dissenting Calcutta Judge, Ghose, J., was brought to our notice; but I am unable to agree that that case is of any assistance. There, certain correspondence of a pleader with the opposite party to his former client was held by their Lordships of the Privy Council to afford ample evidence that the pleader was in his professional capacity guilty of grave improprieties which amounted to reasonable cause for his suspension under section 13 of the Unamended Act XVIII of 1879. Their Lordships had no occasion to consider whether dishonourable or dishonest conduct which was not in the discharge of professional duty would fall within the purview of "reasonable cause" in section 13. *In the matter of Parbati Charan Chatterji*(8)

(1) (1900) I.L.R., 27 Calc., 1023. (2) (1902) I.L.R., 29 Calc., 890.
(3) (1909) 19 M.L.J., 504. (4) L.R., 1 P.C., 283.
(5) (1901) I.L.R., 24 Mad., 17. (6) (1908) 18 M.L.J., 184.
(7) (1890) 17 I.A., 199 (*s.c.*) I.L.R., 13 All., 93.
(8) (1895) I.L.R., 17 All., 498.

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related to the case of a vakil of the High Court and *In the matter of Sashi Bhushan Sarbadhicary*(1) to that of an advocate. Both these cases fell under the Letters Patent by which an advocate or vakil could be removed or suspended from practice "on reasonable cause." The acts charged against them were connected with the discharge of their professional duty. But having regard to the language of the Letters Patent no question could arise like the one with which we have to deal in the present case. The case *In the matter of Ahasan Ali*(2) was decided in favour of the pleader upon the facts. It was there held that he was the victim of a deception in paying the client's monies to one who personated him and that when he afterwards negotiated with the client on the mistake being discovered for acceptance of a reduced sum in discharge of the liability, his conduct could not be said to have been grossly improper. These were all the cases to which our attention was invited. It is clear that the Calcutta High Court in Full Bench with the exception of Ghose, J., and three learned Judges of this Court have expressed themselves in favour of the unrestricted interpretation of clause (*f*) of section 13. I have asked myself the question whether there is sufficient reason for a departure from this trend of authority. The elaborate judgment of Hill, J., in the Full Bench case *Le Mesurier* v. *Wajid Hossain*(3) covers nearly the whole ground of the reasoning which must determine the conclusion. I do not therefore think it necessary to dwell in detail upon the steps by which I have arrived at the same conclusion. But having regard to the importance of the question I have thought it right to indicate in a few words what has inclined me to adopt the same view.

The question must be answered with reference to the language of the Act apart from any decisions in England, however useful and instructive they may be as regards the principles on which the rules laid down by the Indian legislature may be based. It seems difficult in the first place to limit clause (*f*) to professional misconduct because clause (*b*) deals with "grossly improper conduct" in the discharge of professional duty and it is not

(1) (1907) I.L.R., 29 All., 95. (2) 5 All., L.J., p. 126.
(3) (1902) I.L.R., 29 Calc., 890.

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possible to name any species of professional misconduct which does not fall within clause (*b*) itself. If it is suggested that the misconduct referred to in clause (*f*) need not be of a flagrant type which the words "grossly improper conduct" indicate I must confess that the division of misconduct in clauses (*b*) and (*f*) into two species is altogether unnecessary and the object aimed at could have been achieved by the enactment of a single clause which would comprise both the classes of misconduct. Again, it must be remarked that when the legislature intends to strike at any species of professional misconduct by clause (*f*) there is no point in selecting fraudulent and grossly improper conduct in the discharge of professional duty for special condemnation. The doctrine of *ejusdem generis* which has been invoked for the limited interpretation of clause (*f*) is not of universal application. Hardcastle on Statutory Law quoting *Anderson* v. *Anderson*(1) makes the following remark: "But the *ejusdem generis* rule is one to be applied with caution and not pushed too far, as is the case in many decisions which treat it as automatically applicable, and not as being, what it is, a mere presumption, in the absence of other indications of the intention of the legislature; and where the words are clearly wide in their meaning they ought not to be qualified on the ground of their association with other words." Clauses (*a*) to (*c*) of section 13 are not particular cases of one genus. Each of them may well be regarded as a group dealing with a distinct branch or subject by itself and in such a case the general words of clause (*f*) cannot be controlled by the *ejusdem generis* rule. Wilberforce on Statutes at page 185 says "If the particular words exhaust a whole genus, the general words must refer to some larger genus." See *Fenwick* v. *Schmalz*(2) per Willes, J. In Maxwell on the Interpretation of Statutes the idea I have sought to convey is pointedly expressed at page 509. "The general principle in question applies only where the specific words are all of the same nature. Where they are of different *genera*, the meaning of the general words remains unaffected by its connection with them." The learned author makes reference to two cases which illustrate the principles of the passages above cited. In *Regina* v. *Pyne*(3) it was held that "any other article or thing" in the clause making it penal to

(1) (1895) 1 Q.B., 749. (2) (1868) L.R., 3 C.P., at p. 315.
(3) L.R., 1 C.C., 27.

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convey to the prisoner "any mask dress or disguise or any letter or any other article or thing" included a crowbar because the words "disguise" and "letter" exhausted whole *genera*. And in *Regina* v. *Edmundson*(1) it was held that a warehouse a mile and a half distant from a dwelling house was included in the words "other place" when search warrants were authorized for suspected articles in "any dwelling house, outhouse, garden or other place" on the ground that it was reasonable to suppose having regard to the preamble and general intention of the statute that the warehouse was in the contemplation of the legislature as it was a very likely place for the concealment against which the enactment was directed, and a narrower construction would have restricted the effect instead of promoting the object of the Act. Stroud in his Judicial Dictionary in the notes on the interpretation of the word "other" qualifying a general word at the end of a series of particular words observes "It is perhaps impossible to lay down any workable rule to determine which of these two interpretations the word should receive in any case not already covered by authority" and classifies a number of cases under the head of "unrestrictedly comprehensive" interpretation in the sense of "every other sort or kind." *See* pp. 1366–1368.

If we look at the law in England and the history of the legislation in India it seems to me that the larger interpretation of the phrase "for any other reasonable cause" is more in accordance with the intention of the legislature. If a solicitor is convicted of a crime involving moral turpitude even though it has no connection with his professional duty he is liable to be struck off the rolls. *In re Weare*(2). This rule corresponds to section 12 of the Legal Practitioners' Act. It is also the law in England, where the misconduct is in character criminal though no indictment has been preferred, or where a conviction has been quashed because the prisoner's admissions were wrongly received in evidence or even where a solicitor has obtained a verdict of not guilty that the solicitor may be punished by suspension or by striking off the roll. Cordery on Solicitors, page 177. *In re Hill*(3) where an attorney acted as a clerk to a firm of attorneys and appropriated to his own use the balance of pur-

(1) 2 Ellis and Ellis, page 77. (2) (1893) 2 Q.B., 439.
(3) L.R., 3 Q.B., 543.

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chase money which he received in the sale of certain property, the Court suspended him for the misconduct in the exercise of its summary jurisdiction though it was not in his strictly professional character. Chief Justice Cockburn, observed at page 545 "when an attorney does that which involves dishonesty, it is for the interest of suitors that the Court should interpose and prevent a man guilty of such misconduct from acting as attorney of the Court. In this case, if the delinquent had been proceeded against criminally upon the facts admitted by him, it is plain that he would have been convicted of embezzlement, and upon that conviction being brought before us, we should have been bound to act. If there had been a conflict of evidence upon the affidavits, that might be a very sufficient reason why the Court should not interfere until the conviction had taken place; but we have the person against whom this application is made admitting the facts." Mr. Justice Blackburn said "In the present case I adhere to what I think is the effect of *re Blake*(1) that although the misconduct is not directly or incidentally connected with his character of attorney, still we must consider what effect that has upon the question of a proper person to be an officer of the Court." If this be the law in England what reason is there to suppose that a different standard is adopted in India where there is more reason to guard the profession from the influx of questionable characters, to whose machinations a more ignorant clientele is certain to be exposed. The Letters Patent of the High Courts were issued on the 14th May 1862 and they gave the High Courts unrestricted powers "to remove or suspend from practice advocates, vakils and attorneys on reasonable cause," a phrase only to be interpreted in the light of English decisions. It has not been suggested that under the Letters Patent an advocate, vakil or attorney is only liable to be dealt with for misconduct in the discharge of professional duty. To use the language of Lord Westbury in *In re Wallace*(2), "if an attorney be found guilty of moral delinquency in his private character" he may be struck off the roll under the Letters Patent. The amended Letters Patent were issued on the 28th of December 1865. In the same year Act XX of 1865 was passed by section 15 of which it was enacted as follows: "The High Court may also, after

(1) 3 Ellis and Ellis, p. 34. (2) L.R., 1 P.C., 283.

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such inquiry as it may deem proper, suspend and dismiss any pleader or mukhtar enrolled as aforesaid, who shall be guilty of fraudulent or grossly improper conduct in the discharge of his professional duty, or for any other reasonable cause." This section came up for consideration before Glover and Kemp, JJ., in *In the matter of the petition of Gholab Khan*(1). The learned Judges were of opinion that the words "for any other reasonable cause" referred to cases other than professional misconduct, Gholab Khan had been acquitted of the charge of instigating a dacoity, against the opinion of the assessors. The High Court did not agree in the propriety of the verdict. Though no further action was taken against him in the criminal case, both the learned Judges agreed in striking the name of Gholab Khan off the rolls. Act XVIII of 1879 re-produced in the third paragraph of section 13 the language of section 15 of the older Act and there is no reason to suppose notwithstanding the addition of a clause about taking instructions in any case except from the party on whose behalf the pleader is retained, that there was any change of intention on the part of the legislature so as to curtail the power of the High Court in dealing with the misconduct of a pleader which was other than professional. By the amendment of 1896 a number of cases which were penalised by section 36 of the Act were brought in as clauses (*c*), (*d*) and (*e*) of section 13 and the clause as to fraudulent or grossly improper conduct in the discharge of professional duty or any other reasonable cause was split up into two, namely, (*b*) and (*f*) of the section. This manipulation on the part of the legislature does not show any change of intention, as regards the meaning of the phrase "other reasonable cause." It can hardly be supposed that pleaders of Subordinate Courts are intended to be dealt with more lightly than practitioners of the High Court. And the intention of the legislature appears throughout to be consistent in giving a free hand to the High Courts in dealing with the delinquency of professional men.

It was argued that section 14 of the Act which limits the authority of Subordinate Courts in their enquiry into the conduct of professional men to cases where they are charged with taking instructions except as aforesaid or with any such misconduct as

(1) (1871) 7 B.L.R., 179.

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aforesaid indicates a limitation of the scope of clause (*f*) of section 13. The marginal notes to sections 13 and 14 were also relied on. The note to section 13 runs as follows: "Suspension and dismissal of pleaders and mukhtars guilty of unprofessional conduct." And the note to section 14 runs "procedure when the charge of unprofessional conduct is brought in Subordinate Courts or Revenue Office." It is to be observed in the first place that a marginal note cannot be exhaustive of the contents of the section. "Is it not a mere abstract of the clause intended to catch the eye?" said James, L.J., in *Attorney-General* v. *Great Eastern Railway Company*(1). In the next place marginal notes have not the authority of the legislature like the body of the sections so as to justify the controlling of the meaning of the sections by the language of the notes. See Maxwell, page 62 and *Punardeo Narain Singh* v. *Ram Sarup Ray*(2). As regards the argument that Subordinate Courts have only a restricted power it may be said that the legislature so intended to restrict it while the scope of the enquiry of the High Court itself was left unfettered. This was the view taken in *In the matter of the petition of Gholab Khan Mukhtar*(3). It has also the support of the Privy Council in an observation in *In the matter of Southekul Krishna Row*(4). Sir James Hamien delivering the judgment of the Judicial Committee reads section 14 where it speaks of "any such misconduct" as referring to misconduct in the discharge of his professional duty and not to misconduct included in the phrase "any other reasonable cause." Mr. Justice Hill who delivered the leading judgment in *Le Mesurier* v. *Wajid Hossain*(5) expressed himself, *In the matter of Purna Chunder Pal*(6) as inclined to take the view that taking instructions and misconduct referred to in section 14 related to clauses (*a*) and (*d*) respectively of section 13 of the Act. If this view were correct it would follow that cases falling under clauses (*c*) to (*e*) as well as those that come within clause (*f*) of section 13 would lie outside the competency of subordinate Courts to inquire into. It is unnecessary that I should express an opinion as to whether misconduct in section 14 should be understood in such a restricted sense. But it seems to be clear that there is no warrant

(1) (1879) 11 Ch.D., 449 at p. 465.
(2) (1898) I.L.R., 25 Calc., 858.
(3) (1871) 7 B.L.R., 179.
(4) (1887) 14 I.A., 154.
(5) (1902) I.L.R., 29 Calc., 890.
(6) (1900) I.L.R., 27 Calc., 1023.

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for cutting down the meaning of the phrase "for any other reasonable cause," in the light of the circumstance that the authority of the subordinate Courts under section 13 is more restricted. I have therefore no hesitation in following the interpretation placed upon the clause in question by the learned Chief Justice. A different interpretation would necessitate the conclusion that rules 23 and 28 framed by the High Court authorizing refusal of renewal of certificates for misconduct in any position of trust or responsibility and suspension of a pleader for carrying on a trade or business were *ultra vires*.

Having determined the meaning of clause (*f*) of section 13, I proceed to enquire whether the pleaders have rendered themselves liable to punishment. It is unnecessary to set out the facts here as they have been fully examined and dealt with by my brother Abdur Rahim, J., in his judgment in the criminal appeal. It is not seriously argued that the Circars Provident Fund started, advertised and managed by the pleaders before us was anything but a snare to the ignorant and unwary public. The Company was limited by guarantee in the ridiculously low sum of Rs. 5 per head. There were no share-holders. The Directors who numbered seven constituted the members of the Company. They promised by their prospectus, the preface to the Articles of Association, and the notice on the back of the fly-leaf to each nominee on the death of the applicant at least double the amount of the subscription if the death occurred after the first three months of the applicant joining the fund. Every one had his prize which might range from two to fifteen times the subscription. The bonus fund each year available for distribution amongst the nominees of applicants dying in any year was made up only of eight annas out of every rupee received in the year after three months' subscriptions of each set apart as entrance fees. Every applicant being bound to die sooner or later and speaking broadly, their being an obligation to pay the nominee of the applicant at least four times each half rupee set apart for the bonus out of every rupee contributed, what was the source available for making up the difference? The answer is, two annas in each rupee contributed which constituted the Reserve fund and six pice in each rupee so collected which constituted the guarantee fund. The profit of the directors of three annas in the rupee would also be generously given up to make up the difference. But how could five annas and a half out of each rupee, if all the resources

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available were scraped together, meet the minimum liability in excess of the bonus, of one rupee and a half for each rupee received as contribution. The Company could be wound up at any time at the pleasure of the directors. Let the working of the Company be stopped any day and all the outstanding nominees unpaid are bound to suffer loss; and yet the prospectus tells every person that by joining the fund he never stands to lose. There was a note under article 14 of the Articles of Association that the special term as to the minimum bonus of double the subscriptions being made good out of profits was only to be in force till the end of December 1905. But the provision was made permanent in February 1906. This was of course the bait to intending subscribers. That the whole concern was a practical swindle, it is impossible to gainsay. The lucky nominees of short-lived applicants had a good game of lottery. So long as fresh subscribers joined in progressive numbers, the Company might manage to stave off the evil day; and the new capital might pay off the old liability. But the concern was doomed to failure, and the inevitable crash could not be long in coming. As it was, it came in about two years and a half though the number of subscribers stood at the time over 8,000, a flourishing position for any concern conducted on business principles. There was no loss sustained by the Company. No untoward event had happened. No speculation had failed and no investments lost. But the number of subscribers did not go on increasing as rapidly as it was necessary for fresh capital to cover the old liabilities and keep up the company's attractiveness to the gamblers on the lives of applicants. Mr. Ranga Chariar for the first accused had the courage to argue that the principles of the company were the same as those of life insurance. Yes. There was one thing in common, namely, that sums of money were payable on the death of the insured. But an insurance company would be nothing but a fraud if there was not a variable premium dependant on the chance of each life and if the premia paid by the assured could never exceed the policy amount. What made failure inevitable from the inception was the principle of profit to all subscribers and loss to none, with gain to the conductors. The rate of profit was exorbitant and no prospect of interest to be earned on investments could minimise the danger of failure, for only 2½ annas out of every rupee subscribed could be invested at 3½ per cent. The accused have been rightly acquitted of

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criminal misappropriation of the company's funds. They made no secret of their claim to the profit provided for by the articles. Every subscriber paid his dues with full knowledge that 3 annas in the rupee and the entrance fee of three months' subscriptions after certain deductions would go into the pockets of the directors. But the question is different as regards the character of the concern itself. If it was bound to end in failure and to inflict grievous loss on the majority of subscribers what is the measure of the responsibility of those who ushered the company into existence and managed its affairs. We must here discriminate between the first and second accused. Bapatla was the head office of the provident fund. The second accused lived and practised at Ongole. He was a pleader of about six months' standing. In 1906 he got to know that it was unprofessional to continue as a director of the fund. He resigned his place and relinquished his profit of Rs. 600 for the year. Under these circumstances it does not seem to me to be taking too favourable a view of his conduct to hold that when he joined the fund, he did so without knowing or having reason to suspect that he was associating himself with a nefarious concern. I agree with the learned Chief Justice that his recklessness in becoming a director of the fund without sufficient enquiry as regards its character and inevitable tendency to cause ruin may, in view to the hardships he has already undergone, be dealt with by our merely pointing out his error. As regards the first accused, however, I am inclined to take a more serious view of his conduct. I acquit him of a deliberate intention to deceive the public by misrepresentation of the financial possibilities of the enterprise. I would even go further and assume in his favour that he did not definitely realize in his own mind what a large body of subscribers must inevitably be swindled out of their monies. But he was a Graduate in Arts. He was a pleader of some years' standing. He was the President of the fund. He was intimately associated with its working. It is impossible to believe that he had not abundant reason to know the true character of the business. When the second accused assigned his reason for withdrawal that it was unprofessional to be a director of the fund, the first had nothing to say on the subject though his attention was pointedly drawn to it. Mr. Ranga Chariar asked us to believe that the first accused was merely the dupe of Kondalrayudu. I am unable to think so. I have

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no doubt he was a willing party to a scheme calculated to bring him profit at the expense of the ignorant public whom he inveigled into the company's meshes by representations which he must have known were impossible of fulfilment. We are told that no criminal charge of cheating has been brought against him. But that does not oust our jurisdiction under the Act as I have already pointed out. I do not think that on the facts of this case which have been fully threshed out in a judicial trial, though on a different charge, any useful purpose will be served in directing a fresh prosecution for cheating as preparatory to proceedings under the 'Legal Practitioners Act', though, as observed by Chief Justice Cockburn in a case of conflicting evidence, in a matter of a criminal nature such a course would be expedient. I concur in holding that Choragudi Venkatadri Pantulu Garu is guilty of moral delinquency of such a character as to justify the sentence of three months' suspension proposed by the learned Chief Justice.

APPELLATE CIVIL.

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

MANICKAM PILLAI (PLAINTIFF), APPELLANT,

1910. January 12.

v.

AUDINARAYANA PILLAI AND OTHERS (SUPPLEMENTAL DEFENDANTS NOS. 2 TO 5), RESPONDENTS.*

Transfer of Property Act IV of 1882, s. 100—Construction of document—Charge created where words though wide are definite.

Where by a document, 'the properties' of one of the parties are made liable and it appears on the construction of the document that the word 'properties' does not mean the properties of such party generally but certain specific properties, a charge will be created on such specific properties alone.

A distinction must be drawn between wideness and indefiniteness of language. *Bheri Dorayya* v. *Maddipatu Ramayya*, [(1881) I.L.R., 3 Mad., 35], considered.

APPEAL against the decree of M. Visvanatha Aiyar, Subordinate Judge of Negapatam, in Original Suit No. 4 of 1904.

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* Appeal No. 186 of 1905.

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MANICKAM PILLAI v. AUDI-NARAYANA PILLAI.

Suit to recover from defendant Rs. 5,250 by sale of the properties described in the plaint. This amount was claimed under the terms of a partition deed, which terms are set out in the judgment of the High Court. It appearing from the statement of first defendant, that he had sold the lands sought to be made liable, the purchasers were added as defendants Nos. 2 to 4. They pleaded *inter alia* that under the terms of the partition deed the lands sought to be made liable were not charged with the payment of the debt, and that as they were *bonâ fide* purchasers for value, the lands should be exempted from liability.

The Subordinate Judge held that no charge was created by the partition deed and passed a decree against the assets of the first defendant who died pending the suit.

The plaintiff appealed to the High Court.

The Hon. Mr. *T. V. Seshagiri Ayyar* and *T. V. Muthukrishna Ayyar* for appellant.

The Advocate-General (Hon. Mr. *P. S. Sivaswami Ayyar*) for first to third respondents.

SIR ARNOLD WHITE, C.J.—The question which arises for determination in this appeal is whether certain words in clause 5 of exhibit A create a charge within the meaning of section 100 of the Transfer of Property Act. For the purpose of dealing with this question it is necessary to read the words which it is suggested create the charge by the light of the provisions of the deed as a whole. Now the deed in question is a partition deed entered into between two parties, one Sambasiva Pillai who is the first defendant in the present suit, and one Manikkam Pillai who is the plaintiff in the present suit.

The first clause provides that properties mentioned in schedule A should be enjoyed by Sambasiva Pillai and that properties mentioned in schedule B should be enjoyed by Manikkam Pillai. Then clause No. 2 provides that, as the value of the properties in schedule A, *i.e.*, Sambasiva Pillai's schedule, is more than that of the properties in schedule B, Manikkam's schedule, a sum of Rs. 875 should be paid by Sambasiva Pillai to Manikkam, and the same clause also provides that as Manikkam has paid Government kist due from Sambasiva Pillai, Sambasiva Pillai should pay a further sum of Rs. 725, making altogether Rs. 1,600. Then clause No. 3 refers to a debt incurred by the father of Sambasiva Pillai and Manikkam Pillai for which the father

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had executed a pro-note for, in round figures, Rs. 3,200. The deed provides that Sambasiva Pillai should pay and discharge his liability, that is half of Rs. 3,200, viz., Rs. 1,600; and the deed further provides that besides this Rs. 1,600, the half share due by Manikkam Pillai, should be paid and discharged by Sambasiva Pillai who already had to pay Rs. 1,600 to Manikkam Pillai as provided in clause No. 2.

There is no question that the effect of paragraph No. 3 is that Sambasiva Pillai made himself liable to pay, in all, Rs. 3,200.

Now we come to clause No. 5 which contains the words which the appellant contends create a charge. Clause No. 5 is "if either of the parties to the deed"—I only refer to so much of it as is material: "if either of the parties to the deed should fail to observe the provisions in paragraphs Nos. 3 and 4, he, that is the party in default, shall pay to the other party who has sustained loss twice the amount *from their properties*."

No question arises in regard to twice the amount as the plaintiff only claims to be indemnified on the ground that he had to pay by reason of the party in default having failed to discharge the liability which he incurred under the provisions of clause No. 3 of the deed.

The words which are relied on as creating a charge are "pay the amount from their properties." And the first question, which arises for consideration is what is the meaning of the words "their properties" occurring in clause No. 5. It seems perfectly clear to me that the underlying idea of this deed of partition between these two parties was equality of division, and that any inequality which arose from the difference in the value of the properties comprised in the two schedules or from the fact that payments had been made by one of the parties for which the other party was liable or for which both parties were liable, that these inequalities should be adjusted by payment from one party to the other, so that the final result would be that there should be under the partition deed equality of division. Therefore it seems to me in reading the words in clause No. 5 by the light of the general provisions of the deed and bearing in mind the fundamental idea of the deed, namely, equality of division, that the word "properties," which occurs in clause No. 5, is to be construed as meaning properties referred to in Schedule A or in Schedule B as the case may be.

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The Advocate-General has pointed out that whenever it is intended to refer to the properties in the schedules in the other clauses of the deed there is an express reference to the schedules. That is true enough. But then without a reference to the schedules in the other clauses in the deed, it would be impossible to express the intention of the parties intelligibly. No such necessity arises in regard to clause No. 5, and I am certainly not prepared to say that the word "properties" in clause No. 5 is used in a different sense from that in which it is used wherever else it occurs in the deed. Now that being, in my view, the construction of the word "properties" I do not feel much difficulty in dealing with the cases which have been cited by the Advocate-General. The only case to which I need refer is that of *Bheri Dorayya* v. *Maddipatu Ramayya*(1), which I think is the strongest case in support of the Advocate-General's contention, because it contains language which is very similar to the language in the present deed. There, it was held that a promise to pay out of the debtor's property indefinitely did not create a charge. If I took the view that the word "properties" in the deed in question in the present case referred to the debtor's "property" generally one would have to consider how far one would be prepared to follow the case in *Bheri Dorayya* v. *Maddipatu Ramayya*(1) in view of some of the later decisions, and in view of the law which has been laid down in some of the text-books to which our attention has been called. But, as it seems to me, the word "properties" means in the present case the properties in the schedules I think the language is specific and not general. Of course, even if it were general, it does not follow that a charge is not created by reason of the fact that the language is general because, as is pointed out by Mr. Ghose in the passage in his work which the Subordinate Judge himself has cited, a distinction has been drawn between wideness of language and vagueness or indefiniteness of language. The passage is set out in paragraph No. 32 of his judgment. "The truth is indefiniteness is frequently confounded with what has been called wideness, it being forgotten that the subject-matter of the contract may be wide and yet definite, while on the other hand it may be narrow and yet

(1) (1881) I.L.R., 3 Mad., 35.

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indefinite." The proper construction of the words in my view being what I have indicated, I hold that the words are sufficiently apt to create a charge. Therefore I must dissent from the view which was adopted by the Subordinate Judge in this case. His decree must be set aside and the case must be sent back to him to be disposed of according to law. Costs will abide the event.

MUNRO, J.: I am of the same opinion.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Abdur Rahim.

1910. February 21.

MAHADEVA AIYAR (PLAINTIFF), APPELLANT,

v.

GOPALA AIYAR AND OTHERS (DEFENDANTS), RESPONDENTS.*

Mortgage deed, mistake of fact in—Knowledge of mistake by second mortgagee—Notice—Specific Relief Act I of 1877, section 31.

A second mortgagee who has advanced money with the knowledge of a mutual mistake of fact between the mortgagor and the first mortgagee as to the subject matter of the first mortgage has notice of that mistake of fact and cannot plead that he acquired his rights in good faith under section 31, Specific Relief Act.

Where a plaint alleges a mutual mistake of fact extrinsic evidence of such mistake is admissible although no rectification thereof is prayed for.

Karuppa Goundan alias *Thoppala Goundan* v. *Periathambi Goundan*, [(1907) I.L.R., 30 Mad., 397], followed.

APPEAL against the decree of M. Visvanatha Aiyar, Subordinate Judge of Negapatam in Original Suit No. 47 of 1905.

Suit to recover the amount due on a mortgage.

In this suit the mortgagor mortgaged certain properties to the plaintiff by way of first mortgage. In the mortgage bond Survey Nos. 49-D and 194-O were inserted by mutual mistake for Survey Nos. 49-A and 194-W. Subsequently, the mortgagor mortgaged Survey Nos. 49-A and 194-W to a third party. The first mortgagee now sued the mortgagor for the mortgage amount joining the third party as second defendant and alleging the mistake of

* Appeal No. 106 of 1906.

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fact. The second defendant had knowledge of the mistake when his mortgage was executed. The lower Court held that this knowledge did not amount to notice, and passed a decree in favour of plaintiff as against the mortgagor only and dismissed the suit against the second defendant.

The plaintiff appealed to the High Court.

The Advocate-General (Hon. Mr. *P. S. Sivaswami Aiyar*) for appellant.

The respondents were not represented.

JUDGMENT.—It is to be regretted that the respondent is not represented in this appeal.

It is found that the survey numbers in the two mortgage deeds executed by the first defendant to the plaintiff 49-D and 194-O were by mutual mistake inserted instead of 49-A and 194-W, respectively. The second defendant was a subsequent mortgagee. His evidence, as we understand the case, was that he knew of this mistake and that it was on the strength of this mistake that he advanced money on second mortgage. The Judge finds that the second defendant made the advance without notice of the error in the mortgage to the plaintiff, "though", he says "he was aware of it". We cannot follow this finding. If the second defendant made the advance with knowledge of the mistake, we do not see how it can be said that he did so without notice or that he acquired rights in good faith (section 31 of the Specific Relief Act). The plaint does not contain a prayer for rectification, of the first defendant's mortgage, but it alleges a mutual mistake of fact, and the omission of a prayer for rectification is, at most, a matter of form. Extrinsic evidence is admissible to show the mistake (*Karuppa Goundan* alias *Thoppala Goundan* v. *Periathambi Goundan* (1)). In our opinion the plaintiff is entitled to relief against the second defendant in respect of Survey Nos. 49-A and 194-W, and the decree must be modified accordingly.

The second defendant must pay the costs of this appeal.

(1) (1907) I.L.R., 30 Mad., 397.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Krishnaswami Ayyar.

1910. January 12, 17.

RAMASAMI PILLAI (FIFTH DEFENDANT), APPELLANT,

v.

MUTHU CHETTI AND OTHERS (PLAINTIFFS Nos. 1 TO 4 AND DEFENDANTS Nos. 1 TO 4), RESPONDENTS.*

Debt, hypothecation of—Hypothecatee of debt has the right to sue for the debt hypothecated—Transfer of Property Act, IV of 1882, s. 134.

The holder of a charge on a debt due to his debtor is a transferee of an actionable claim and entitled to recover the debt from the transferor's debtor.

Section 134 of the Transfer of Property Act shows that the mortgagee is a transferee and entitled to sue in his own name for the recovery of the original debt.

Where the original creditor is added as a party, the chargeholder, though not entitled to the whole amount, may recover the amount.

SECOND APPEAL against the decree of V. Swaminatha Ayyar, Subordinate Judge of Madura (West) in Appeal Suit No. 371 of 1906 presented against the decree of T. Jivaji Row, District Munsif of Tirumangalam in Original Suit No. 189 of 1906.

Suit for Rs. 560 due on a hypothecation bond executed by defendants Nos. 1 to 4 in favour of the plaintiffs' father. Defendants Nos. 1 to 4 were subscribers to a chit fund of which fifth defendant was stake-holder. The chit amount was hypothecated to plaintiffs' father and plaintiffs alleged that fifth defendant attested the bond and promised to pay the amount to the plaintiffs' father on behalf of the defendants Nos. 1 to 4.

The fifth defendant pleaded *inter alia* that he attested the bond without knowing its contents and that he never undertook to pay the chit amount.

The Munsif found that there was no undertaking by the fifth defendant, and passed a decree against defendants Nos. 1 to 4.

On appeal, the Subordinate Judge held that the fifth defendant was not liable as a surety, but found that in respect of the chit transactions he owed the third defendant a sum of Rs. 160. He held that under the bond the fifth defendant was liable to the plaintiffs for this sum.

The fifth defendant appealed.

* Second Appeal No. 905 of 1907.

MILLER AND KRISHNASWAMI AYYAR, JJ.

RAMASAMI PILLAI v. MUTHU CHETTI.

K. N. Aiya for appellant.

C. Krishnama Chariar for the first respondent.

JUDGMENT.—There is evidence to support the Subordinate Judge's finding that Rs. 160 had been paid to the fifth defendant by the third defendant and we accept that finding.

The question is raised whether exhibit A constitutes an assignment of the right to recover the subscriptions received by the fifth defendant.

The instrument hypothecates a debt, and on this instrument the hypothecatee has an interest sufficient to give him a right to sue. In *Muthu Vijia Ragunatha Ramachandra Vacha Mahali Thurai* v. *Venkatachalam Chetti*(1) the sub-mortgagee was held entitled to sue the original mortgagor. *Isri Prosad* v. *Rai Gunga Prosad Singh Bahadur*(2) and *Ardesir Bejonji Surti* v. *Syed Sirdar Ali Khan*(3) are authorities for the position that the holder of a charge on a debt due to his debtor by way of security for his own loan, is a transferee of an actionable claim, and entitled to recover the debt from the transferor's debtor. In *Durham Brothers* v. *Robertson*(4) Chitty, L.J., observes "a mere charge on a fund or debt operates as a partial equitable assignment. As is well known, an ordinary debtor chose in action before the Judicature Act was not assignable so as to pass the right of action but it was assignable so as to pass the right to sue in equity. In a suit in equity the assignee of a debt even when the assignment was absolute on the face of it had to make the assignor, the original creditor, a party, in order, primarily, to bind him and prevent his suing at law, and also to allow him to dispute the assignment if he thought fit. This was *a fortiori* the case where the assignment was by way of security, or by way of charge only, because the assignor had a right to redeem." Section 134 of the Transfer of Property Act shows that the mortgagee is a transferee and entitled to sue in his own name for the recovery of the original debt. Even though the plaintiff as chargee may not be entitled to the whole debt assigned by way of security, still as the original creditor is a party to the suit, there can be no objection to his recovering.

In these circumstances we dismiss the appeal with costs.

(1) (1897) I.L.R., 20 Mad., 35.
(2) (1910) 14 C.W.N., 165.
(3) (1909) I.L.R., 33 Bom., 610.
(4) (1898) 1 Q.B., 765 at p. 769.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Krishnaswami Ayyar.

AIYAVU MUPPAN (THIRD DEFENDANT), APPELLANT,

v.

VELLAYA NADAN AND OTHERS (PLAINTIFFS Nos 1 TO 4), RESPONDENTS.*

1909. November 5, 12. 1910. February 15.

Misjoinder of causes of action—Persons whose separate rights have been infringed by a single act of another cannot join in one suit—course to be adopted when there is a misjoinder of causes of action—Civil Procedure Code, Act V of 1908, s. 99.

Where the separate right of each of several persons is affected by a single act of another person, each of such persons has a separate cause of action against such other person and they cannot bring a suit jointly against such other person.

Smurthwaite v. *Hannay*, [(1894) A.C. 494], referred to.

Where there has been a misjoinder of causes of action, which has prejudiced the defendant on the merits and no objection to such misjoinder was taken in the written statement or at the settlement of issues, the provisions of Section 99 of the Civil Procedure Code, Act V of 1908, will apply and the ends of justice will be sufficiently met by findings in the case of each separately, instead of dismissing the suit.

SECOND APPEAL against the decree of S. Ramaswami Ayyangar, Subordinate Judge of Madura (East) in Appeal Suit No. 541 of 1905, presented against the decree of T. K. Subbier, District Munsif of Manamadura in Original Suit No. 15 of 1904.

Suit to recover lands. The plaintiffs' case was that the suit lands were sold by the first defendant to the first plaintiff and S, the deceased father of plaintiffs Nos. 2—4; that the first plaintiff and S, and after the death of S, plaintiffs Nos. 2—4, continued in possession till 1894, when defendants Nos. 3 and 4 under a fraudulent sale from first defendant ousted them

The defendants raised various objections, none of which were directed to the question of misjoinder.

At the trial of the suit the first plaintiff deposed that he and the other plaintiffs were divided in interest and owned distinct portions of the land. An issue was then raised whether the suit was bad for misjoinder of parties and causes of action.

* Second Appeal No. 645 of 1907.

BENSON AND KRISHNASWAMI AYYAR, JJ.

AIYAVU MUPPAN v. VELLAYA NADAN.

The Munsif held that the suit was bad for misjoinder and that the plaintiffs' case was not proved and he accordingly dismissed the suit.

On appeal the Subordinate Judge found that the case for plaintiffs was proved and holding that the suit ought not to have been dismissed for misjoinder, passed a decree in favour of the plaintiffs.

The third defendant appealed.

T. Ranyachariar for appellant.

The Hon'ble Mr. T. V. Seshagiri Aiyar and *K. Kuppuswami Aiyar* for first and second respondents.

JUDGMENT.—It is found by the Subordinate Judge that the first plaintiff and plaintiffs Nos. 2 to 4 are divided in interest, and have been in possession of separate portions of the disputed land. The plantiffs allege title under a sale in 1878. This was negatived by the District Munsif. But the Subordinate Judge without finally deciding that question has found a title by adverse possession for more than 12 years in their favour. It is argued for the appellant that the suit is bad for misjoinder of causes of action. The first plaintiff and plaintiffs Nos. 2 to 4 claim different lands and their title as found is by adverse possession of their respective portions. The injury to their rights is by the defendants' trespass. Although the trespass might have been at the same time, the right being separate, the cause of action must be held to be separate. The authorities cited by Mr. Rangachariar are decisive of the question. The decision of the House of Lords in *Smurthwaite* v. *Hannay*(1) referred to in *Subramania Aiyar* v. *King-Emperor*(2) and in *P. and O. Co.* v. *Tsune Kijima*(3) are clear authorities in support of the appellant's contention. Each person being separate in the eye of the law, any act of the defendant affecting the separate right of each gives to each a separate cause of action. The same principle was laid down in *Carter* v. *Rigby and Co.*(4). For Indian cases, we may refer to *Ramanuja* v. *Devanayaka*(5), *Ali Serang* v. *Beadon*(6) and *Salima Bibi* v. *Sheikh Muhammad*(7). The decisions cited by Mr. Seshagiri Aiyar, who appeared for the respondents, are not in point. They are all cases either of common

(1) (1894) A.C., 494. (2) (1902) I.L.R., 25 Mad., 61.
(3) (1895) A.C., 661. (4) (1896) 2 Q.B., 113.
(5) (1885) I.L.R., 8 Mad., 361. (6) (1885) I.L.R., 11 Calc., 524.
(7) (1896) I.L.R., 18 All., 131.

BENSON AND KRISHNASWAMY AYYAR, JJ.

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title or alternative claims arising upon one event. Reference was made to the recent decision of the Privy Council in *Rup Narain* v. *Gopal Devi*(1). It was a suit by reversioners in respect of alienations by the widow. Their Lordships of the Judicial Committee were disposed to regard the cause of action as one. But even if it was more than one, they were inclined to hold that section 578 of the Civil Procedure Code of 1882, cured the irregularity in the joinder of several causes of action, for the parties had not been prejudiced on the merits. Assuming this to be a pronouncement by that tribunal that all misjoinder of causes of action could be cured under section 578, if there was no prejudice on the merits; a proposition to which we are not prepared to assent in the face of *Smurthwaite* v. *Hannay*(2), where the misjoinder was described by Lord Herschell as much more than a mere irregularity, and it was quoted with approval by their Lordships in *Subramania Ayyar* v. *King-Emperor*(3), we are still inclined to think that the defendants must be held to have been prejudiced by the joinder of the causes of action.

It is sufficient to draw attention to the fact that the evidence of adverse possession by the first plaintiff would not be evidence of adverse possession in favour of plaintiffs Nos. 2 to 4 and *vice versâ*. The Subordinate Judge has considered the whole of the evidence as to adverse possession as bearing on the rights of all the plaintiffs. Exhibits B and D which relate to the first plaintiff's lands would have no bearing on the possession of plaintiffs Nos. 2 to 4. We hold, therefore, that there has been a misjoinder of causes of action and that the defendants have been materially prejudiced by such misjoinder. But we do not think that we are bound to dismiss the suit on that account. The plea of misjoinder was not raised in the written statement or at the time of the settlement of issues. An additional issue was framed on that question on the 24th February 1905, when the plaintiff's first witness was under examination.

Moreover, section 99 of the new Code applies to this case. We think the interests of justice will be sufficiently met by directing the Subordinate Judge to return fresh findings on the question of title by adverse possession in the first plaintiff, and

(1) (1909) L.R., 36 I.A., 103. (2) (1894) A.C., 494.
(3) (1902) I.L.R., 25 Mad., 61.

BENSON AND KRISHNASWAMI AYYAR, JJ.

AIYAVU MUPPAN v. VELLAYA NADAN.

plaintiffs Nos. 2 to 4 separately as regards the lands respectively claimed by them. The findings will be returned on the evidence on record in six weeks. Seven days will be allowed for filing objections.

[In compliance with the order contained in the above judgment, the Subordinate Judge found the adverse possession of plaintiffs proved and the second appeal was dismissed.]

APPELLATE CIVIL.

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

1909. December 16. 1910. February 2.

GORIJALA PITCHI NAIDU AND OTHERS (DEFENDANTS), APPELLANTS,

v.

VALLUR VEERIAH AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Unassessed Government waste—Right of pasture on, not to exclude owner's right to possession—Acts necessary to obtain prescriptive title.

There are no statutory provisions in the Madras Presidency as in Bombay with reference to the grazing rights of villagers over adjoining Government waste.

The right of pasture on unassessed waste cannot exclude the owner's right to possession and enjoyment of the property over which such a right may exist.

Ram Sarjn Singh v. *Birju Singh*, [(1897) (I.L.R., 19 All., 172)] referred to.

Secretary of State for India v. *Mathmabhai*, [(1890) (I.L.R., 14 Bom., 213 at p. 221)] distinguished.

SECOND APPEAL against the decree of A. Venkatramana Poi, District Judge of Nellore, in Appeal Suit No. 194 of 1904, presented against the decree of R. Narasimham Aiyangar, in Original Suit No. 190 of 1903.

The Defendants appealed to the High Court.

The facts necessary for this report are stated in the judgment.

A. Krishnaswami Ayyar for *P. R. Sundara Ayyar* for appellants.

K. Bhashyam Ayyangar for respondents.

JUDGMENT.—The suit land was unassessed waste, part of the defendant's village of Lakkarajupalle, hamlet of Minagallu. It

* Second Appeal No. 37 of 1907.

WHITE, C. AND KRISHNASWAMI AYYAR, J.

GORIJAL PITCHI NAIDU v. VALLUR VEERIAH.

was granted on darkhast in 1901 to the plaintiffs, ryots of Mahimalur. They complain of obstruction and dispossession by the defendants and seek to recover it. The defendants in their written statement do not set up title in themselves or adverse possession against the Government. They plead enjoyment of the land for pasture from time immemorial and deny the right of Government to grant it on darkhast. The District Munsif decreed the plaintiffs' claim. On appeal the District Judge has confirmed the Munsif's decision. He came to the conclusion that most of the plots in dispute were pattah lands till 1873, that the defendants did not hold the lands for pasture from time immemorial or as of right against the Government, and that they had no rights in unassessed waste against Government. The defendants appeal and set up various contentions. It is unnecessary to set them out at length, for we are of opinion that the only plea that was raised in the written statement was as regards the right of pasture, and that has been negatived by the Appellate Court. There being no plea of adverse possession, it is unnecessary to consider the cases as to what would constitute possession according to the nature and character of the property in question (See, however, *Lord Advocate* v. *Lord Blantyre*(1), *Lord Advocate* v. *Young*, *North British Railway Company* v. *Young*(2) and *Van Diemen's Land Co.* v. *Table Cape Marine Board*(3). Nor, is it necessary to determine whether proof of possession for a certain number of years should not lead to the presumption of anterior possession extending to more than the statutory period against the Government (see *Sivasubramanya* v. *Secretary of State for India*(4), *The Secretary of State for India in Council* v. *Nella Kutti Sivasubramania Tevar*(5)). There are no statutory provisions in this Presidency as in Bombay with reference to the grazing rights of villagers over adjoining Government waste, (see *The Collector of Thane* v. *Bal Patel*(6) and *Trimbak Gopal* v. *The Secretary of State for India*(7)). It is, however, contended that the defendants have acquired a right of pasturage over Government waste, and reference is made to the passage at page 221 in the case of *The Secretary of State for India* v. *Mathurabhai*(8) where Sargent, C.J.,

(1) (1879) 4 A.C., 770 at p. 797.
(2) (1887) 12 A.C., 544.
(3) (1906) A.C., 92.
(4) (1886) I.L.R., 9 Mad., 285.
(5) (1892) I.L.R., 15 Mad., 101.
(6) (1878) I.L.R., 2 Bom., 110.
(7) (1897) I.L.R., 21 Bom., 684.
(8) (1890) I.L.R., 14 Bom., 213.

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

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speaks of "the right of free pasturage, which certain villages enjoy according to the recognized custom of the country." But the learned Chief Justice proceeds to qualify this recognition of such a right by the statement that the right is not necessarily conferred on a particular piece of land but may merely amount to having sufficient land set apart for the purpose of the village. Nor can it be said that the right of pasture excludes the owner's right to the possession and enjoyment of the property over which such a right may exist (see *Ram Saran Singh* v. *Birju Singh*(1)). It may perhaps be doubted whether in the case of Government waste where the owner has no use for the property and is not present on the spot to resist any acts of trifling enjoyment on the part of another (see *Lord Advocate* v. *Lord Blantyre*(2)) the mere pasturing of cattle by the adjoining ryot would amount to an enjoyment as of right so as to create a prescriptive title (see *Wali Ahmed Chowdhry* v. *Tota Meah Chowdhry*(3)). We do not think we have sufficient materials in this case to enable us to determine the question whether the defendants have acquired a right of pasture, and if so, on what extent of the suit land. The plaintiffs are clearly entitled to possession. We dismiss the second appeal with costs.

(1) (1897) I.L.R., 19 All., 172. (2) (1879) 4 A.C., 770 at 797. (3) (1904) I.L.R., 31 Cal., 405.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Krishnaswami Ayyar.

1910. April 22, 25, 28.

KOZHIKOT PUDIYA KOVILAGATH SREEMANA Á VIKRAMAN *alias* CHERIYA RAJAH AVERGAL (FIRST DEFENDANT), APPELLANT,

v.

CHUNDAYIL MODATHIL ANANTA PATTER AND OTHERS (PLAINTIFFS AND DEFENDANTS NOS. 2 TO 11, AND 13 AND LEGAL REPRESENTATIVES OF FOURTH AND SIXTH RESPONDENTS.)*

Malabar compensation for Tenants Improvements Act (Madras) Act I of 1900, *ss.* 5, 6, 9 *to* 18, 19—*Contract to claim compensation according to custom not special contract within the meaning of s.* 19—*Tenant can claim higher rates under Act in spite of contract before Act prescribing a lesser rate.*

Where, under a contract entered into in 1872, the tenant has agreed to accept compensation for improvements according to local custom, such undertaking by the tenant is not a special contract within the meaning of section 19 of Madras Act I of 1900 which will debar the tenant from claiming under section 5 compensation as provided in sections 6–18.

Kerala Varmah Valia Rajah v. *Ramunni*, [(1893) 3 M.L.J., 51], referred to.

Section 19 of Act I of 1900 deals only with contracts limiting the right to make improvements and claim compensation. A mere contract regulating the rates of compensation whether before or after the 1st day of January 1886 is not touched by section 19. Where there is such a contract, the tenant, if the contract rates are lower than the rates provided in the Act, can claim the latter rates under section 5; and if the contract rates are higher, he can claim such rates notwithstanding section 6 of the Act.

SECOND APPEAL against the decree of K. Imbichunni Nair, Subordinate Judge of South Malabar, at Palghat in Appeal Suit No. 178 of 1908, presented against the decree of K. Gopalan Nair, District Munsif of Manjeri, in Original Suit No. 653 of 1906.

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

The first defendant appealed.

P. R. Sundara Ayyar for appellant.

C. K. Mahadeva Ayyar for first respondent.

JUDGMENT.—This second appeal relates to improvements. The kanom sought to be redeemed is dated the 3rd of November 1872.

* Second Appeal No. 228 of 1909.

BENSON AND KRISHNASWAMI AYYAR, JJ.

KOZHIKOT SREEMANA VIKRAMAN v. MODATHIL ANANTA PATTER.

It provides that the tenant shall accept the value of improvements according to local custom. The Subordinate Judge has held that the provision amounts to a special contract which is unaffected by the Malabar Tenants Improvements Act. He directed an enquiry into the customary rates and has awarded to the defendants a lesser sum for improvements than the Munsif fixed in accordance with the provisions of the Act. Now, section 5 of Madras Act I of 1900 declares every tenant entitled to compensation for improvements on ejectment. Section 6 provides that the amount of compensation when claimed under section 5 shall be computed according to sections 9 to 18. It is open to every tenant to claim compensation under section 5 and if he does so, the rules for ascertaining the compensation are laid down in sections 9 to 18. But he may instead claim compensation according to the provision contained in any contracts between the parties. In that case section 6 has no application nor have sections 9 to 18. In this case, the tenant claims compensation under section 5. It would *prima facie* seem therefore that the rate of compensation is to be determined in accordance with sections 9 to 18. But it is argued that section 19 of the Act validates all contracts prior to the 1st day of January 1886 by implication and that such contracts should be given effect to in their integrity. Assuming this to be so, is there any contract in this case prescribing particular rates of compensation? The authority of the Full Bench in *Kerala Varmah Valia Rajah* v. *Ramunni*(1) is against such a contention. It is there pointed out that a mere provision for the customary compensation is not a special contract such as is contemplated in section 7 of Madras Act I of 1887 which corresponds to section 19 of the Act of 1900. There is no contract in this case for particular rates to be enforced. It merely states in express terms what would otherwise be imported into the contract, that the parties shall conform to the usage of the country. There being no special contract, the tenant is entitled to compensation according to the Act. This is enough to dispose of this case. But as we have listened to an able argument from Mr. Sundara Ayyar on the section of the Act which relates to the effect of contracts before the 1st of January 1886, we think it desirable to indicate our opinion on the points dealt with.

(1) (1893) 3 M.L.J., 51.

BENSON AND KRISHNASWAMI AYYAR, JJ.

KOZHIKOT SREEMANA VIKRAMAN v. MODATHIL ANANTA PATTER.

The question is whether the tenant is entitled to claim compensation under the Act where there is a contract before the Act prescribing lesser rates? It seems to us he is not precluded from doing so. Section 19 deals with contracts limiting the rights to make improvements and to claim compensation. Contracts before the 1st day of January 1886 cutting down the right to make improvements are left untouched and may be deemed to be valid if by the law in force at that time they would be treated as valid. There is nothing in section 19 which deals with a mere contract regulating the rates of compensation whether before or after the 1st day of January 1886. And if such a contract is favourable to the tenant, he could always insist on it despite the provision in section 6. If a contract as to the rate of compensation is unfavourable to the tenant even though it has been entered into before 1886, he is entitled to claim compensation under section 5 and the rates prescribed in sections 9 to 18, must then prevail. We do not think that the recent Full Bench decision in *Randu Purayil Kunhisore* v. *Neroth Kunhi Kannan*(1) is against our view. The question there was, as would appear from the referring order, whether the making of the improvements after 1886 disentitled the tenant to the rates fixed by the contract before that date? and the Full Bench held that a contract made prior to the 1st of January 1886 was unaffected whether the improvements were made before or after. This is no authority for the position that mere rates of compensation fixed by contract before the Act are decisive as between the parties, and preclude the tenant from claiming the rates under the Act if he elects to proceed under section 5. If, on the other hand, a contract before 1886 restrained the tenant from making improvements and claiming compensation therefor, such a contract would *primâ facie* be valid apart from any question of the customary law rendering the restraint invalid.

We reverse the judgment of the Subordinate Judge and restore the Munsif's decree with the modification that defendants Nos. 1 to 3 will have their costs throughout. The memorandum of objections is dismissed with costs.

(1) (1909) I.L.R., 32 Mad., 1.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Krishnaswami Ayyar.

1910. February 15, 25.

MANGALASWAMI *alias* MUTHU VIJIYA RAGUNATHA THEVAR (PLAINTIFF), APPELLANT,

v.

SUBBIA PILLAI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Registration Act III of 1877, *ss.* 3, 17—*Document creating right to benefits to arise out of land compulsorily registrable—Evidence, such document not admissible in, if unregistered—Possession under such document only.*

First defendant obtained possession of certain lands under an unregistered instrument which gave him the right to apportion future rents (over Rs. 100 in value) towards an antecedent debt due to him :

Held, that the instrument created a right to benefits to arise out of land and was compulsorily registrable under section 17, Indian Registration Act.

Venkaje Babaji Naik v. *Shidramapa Balapa Desai*, [(1895) 19 Bom., 663], followed.

Misri Lal v. *Mozhar Hussain*, [(1886) I.L.R., 13 Calc., 262], distinguished.

Bansidhar v. *Sant Lal*, [(1888) 10 All., 133], distinguished.

Such a document if not registered cannot be admitted in evidence.

Where defendant's possession arose only out of such an unregistered document he cannot otherwise prove that he was not a trespasser.

SECOND APPEAL against the decree of A. F. Pinhey, District Judge of Madura, in Appeal Suit No. 581 of 1905, presented against the decree of S. Ramaswami Ayyangar, District Munsif of Paramakudi, in Original Suit No. 693 of 1904.

Suit for damages for trespass.

The plaintiff's father owed the first defendant and one Bangaraswami a certain sum being mesne profits which had been unlawfully received by him. On his death, the fourth defendant, as guardian to the plaintiff (a minor) executed a document (exhibit I), which purported to transfer an interest in the plaintiff's one-fourth share in certain property in favour of the first defendant (?) as security for the debt due to the first defendant and Bangaraswami as above stated and further to transfer the enjoyment of the said share to the first defendant and Bangaraswami in satisfaction of this said claim and to take away the

* Second Appeal No. 1469 of 1907.

plaintiff's control over the said share during such enjoyment and until the payment of the amount due with the future profits. Exhibit I was neither registered nor stamped. Plaintiff sued for damages for trespass.

The District Munsif held that the document (exhibit I) created an interest in immoveable property of a value exceeding Rs. 100, and that, being unregistered, it was inadmissible in evidence to show that the first defendant obtained possession thereunder and was therefore not a trespasser. He further held that first defendant was a trespasser, although the fourth defendant had acted *bonâ fide* in giving him possession under exhibit I.

On appeal the District Judge agreed with the Munsif that exhibit I was inadmissible in evidence, but he reversed his decision on the ground that, as the fourth defendant had acted *bonâ fide* as the guardian of the plaintiff, first defendant was not a trespasser.

Second and third defendants were impleaded as the sons of first defendant.

The Advocate-General (Hon. Mr. *P. S. Sivaswami Ayyar*) and *T. R. Venkatrama Sastri* for appellant.

The plaintiff appealed to the High Court.

S. Srinivasa Ayyangar for first respondent.

JUDGMENT.—The plaintiff is the owner of a fourth share in the melvaram right of Kavoor village. The first defendant having obtained a decree in Original Suit No. 24 of 1898 in the Subordinate Court of Madura East for a three-twentieth share of the melvaram right, the plaintiff's guardian entered into an arrangement with the first defendant whereby the first defendant was to have a mortgage of the plaintiff's right to the fourth share of the rents due to him from fasli 1310 as security for the first defendant's share of the rents for faslis 1307 and 1308 unlawfully received by the plaintiff's father. The transaction was in substance a mortgage of future rents due for the plaintiff's share to the first defendant. Both the Courts below have held that the document being unregistered was inadmissible in evidence. The Munsif gave a decree to the plaintiff for the sum of Rs. 496-8-6 holding that the first defendant was a trespasser. The District Judge on appeal has dismissed the plaintiff's suit. He has come to the conclusion that the act of the *de facto* guardian, the fourth

BENSON AND KRISHNASWAMI AYYAR, JJ.

MANGALASWAMI v. SUBBIA PILLAI.

defendant, in placing the first defendant in possession of the plaintiff's fourth share was *bonâ fide* and justifiable, and although exhibit I was inadmissible, the first defendant could not be treated as a trespasser, and the plaintiff was therefore not entitled to any damages. In support of this second appeal the learned Advocate-General argues that the first defendant's possession and his right to apportionate the plaintiff's share of the rents towards his claim for faslis 1307 and 1308 only arose under the mortgage, exhibit I, and, on the footing that that instrument was invalid, the defendant's possession could only be treated as that of a trespasser and that the plaintiff was therefore entitled to recover. We think his contention must be upheld. The learned vakil for the respondent did not attempt to support the judgment of the District Judge on the ground stated by him, but he argues that exhibit I was receivable in evidence because it did not require registration. We are unable to agree with this view. The document was a mortgage of the plaintiff's right to future rents. It was over one hundred rupees in value. By section 3 of the Registration Act immoveable property is defined as including "any other benefit" to arise out of land. The question is whether future rents payable in respect of land are benefits to arise out of land. It has never been doubted that a lease by a Zamindar or a transfer by him of the zamindari interest, which is generally the right to the melvaram, is a transfer of immoveable property. If the assignment is, however, of an arrear of rent, the benefit has already arisen out of the land and is therefore outside the definition of immoveable property. It has been held that a lease of a right to market dues upon a certain land requires registration as an instrument dealing with a benefit to arise out of land (see *Sikandar* v. *Bahadur*(1)), though the profits which have already accrued from a lambardar were held not to fall within the definition of immoveable property (see *Damodar Das* v. *Girdhari Lal*(2)). The decision in *Venkaje Babaji Naik* v. *Shidramapa Balapa Desai*(3), seems, almost exactly, to cover the present case. There, a right to assessment due upon certain land was assigned by an unregistered instrument. It was held that the instrument required registration as the assessment had not accrued due at the

(1) (1905) I.L.R., 27 All., 462. (2) (1905) I.L.R., 27 All., 564.
(3) (1895) I.L.R., 19 Bom., 663.

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date of the assignment, but was only to become due in the future. It has no doubt been decided that a sale of indigo crop of the coming year operates merely as an agreement to convey, and that the conveyance takes effect only after the crops have come into being (see *Misri Lal* v. *Mozhar Hussain*(1) and *Bansidhar* v. *Sant Lal*(2)). No question arose in these cases as to registration, though it may be pointed out that growing crops are within the definition of moveable property. The principle laid down in those cases is in accordance with *Collyer* v. *Isaacs*(3) and *Holroyd* v. *Marshall*(4). Sir George Jessel observes in the first of these cases "a man cannot in equity any more than at law assign what has no existence. A man can contract to assign property which is to come into existence in future and, when it has come into existence equity treating as done that which ought to be done fastens upon that property and the contract to assign thus becomes a complete assignment." We do not know that the rule here laid down as to after acquired chattles has anything to do with the assignment of future rents which a lease of the melvaram generally is. But however this may be, the question narrows itself to this "whether within the meaning of the Registration Act future rent is a benefit to arise out of land?" If that should be so, we have only to see whether the instrument purports to create or assign any right, title or interest in such property. It would be compulsorily registrable under section 17, if the value of the interest which the document purports to create is one hundred rupees or upwards. We are therefore bound to hold that exhibit I cannot be received in evidence and that there is no answer to the plaintiff's claim for damages.

In estimating the damages the District Judge has held that the defendants are entitled to a reduction as regards some damage caused by fire. The Advocate-General has made no exception to this. The plaintiff's share therefore of the loss must be deducted from the damages awardable. The plaintiff is entitled to a decree for Rs. 496-8-6 *minus* Rs. 124-8-6.

The decree of the District Judge will be reversed, and the plaintiff will have a decree for Rs. 372 against the first defendant personally with interest at 6 per cent. per annum from this date

(1) (1886) I.L.R., 13 Cal., 262. (2) (1888) I.L.R., 10 All., 133.
(3) (1881) L.R., 19 Ch.D., 342. (4) 10 H.L.C., 191.

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and against defendants Nos. 2 and 3 to the extent of their share in the joint family properties. Each party will bear his costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Krishnaswami Ayyar.

1910. January 11. February 2.

SUBRAMANIA MUDALY AND OTHERS (DEFENDANTS), APPELLANTS,

v.

VALU AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Maintenance—Right of offspring of illegitimate son of a married woman to, from the joint family property of the survivors of the putative father—Criminal intercourse, affect of on right to maintenance.

The offspring of the intercourse of a man with his concubine who was a married woman is entitled to maintenance against the surviving members of the joint Hindu family to which the father belonged and who have taken his share by survivorship.

Chuoturya Run Murdun Syn v. *Sahib Purhulad Syn*, [(1857) 7 M.I.A., 18], followed, and *Muthusawmy Jagavera Yettappa Naicker* v. *Vencataswara Yettaya*, [(1868) 12 M.I.A., 203], followed.

There is no distinction between the right of the illegitimate son of an unmarried woman to maintenance out of the estate of the putative father and that of the offspring of an adulterous intercourse.

Vencatachella Chetty v. *Parvatham*, [(1874) 8 M.H.C.R., 134 at p. 143], followed.

Viravamuthiudiyan v. *Singaravelu* [(1876) I.L.R., 1 Mad., 306], followed.

Kuppa v. *Singaravelu*, [(1885) I.L.R., 8 Mad., 325], followed.

Rahi v. *Govinda Valad Teja*, [(1876) I.L.R., 1 Bom., 97], followed.

The offspring of a criminal intercourse should not be deprived of maintenance on the ground of the criminal origin of its being.

Vedanayaga Mudaliar v. *Vedammal*, [(1904) I.L.R., 27 Mad., 591], distinguished.

SECOND APPEAL against the decree of V. Swaminatha Ayyar, Subordinate Judge of Madura (West), in Appeal Suit No. 219 of 1906, presented against the decree of T. A. Ramakrishna Ayyar, District Munsif of Madura, in Original Suit No. 264 of 1904.

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* Second Appeal No. 888 of 1907.

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SUBRAMANIA MUDALY v. VALU.

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

T. Rangachariar for appellants.

K. N. Ayya for respondents.

JUDGMENT.—This is a suit for maintenance by the illegitimate sons of one Chidambara Mudali, deceased, against his undivided brothers and their sons. The Subordinate Judge has decreed the plaintiff's claim with some modification as regards the amount; and the defendants' appeal. It has been assumed by the Subordinate Judge for the purpose of his decision that Umayal, the mother of the plaintiffs, was a married woman who was living with Chidambara Mudali as his concubine.

The first question is whether the plaintiffs are entitled to maintenance? and, the second, whether they are entitled to it against the father's undivided brothers and their sons in consequence of their having taken the father's share of the family property by survivorship? It is altogether useless to consider whether the Hindu law as regards the claims of illegitimate sons as now administered is in accord with the ancient Hindu texts or even the authoritative comment arises. It is true the High Court of Calcutta still adheres to the literal interpretation of the texts holding that the illegitimate son entitled to inherit amongst Sudras is the son of the female slave. (See the cases of *Narain Dhara* v. *Rukhal Gain*(1), *Kirpal Narain Tewari* v. *Sukurmoni*(2) and *Ram Saran Garain* v. *Tekchand Garain*(3).) But the High Court of Madras, as well as the High Courts of Bombay and Allahabad, have adopted the view that an unmarried woman kept as a continuous concubine is on the same footing as the female slave with reference to the rights of the illegitimate sons born to them. (See the cases of *Krishnayyan* v. *Muthusami*(4), *Ranoji* v. *Kandoji*(5), *Rahi and others* v. *Govinda Valad Teja*(6), *Sadu* v. *Baiza and Gonu*(7), *Sarasuti* v. *Mannu*(8) and *Hargobind Kuari* v. *Dharam Singh*(9).) But even this rule as to the mother being an unmarried woman has been relaxed as regards the illegitimate sons' right to maintenance. (See the cases of *Vencatachella Chetty*

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(1) I.L.R., Calc., 1.
(2) (1892) I.L.R., 19 Calc., 91.
(3) (1901) I.L.R., 28 Calc., 194
(4) (1884) I.L.R., 7 Mad., 407.
(5) (1885) I.L.R., 8 Mad., 557.
(6) (1875) I.L.R., 1 Bom., 97.
(7) (1880) I.L.R., 4 Bom., 37.
(8) (1879) I.L.R., 2 All., 134.
(9) (1884) I.L.R., 6 All., 329.

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v. *Parvatham*(1); *Viraramuthi Udayan* v. *Singaravelu*(2), and *Kuppa* v. *Singaravelu*(3).) We think it too late to go back on this line of authorities. In the case of *Viraramuthi Udayan* v. *Singaravelu*(2), the claimant was the offspring of an adulterous intercourse; and so also in the case of *Kuppa* v. *Singaravelu*(3). In the case of *Rahi and others* v. *Govinda Valad Teja*(4), the Bombay High Court decided that the illegitimate son by an adulterous intercourse was entitled to maintenance.

The next question is whether the decree against the surviving members of the family is right. In *Chuoturya Run Murdun Syn* v. *Sahib Purhulad Syn*(5), a decree for maintenance was made by the Privy Council in favour of an illegitimate son by a Sudra concubine against a successor to the Raj of the putative father. In *Muttusawmy Jagavera Yettappa Naicker* v. *Vencataswara Yettaya*(6), the same tribunal awarded maintenance to the son of the concubine of a Sudra zamindar and directed an enquiry as to the existence of private property of the putative father, and in its absence as to charging the income of the zamindari with the amount of maintenance. In both these cases the estates concerned would seem to have been impartible and at least one of them descendible according to the rule of survivorship. In *Ananthaya* v. *Vishnu*(7) Muthusami Ayyar and Best, JJ., charged the maintenance awarded to the illegitimate son against the family properties in the hands of the survivors. And in *Gopalasami Chetti* v. *Arunachellam Chetti*(8), a decree was passed by Benson and Bhashyam Iyengar, JJ., against the brothers and legitimate sons of the putative father.

It has however been argued that whatever justification there may be for passing such a decree in favour of illegitimate sons by a concubine who was not a married woman, such a decree is improper when the claimants are the offspring of an adulterous intercourse It is difficult to suggest any principle upon which this distinction can rest. Although this Court has refused to give a decree for a share to the illegitimate son of a Sudra where he is the offspring of an adulterous intercourse (see the cases of *Datti Parisi Nayudu* v. *Datti*

(1) (1875) 8 M.H.C.R., 134 at p. 143.
(2) (1877) I.L.R., 1 Mad., 306.
(3) (1885) I.L.R., 8 Mad., 325.
(4) (1875) I.L.R., 1 Bom., 97.
(5) (1857) 7 M.I.A., 18.
(6) (1868) 12 M.I.A., 203.
(7) (1894) I.L.R., 17 Mad., 160 at p. 161.
(8) (1904) I.L.R., 27 Mad., 32.

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Bangaru Nayudu(1), *Vencatachella Chetti* v. *Parvatham*(2), *Annayan* v. *Chinnan*(3), his claim to maintenance has always been recognised. We are aware of no instance where such a claim, if valid against the putative father has not been held good against the surviving members of the joint family who have taken his share by survivorship. In *Viraramuthi Udayan* v. *Singaravelu*(4), the claim was recognised against the legitimate sons who presumably took the property by survivorship. In *Ananthaya* v. *Vishnu*(5), it was pointed out by Muthusami Ayyar and Best, JJ., that "as the maintenance awarded is the result of exclusion from inheritance, and as the Hindu theory is that family property constitutes assets from which charges in the nature of maintenance, etc., are to be met, the maintenance decreed to an illegitimate son may be secured on the family property". If this be the correct theory on which maintenance is awarded, we can see no distinction between the case of the offspring of an adulterous intercourse and the illegitimate son by an unmarried woman, in so far as they are entitled to maintenance against the putative father or the successors to his property.

It has been contended that where the illegitimate son is the offspring of an adulterous intercourse no rights should accrue as he comes into being by a violation of the Criminal law. But intercourse with a married woman is not always a crime. And though there is authority for the position that the criminal himself should not acquire rights by the crime (see the case of *Vedanayaga Mudaliar* v. *Vedammal*(6), there is no warrant for holding that the offspring of a criminal intercourse should be deprived of all rights. It is difficult to find in the Hindu Law, which recognised twelve sorts of sons, including the Kshetraja and the Gudhaja, a negation of rights of maintenance on the ground of the criminal origin of a class of illegitimate sons At all events we cannot develop any new legal theory for the sake of denying to illegitimate sons of married women maintenance against the surviving members of the putative father's joint family when it has already been judicially allowed against the fathers themselves.

We are therefore constrained to hold that the decree of the Court below is right and we dismiss the second appeal with costs.

(1) (1869) 4 M.H.C.R., 204.
(2) (1875) 8 M.H.C.R., 134 at p. 143.
(3) (1910) I.L.R., 33 Mad., 366.
(4) (1877) I.L.R., 1 Mad., 306.
(5) (1894) I.L.R., 17 Mad., 160 at p. 161.
(6) (1904) I.L.R., 27 Mad., 591.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Krishnaswami Aiyar.

1910. March 11, 14.

LATCHUMAMMAL (PLAINTIFF), APPELLANT,

v.

GANGAMMAL (FIRST DEFENDANT), RESPONDENT.*

Judgment, binding nature of, on succeeding Judge—Partition of property between co-widows may be effected orally.

Where a Judge on appeal decides certain points and remands the case, his decision is binding on his successor before whom the case comes up again on appeal from the judgment on remand.

There is nothing in the Transfer of Property Act to prevent co-widows effecting an absolute division of property orally.

SECOND APPEAL against the decree of R. D. Broadfoot, District Judge of Coimbatore, in Appeal Suit No. 29 of 1907, presented against the decree of C. R. Venkateswara Aiyar, District Munsif of Udamalpet, in Original Suit No. 38 of 1904.

G. S. Ramachandra Ayyar for *T. R. Ramachandra Ayyar* for appellant.

T. M. Krishnasami Ayyar for respondent.

JUDGMENT.—The first issue raised two questions, namely, whether there was an oral will and whether there was an absolute division by the widows. The original Munsif held in the plaintiff's favour on both the questions. Mr. Oldfield held against the will but in favour of the absolute partition. He reversed and remanded the case with instructions to the Munsif to try the question as to the date of the partition. The Munsif having decided in the plaintiff's favour, an appeal was again preferred to the District Court, which now came before Mr. Broadfoot. He held the will proved and dismissed the suit. We are of opinion that he was wrong in going back upon Mr. Oldfield's decision against the will. The order of remand was based upon the decision that the will was not true. Though he held the partition was absolute, he would not dispose of the case finally as he wanted a further question to be decided as to whether it was before or after the Transfer of Property Act.

* Second Appeal No. 834 of 1908.

We think that Mr. Oldfield's decision was binding on Mr. Broadfoot on both the points, namely, that the will was not true and that the partition was absolute. It is now contended that an oral partition by two co-widows, if absolute, must, after the Transfer of Property Act, be by a registered instrument as the property exceeded Rs. 100 in value. But we think this view is not right. Adopting the view in *Tiruvengadachariar* v. *Ranganatha Aiyangar*(1), we may say it is not a sale or a gift or an exchange. Partition amongst male members of a Hindu family may, after the Transfer of Property Act, be oral. This is conceded in argument. We do not see any difference in principle where it is amongst co-widows. It is said that if the partition be for life it may be valid though oral. But when the partition operates as a release of the life interest of each in the property assigned to the other each of the parties is only converting the joint interest of both during their life-time into the several interest of each during the life-time of both. We can see no objection to this in the Transfer of Property Act. The decisions in *Ariyaputri* v. *Alamelu*(2) and *Ramakkal* v. *Ramasami Naickan*(3) do not deal with the question of an oral partition and are not therefore in conflict with our view. We must dismiss the second appeal with costs.

(1) (1903) 13 M.L.J., 500. (2) (1888) I.L.R., 11 Mad., 304.
(3) (1899) I.L.R., 22 Mad., 522.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Krishnasawmi Ayyar.

1910. April 25.

SYED NOORDEEN SAHIB AND OTHERS (DEFENDANTS Nos. 1, 2 AND 27 TO 31), APPELLANTS,

v.

SYED IBRAHIM SAHIB AND OTHERS (PLAINTIFFS AND DEFENDANTS Nos. 6, 7, 9 TO 13, 15 AND 16 TO 20, 22, LEGAL REPRESENTATIVE OF DEFENDANTS, 14TH DEFENDANT AND DEFENDANTS Nos. 33, 34, 35, 36, 3 AND 32, RESPONDENTS.*

Limitation Act XV of 1877, art. 120, 144—Suit by Mahomedan for partition of immoveable property governed by art. 144 and not 120.

Where a Mahomodan sues for partition of moveables and immovables, his claim as regards immovables falls within article 144 and not 120 of schedule II of the Limitation Act.

SECOND APPEAL against the decree of F. H. Hamnett, District Judge of Madura, in Appeal Suit No. 687 of 1907, presented against the decree of V. Swaminatha Ayyar, Subordinate Judge of Madura (West), in Original Suit No. 32 of 1905. The facts for the purpose of this case are sufficiently set out in the judgment.

T. Rangachariar and *K. Parthasarathy Ayyangar* for *P. Rajagopalachariar* for appellants.

K. Srinivasa Ayyangar for first respondent.

JUDGMENT.—The suit is by a Mahomedan for partition of a half share of properties both moveable and immoveable on his wife's death. The defendants among whom are the other sharers do not set up adverse possession. Even assuming that possession became adverse at some time within the last 12 years, there is no reason to suppose that it was adverse before the 27th November 1893; while defendants Nos. 27 to 31 were impleaded on the 27th November 1905. We must hold that the suit as regards immoveables is not time barred. In this view it is unnecessary to express any opinion on the other points argued. But we think that the District Judge was right in holding that the plaintiff was entitled to the deduction of the time spent in prosecuting the suit before the Munsif. The question was one of market value

* Second Appeal No. 1927 of 1908.

and the plaintiff paid a substantial court fee. We are not prepared to say that the Judge was wrong in holding that the plaintiff's valuation was *bonâ fide*.

Mr. Rangachariar raised an ingenious contention on the authority of *Mahomed Riasat Ali* v. *Hasin Banu*(1) that the article applicable was 120 of the Limitation Act. The Privy Council applied that article as regards a claim for moveables as the heir of a deceased person. In *Runchor Das* v. *Parvati Bai*(2) the Judicial Committee decided that a Hindu reversioner suing for the property of a deceased Hindu was entitled to come within six years as regards moveables and twelve years as regards immoveables. Mr. Rangachariar, however, argues that this is a suit for partition and that a share can only be allowed after taking into account both moveables and immoveables. That is no doubt so, and, if the plaintiff withholds moveables after six years from the date of the death of the intestate, his share of the immoveables may be affected. But this has nothing to do with limitation as regards the claims to immoveables. Article 144 of the Limitation Act must be applied to the suit as regards immoveable property. There is no foundation for the contention that the claim for immoveables is time barred.

The second appeal is dismissed with costs.

(1) (1894) I.L.R., 21 Calc., 157. (2) (1899) I.L.R., 23 Bom., 736.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Krishnaswami Ayyar.

1910. February 2, 10.

JOSIAM TIRUVENGADACHARIAR AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

SAWMI IYENGAR *alias* VENKATACHARIAR AND OTHERS (SECOND DEFENDANT AND HIS LEGAL REPRESENTATIVES), RESPONDENTS.*

*Civil Procedure Code (Act XIV of 1882), ss. 361, 582—Abatement of appeal on death of defendant-respondent—*Actio personalis moritur cum persona—*Application of rule to appeal by plaintiff—Costs.*

In a personal action for an injunction a decree was given for the defendant with costs. Plaintiffs appealed. During the pendency of the appeal, the defendant-respondent died:

Held, that the right to prosecute the appeal against the respondent's legal representative does not survive to the appellants.

The rule *actio personalis moritur cum persona* is not interfered with merely because the person injured incurred in his life-time some expenditure of money in consequence of the personal injury.

Pulling v. *Great Eastern Railway Company*, [(1882) 9 Q.B.D., 110], approved.

Krishna Behary Sen v. *The Corporation of Calcutta*, [(1904) I.L.R., 31 Calc., 406], approved.

This rule applies as against the estate of a deceased-respondent.

Paraman Chetty v. *Sundararaja Naick*, [(1903) I.L.R., 26 Mad., 499], distinguished.

If an action fails what is incidental fails also, and if an appeal abates as regards an injunction sought for it abates as regards the costs incurred by the appellant as a consequence of the dismissal of his suit. An appellant cannot be allowed to show that the decree refusing the injunction was wrong for the mere purpose of getting rid of the direction as to costs.

SECOND APPEAL against the decree of E. L. Thornton District Judge of Trichinopoly, in Appeal Suit No. 142 of 1906, presented against the decree of A. Ramaswami Sastri, District Munsif of Srirangam, in Original Suit No. 399 of 1904.

This was a suit brought against the second defendant for an injunction to restrain him from preventing the plaintiffs from enjoying the honour of standing at a particular place in the

* Second Appeal No. 1583 of 1907.

Srirangam temple. The suit was dismissed by the Munsif on 13th June 1906 with a decree for costs against the plaintiffs. This decree was upheld by the District Judge on 25th September 1907. The plaintiffs appealed to the High Court on 25th September 1907. Pending the hearing of this appeal the second defendant died, and the plaintiffs brought his widow and legal representative on the record on 20th November 1908. The widow raised the preliminary objection that the appeal abated on the death of her husband, the second defendant.

R. Rangaswami Ayyangar for appellant.

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

JUDGMENT.—This is a second appeal by the plaintiffs against the second defendant. The latter having died pending the second appeal, his widow has been brought upon the record. She raises the preliminary objection that the second appeal has abated on the ground that the right to sue did not survive after the death of the original second defendant. The suit was brought for an injunction against the second defendant restraining him from preventing the plaintiffs standing at a particular place in the Srirangam temple. It is conceded by the appellant's vakil that he has no right to prosecute the appeal as regards the injunction after the death of the second defendant but he contends that the Courts below have dismissed his suit with costs, that his estate has lost and the estate of the second defendant has gained to the extent of the costs awarded, and that he is therefore entitled to continue the second appeal against the second defendant's representative to get rid of the liability imposed upon him by the action of the Courts below. We think the preliminary objection is well founded.

The case has to be decided with reference to the provisions of the repealed code as the second defendant died in 1908. It is provided by section 361 that the death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives. Section 582 authorizes in the case of appeals the substitution of "Appellant" for "Plaintiff," "Respondent" for "Defendant" and "Appeal" for "Suit". Making the necessary changes then we may read the section as follows:—

"The death of an appellant or respondent shall not cause the appeal to abate if the right to sue survives." Section 582 does not, in terms, authorise the substitution of the verb 'Appeal' for

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the verb 'Sue' and therefore, strictly speaking, we have no warrant for reading the section as if it ran." "The death of the appellant or a respondent shall not cause the appeal to abate if the right to appeal survives." It was, however, held by this Court in *Paramen Chetty* v. *Sundararaja Naick*(1) where in an action for malicious prosecution a decree for damages had been passed by the Court below and the defendant had appealed against the decree for damages and the plaintiff-respondent died pending the appeal, that the defendant could continue his appeal as the right to appeal survived against the representative of the plaintiff. The ground of decision was that after the judgment for damages the estate of the respondent was liable to be enriched by the amount of the decree for damages and that the appellant was entitled to get rid of the liability imposed upon him although an action for malicious prosecution was a personal action that would not survive the death of the parties suing or sued. In deciding as above, this Court followed the view of the majority of the Bombay High Court in *Gopal* v. *Ramchandra*(2). In *Phillipp* v. *Homfray*(3) it was observed by Bowen Lord Justice. "It is of the essence of the rule, viz., *actio personalis moritur cum persona*, that claims which are indeterminate in their character shall not be pursued against the estate of a person after his death: If the claim is one for unliquidated damages and *has not been perfected by judgment* at the time of the death of the defendant, the rule applies." This observation of the learned Lord Justice would seem to lead to the inference that if in an action for libel or malicious prosecution, a decree for damages had been made, the defendant aggrieved by the decree and appealing against it would be entitled to continue it notwithstanding the death of the plaintiff-respondent. To the same effect are the remarks of Edge, C.J., in *Muhamad Husain* v. *Khushalo*(4). But it does not appear to follow from these decisions that a plaintiff mulcted in costs in such an action dismissed and incompetent to prosecute his appeal for damages, would be entitled to maintain an appeal for the setting aside of the decree for costs which was consequent on the dismissal of the action. In *Pulling* v. *Great Eastern Railway Company*(5) which

(1) (1903) I.L.R., 26 Mad., 499. (2) (1902) I.L.R., 26 Bom., 597.
(3) (1883) 24 Ch.D., 439. (4) (1886) I.L.R., 9 All., 131 at p. 134.
(5) (1882) 9 Q.B.D., 110.

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was an action for damages for personal injuries sustained by the plaintiff's husband who was rum over by an engine, it was held that there was no right of action to the representative of the deceased merely because there was damage to the estate of the deceased arising from expenses for medical attendance. It was pointed out by Denman, J., that none of the authorities go so far as to say that where the cause of action is, in substance, an injury to the person the personal representative can maintain an action merely because the person so injured incurred in his life-time some expenditure of money in consequence of the personal injury. In *Krishna Behary Sen* v. *The Corporation of Calcutta*(1) Mr. Justice Henderson held that an action for damages for malicious prosecution could not be continued after the death of the plaintiff because of the pecuniary loss sustained by reason of the expenses of defending the criminal prosecution. Applying the principle of these cases which we take to be that if the action fails what is incidental to it must fail also, it appears to us that if the appeal abates because the appellant can no longer claim the injunction he prayed for against the deceased second defendant, the costs he was made liable to pay as a consequence of the dismissal of his suit could not form the subject-matter of a continuing appeal. It was said that an appeal might be preferred for costs alone. But this is not as of course, for no such appeal on a mere question of costs is ever entertained unless there is a legal principle involved. And if the appellant cannot prosecute his appeal for the injunction, he cannot be allowed to show that the decree refusing the injunction was wrong for the mere purpose of getting rid of the direction as to costs. We must therefore hold that the appeal abates.

The representative of the second defendant is entitled to her costs against the appellant.

(1) (1904) I.L.R., 31 Calc., 406.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Krishnaswami Ayyar.

1910. February 23.

ARAKAL JOSEPH GABRIEL (PLAINTIFF), APPELLANT,

v.

DOMINGO INAS AND OTHERS (DEFENDANTS AND LEGAL REPRESENTATIVE OF FIRST DEFENDANT), RESPONDENTS.*

Joint tenancy, presumption of, where no words used—Gift—Donor guardian for donees—Management handed over on different dates—Effect of—Transfer of Property Act, s. 45.

Where there are no words in an instrument of gift of property to several persons indicating an intention to create tenancies in common there is a presumption that the donees hold the property as joint tenants and not as tenants in common.

Indian Succession Act, section 93, illustration, relied on.

Differences in dates of handing over the management of the property by the donor to the several donees creates no presumption in favour of a tenancy in common, the property having vested on the same date.

Navroji Manockji Wadia v. *Perozbai*, [(1899) I.L.R., 23 Bom., 80], referred to.

Section 45, Transfer of Property Act IV of 1882 has no application to gifts.

SECOND APPEAL against the decree of J. H. Munro, District Judge of South Malabar, in Appeal Suit No. 253 of 1907, presented against the decree of J. L. Jacques, Subordinate Judge of Cochin, in Original Suit No. 3 of 1906.

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

A. Krishnaswami Ayyar for *C. V. Anantha Krishna Ayyar* for appellants.

K. Govinda Marar for second respondent.

JUDGMENT.—The first defendant, a Native Christian, made a gift of property to his three children: two of them died. The father mortgaged the property to the plaintiff. The question is, whether the father had any interest in the property? It is argued that on the death of the two children the father inherited their two-thirds share to the exclusion of the surviving brother under the Indian Succession Act. We are unable to agree with this contention. There are no words in the instrument of gift which

* Second Appeal No. 1421 of 1907.

indicate an intention to create tenancies in common. The rule of English law is to presume that the donees are joint tenants. This principle is adopted by the Indian legislature in the illustration to section 93 of the Succession Act. The illustration no doubt deals with the case of a legacy. But the same principle is applicable to wills as to gifts unless there are special rules justifying a deviation. We must therefore regard the gift in this case as joint. It has been argued that Courts of Equity in England favour tenancies in common. But it has not been pointed out that in any English case upon a simple gift to A and B, a tenancy in common was presumed by the Court of Equity. It is next urged that the father retains possession as guardian till the children attain majority which must be on different dates and that this indicates a severance of interest. But the vesting of the property is on the same date and the beneficial enjoyment of all commences at the same time. We cannot treat the difference in date as to the handing over of management as any ground for holding in favour of tenancy in common. No authority has been cited in support of this contention.

It is further argued that the English law ought not to be applied to this country. The decision in *Navroji Manockji Wadia* v. *Perozbai*(1) was no doubt in a case which arose within the original jurisdiction of the High Court of Bombay. But we see no objection to the application of the English rule in a matter in which the Indian legislature has shown its leaning in its favour.

Our attention was drawn to section 45 of the Transfer of Property Act. That relates to transfers for consideration. The principle of that section does not apply to gifts. The amount of consideration paid by each measures the interest of each in in the property bought. Gifts stand on a different footing. We must therefore agree with the learned Judge in the Court below that the mortgage by the first defendant passed no interest to the plaintiff. We may point out that the decision in *Mankamma Kunwar* v. *Balkishan Das*(2) in which the parties were Hindus does not apply. We dismiss the second appeal with costs.

(1) (1899) I.L.R., 23 Bom., 80. (2) (1906) I.L.R., 28 All., 38.

APPELLATE CIVIL.

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

1910. February 10, 11. March 11.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL REPRESENTED BY THE COLLECTOR OF TRICHINOPOLY (DEFENDANT—APPELLANT),

v.

MUTHUVEERAMA REDDY (PLAINTIFF), RESPONDENT.*

Government, liability of, for not repairing irrigation works—No duty in Government to repair irrigation works.

In India, the Government is under no obligation with regard to each individual ryot to repair irrigation works whenever they require repair.

Madras Railway Company v. *Zemindar of Carvetnagram*, [(1874) L.R., 1 I.A., 364], distinguished.

The rule derivable from English cases is that where statutory powers have been conferred and statutory duties imposed on persons or corporations, no liability for non-feasance in regard to individuals arises, in the absence of such liability under the common law, merely because such duty is imposed. The statute must impose the liability expressly or by clear implication.

Sankaravadivelu Pillai v. *Secretary of State for India*, [(1905) I.L.R., 28 Mad., 72], referred to.

The rights and obligations of Government in regard to irrigation works in this country have to be ascertained from unrecorded custom and practice; and no custom or practice, recorded or unrecorded, gives the ryot, in case of non-repair, compensation measured by the value of the crops lost by defects in irrigation works commanding his land arising from such non-repair.

There is no contract between a ryot and the Government, by which the latter is bound to maintain a supply of water for the irrigation of lands belonging to the former.

The irrigation rights of ryotwari owners are not rights *in personam*, but rather partake of the nature of rights *in rem*.

Chinnappa Mudaliar v. *Sikka Naicken*, [(1901) I.L.R., 24 Mad., 36], doubted.

APPEAL against the decree of E. L. Thornton, District Judge of Trichinopoly, in Appeal Suit No. 135 of 1908, presented against the decree of Muhammad Fuzluddin Sahib, District Munsif of Kulitalai, in Original Suit No. 684 of 1905.

* Appeal against Order No. 68 of 1909.

The facts are stated in the judgment of the lower Appellate Court.

"The plaintiff sues to recover damages from the Secretary of State for India in Council alleged to have been caused to the plaintiff by the defendant's failure to repair a calingula by means of which water is diverted into a channel that supplies the tank which is the recognized source of irrigation to plaintiff's land. Without expressing any opinion on the issues framed, the District Munsif had dismissed the suit on the preliminary point that the plaintiff has no cause of action since the defendant is not bound to keep the calingula in repair. I think the decision is erroneous. It is not disputed that the plaintiff has for some years held land classed as wet land as a ryotwari tenant under the defendant, and this circumstance in my view evidences a contractual obligation on the defendant to continue such supply of water as is sufficient for the plaintiff's accustomed requirements (*vide* 28 Mad., 72 and 31 Mad., 171). The respondent's vakil urges on the authority of VII Madras High Court reports, page 60, that the plaintiff's tenancy is only one from year to year and that the defendant did not contract after the calingula was breached to supply him with water. He further urges that even if the contract be held to be one for an indefinite term, no obligation to supply water inured after the dam fell into disrepair. The matter is not free from doubt, but I am inclined to put a different construction on the remarks of Mr. Justice Innes (7 Madras High Court reports, page 64) to the construction placed on them by the respondent's vakil; and I am clearly of opinion that when land in a ryotwari holding is classed as wet, and water has been supplied for a number of years, there is a contractual obligation to continue its supply provided that it has not become impossible by the act of God.

In this view the case will be remanded under section 362, Civil Procedure Code, and the District Munsif will be directed to determine the suit on its merits. Costs to abide and follow the result."

Defendant appealed.

The Advocate-General (Hon. Mr. *P. S. Sivaswami Ayyar*) for appellant.

N. Rajagopala Chariar for respondent.

JUDGMENT.—The plaintiff alleged that a certain calingula which regulated the supply of water for irrigation to his land had

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fallen into disrepair and the Government officers being bound to repair it failed to do so, in consequence of this failure, his land received no water and his crop was lost: he sued for compensation to the extent of the value of the crop which but for the failure of the water-supply he might have grown.

Both Courts below have considered the question whether the plaintiff has a cause of action against the Government, and though the written statement does not distinctly raise this question, we have dealt with it in the circumstances. We are of opinion that the District Munsif was right, and that the Government is not under an obligation with regard to each individual ryot to repair irrigation works whenever they require repair. There is no case, so far as we know, in which a claim like the present has ever been made in India, whether against the Government, or against a zemindar, though opportunities for such claims have been sufficiently frequent ever since a system of irrigation works was inaugurated in the country.

The Courts in this presidency have held that a ryot is entitled to prevent the Government from doing any act resulting in a material diminution of the usual supply of water for irrigation to his land, but it has never yet been held that an action will lie for mere failure to repair, when repair is required to enable the ryot to receive the usual supply. For the respondent, reliance is placed on the case of the *Madras Railway Company* v. *Zemindar of Carvetnagram* (1), but that case does not help him. It may very well be—it is a question which we need not decide—that the Government when handing over large tracts of the country to zemindars at the Permanent Settlement laid upon them an obligation to preserve and repair the irrigation works handed over to them at the same time, and consequently, that there may lie on a zemindar an obligation more onerous than any that is upon the Government, and that what is discretionary in the Government had been made by the Government obligatory in the case of the zemindar. But however that be, we have to remember that what the Privy Council had to decide was not a question as to the extent of the obligation if any to maintain the works, but a question whether the rule laid down by the House of Lords in *Fletcher* v. *Rylands* (2) could properly be applied so as to make a zemindar liable for

(1) (1874) L.R., 1 I.A., 364. (2) L.R., 3 H.L., 330.

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damage done by the breaching of an irrigation tank maintained by him. In discussing this question, their Lordships observe that the Government of India have undertaken the public duty of maintaining what may be called a national system of irrigation essential to the welfare of a large portion of the population, and that this public duty has in some cases, devolved upon zemindars who cannot do away with the irrigation works in which many persons are interested, but are charged by Indian Law, by reason of their tenure, with the duty of preserving and repairing them. These considerations are advanced to demonstrate the difference between the position of a zemindar and that of the defendants in *Fletcher* v. *Rylands* (1). That is to say, because the zemindars are under an obligation to preserve and repair these tanks as a part of the public duty undertaken by the Government, they cannot be held liable for damage caused by the accidental destruction of one of those tanks. The zemindar's position is further likened by their Lordships to that of a person or Corporation on whom statutory powers are conferred and statutory duties imposed.

Their Lordships had not to decide, and did not decide, the extent of the duty undertaken by the Government and cast upon the zemindar, and if we consider the suggested analogies we find that it has never been held that a person bound by reason of his tenure to keep a way in repair is liable to an action by individuals injured by his failure to do so (vide *Young* v. *Davis* (2) and *Rundle* v. *Hearle* (3)), while, as regards persons and Corporations on whom statutory powers have been conferred and statutory duties imposed, the rule derivable from the English cases seems to be that in the absence of a common law liability as regards individuals, no such liability arises in cases of non-feasance, merely because the statute imposes a duty: the statute must impose the liability expressly or by clear implication (vide *Saunders* v. *Holborn District Board of Works* (4) and the cases therein cited; also *The Municipal Council of Sydney* v. *Bourke* (5)).

It is clear then, that there is nothing in their Lordships' judgment which requires us to decide that a zemindar is under an obligation to a ryot to keep a tank in repair or failing that to

(1) L.R., 3 H.L., 330. (2) 7 H.N., 772.
(3) (1898) 2 Q.B. 83 at p. 88. (4) (1895) 1 Q.B., 64.
(5) (1895) A.C., 433.

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pay the value of the crops which the ryot might have raised. That question was outside the case before their Lordships and if their observations are to be taken as dealing with it at all, they amount only to this, that the extent of the public duty which lies on the zemindar is to be ascertained on the analogy of those public duties cast upon persons or Corporations by reason of tenure or by statute, and the analogies as we have shown do not assist the respondent.

As pointed out by Subrahmania Aiyar, J., in *Sankaravadivelu Pillai* v. *Secretary of State for India in Council*(1), the rights and obligations of the Government in the matter of irrigation works in this country have to be ascertained from unrecorded custom and practice rarely brought before the courts—and as we have already said, we have no case in which a ryot has claimed payment for his crops lost owing to non-repair of an irrigation work. The ryot's payments of revenue being based on a division of the crop between him and the Government, when the crop fails there is nothing to divide, and so far as we know, no ryot has hitherto thought of claiming more than this, that when the crop fails for want of water, the land tax shall be remitted.

It is unnecessary to decide whether a ryot has a right to claim this remission, when the failure of water-supply is due to neglect to maintain a work of irrigation: but it cannot be denied that there is no custom or practice recorded or unrecorded in this presidency, under which a ryot receives compensation from the State or a zemindar measured by the value of the crop lost owing to defects in the irrigation works which command his land.

The application therefore of Subrahmania Aiyar, J.'s test is of no assistance to the respondent, and we have to see whether without the aid of custom or practice we can hold that there is in any way imposed on the State the liability which the respondent seeks to enforce.

It is argued that in the case to which we have referred, (*Sankaravadivelu Pillai* v. *Secretary of State for India in Council*(1)), Subrahmania Aiyar, J., has decided that the duty of the Government to maintain existing works of irrigation is an 'imperative' as opposed to a 'permissive' obligation, and that the liability to compensate individual ryots is to be inferred from the imperative

(1) (1905) I.L.R., 28 Mad., 72.

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nature of the duty. But the observations of the learned Judge are not to be considered without reference to the case which he was deciding when he made them, and it is clear from the context that his use of the word 'imperative' was intended only to show that in maintaining existing irrigation works the Government in the absence of negligence are not responsible for injury caused by the execution of the operations undertaken in pursuance of the duty.

In the English cases to which reference has already been made, learned Judges have remarked on the inconvenience which would be caused if every person injured by non-feasance on the part of a body or a person entrusted with a public duty were entitled to come into Court with a demand for compensation for his own particular grievance, and this argument is particularly applicable to the present case where the public duty is that of maintaining out of public funds a national system of irrigation over an area so extensive as British India. It is true that only a limited number of persons own land under any given tank or other irrigation work and the case is therefore not entirely on all fours with highway cases where the number of possible sufferers is unlimited, but the difference is merely one of the degree of inconvenience, and does not make the argument inapplicable generally.

It was also argued for the respondent that the Government is liable as for breach of contract, and in support of this contention reliance was placed on *Chinnappa Mudaliar* v. *Sikka Naicken*(1). That case no doubt decides that the ryot's right to a supply of water for irrigation is founded on contract, but that decision has been doubted in *Sankaravadivelu Pillai* v. *Secretary of State for India in Council*(2) by Subrahmania Aiyar, J., who holds that it goes too far in treating the irrigation rights of ryotwari owners as rights *in personam* and that those rights ought on principle and authority to be held to partake of the nature of rights *in rem*.

The learned Judges in *Chinnappa Mudaliar* v. *Sikka Naicken* (1) cite *Krishna Ayyan* v. *Venkatachella Mudali*(3) in support of their view, but that decision is based on a view of the relationship between the Government and the ryots which is not

(1) (1901) I.L.R., 24 Mad., 36. (2) (1905) I.L.R., 28 Mad., 72.
(3) (1871) 7 M.H.C.R., 60.

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now generally accepted—the view that the ryot holds his land of the Government as a tenant from year to year. The other case referred to in the same judgment, *Ramachendra* v. *Narayanasami* (1), suggests that the view taken by Subrahmania Aiyar, J., was that held by the Court, though the nature of the liability of the ryot who then interfered with the irrigation channel is not expressly laid down.

Chinnappa Mudalior v. *Sikka Naicken*(2) does not lay down the conditions of the supposed contract, and as the authorities stand we are not prepared to hold that the Government is bound by a contract with the plaintiff to maintain a supply of water for the irrigation of his land.

We think the plaintiff has no cause of action, and we reverse the decree of the District Judge and restore that of the District Munsif dismissing the suit. The plaintiff must pay the defendant's costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Miller.

1910, February 21.

CHATURVEDULA SURYANARAYANA, PETITIONER,

v.

CHATURVEDULA RAMAMMA, RESPONDENT.*

Provincial Small Cause Courts Act IX of 1887, s. 1 *F—Security on application for order to set aside* ex parte *decree—Indian Limitation Act XV of* 1877, *schd. II, art.* 164*—Notice under s.* 248, *Civil Procedure Code, Act XIV of* 1882*—Execution of process.*

When security is not deposited under section 17 of Act IX of 1887, until after the application to set aside the *ex parte* decree is disposed of, the hearing of the application must be held to have been barred. But where no objection is taken on this ground at the hearing, the High Court will not set aside the order in revision.

Ramaswami v. *Kurisu*, [(1890) I.L.R., 13 Mad., 178], explained.

A process is executed when notice under section 248, Civil Procedure Code (Act XIV of 1882), has been served and limitation under schedule II, article 164 of the Indian Limitation Act will run from the date of service of such notice.

Bimola Soonduree Dassee v. *Kalee Kishen Meojoomdar*. [(1874) 22 W.R., 5] followed.

(1) (1893) I.L.R., 16 Mad., 333. (2) (1901) I.L.R., 24 Mad., 36.

* Civil Revision Petition No. 231 of 1909.

MILLER, J.

CHATURVEDULA SURYANARAYANA v. CHATURVEDULA RAMAMMA.

PETITION under section 25 of Act IX of 1887, praying the High Court to revise the order of P. Adinarayaniah, District Munsif of Bezwada in Miscellaneous Petition No. 1046 of 1908 in Small Cause No. 404 of 1906.

This was a petition instituted in the Provincial Small Cause Court at Bezwada on 2nd July praying to set aside an *ex parte* decree passed against the deceased husband of the petitioner under section 108, Civil Procedure Code (Act XIV of 1882). The *ex parte* decree was passed on 2nd April 1906. The judgment-debtor died and the decree-holder brought his widow on the record. On 1st February 1908 a notice under section 248, Civil Procedure Code (Act XIV of 1882) was served upon her in execution. Attachment of her property was ordered on 13th March 1908. The warrant was returned unexecuted as there was no property.

The Munsif held that service of notice under section 248 did not amount to executing a process for enforcing a decree, and that time did not run under schedule II, article 164, Indian Limitation Act. He set aside the *ex parte* decree.

The security required by section 177 of the Provincial Small Cause Court Act was not paid into Court by the petitioner until after the hearing of the petition by the Munsif but no objection on this ground was taken at the hearing by the defendant.

V. Ramesan for petitioner.

The respondent was not represented.

JUDGMENT.—No one appeared for respondent. I think the hearing of the application was barred by section 17 of the Provincial Small Cause Courts Act as the security was not deposited until after the petition was disposed of. No doubt in *Ramaswami* v. *Kurisu*(1), Parker and Wilkinson, JJ., held that section 17 is "merely directory," but they did not decide that the Judge of the Small Cause Court could allow the deposit at any time. The District Munsif was in my opinion clearly wrong in hearing the petition before the security was deposited, but inasmuch as he heard it without objection on that ground by the plaintiff, and received the deposit, I should not be inclined to set aside the order in revision. I think, however, that the application was barred by limitation. I agree with the decision in *Bimola Soonduree Dassee* v. *Kalee Kishen Meojoomdar*(2), which held that

(1) (1890) I.L.R., 13 Mad., 178. (2) (1874) 22 W.R., 5.

MILLER, J.

CHATURVEDULA SURYANARAYANA v. CHATURVEDULA RAMAMMA.

the notice under section 248 is a process for enforcing the decree and I think that that process is executed when the notice is served.

If this is the right view the present application is barred by limitation, and on that ground I set aside the District Munsif's order and dismiss the application for restoration with costs in both Courts.

APPELLATE CIVIL.

Before Mr. Justice Sankaran-Nair and Mr. Justice Krishnaswami Ayyar.

1910. April 6, 7.

VENKATASAMI CHETTI (PETITIONER), APPELLANT,

v.

SUPPA PILLAI (PLAINTIFF), RESPONDENT.*

Registration Act III of 1877, s. 17, clause (d)—Reservation of annual rent not necessary to bring the document within proviso to clause (d) of s. 17.

In order to exempt a lease from Registration under the proviso to clause (*d*) of section 17 of the Registration Act, it is not necessary that an annual rent should be reserved. The proviso simply means that if an annual rent is reserved, it should not exceed fifty rupees.

APPEAL under section 15 of the Letters Patent against order of Miller, J., in C.R.P. No. 29 of 1909.

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

K. N. Aiya Ayyar for appellant.

M. Narayanaswami Ayyar for respondent.

JUDGMENT.—The lease in this case was for a three years' term and the rent fixed was a consolidated amount of Rs. 56-4-0 and ten bundles of betel leaves payable in one lump about the middle of the term. The question is whether the document requires registration. That depends upon the meaning of the proviso to clause (*d*) of section 17 of the Registration Act. But for the proviso the instrument would require registration. Clause (*d*) provides for three alternative conditions, any one of which would suffice to bring an instrument within the rule as to compulsory registration. One of these alternatives is a term exceeding one

* Letters Patent Appeal No. 152 of 1909.

SANKARAN-NAIR AND KRISHNASWAMI AYYAR, JJ.

VENKATASAMI CHETTI v. SUPPA PILLAI.

year. The proviso requires two conditions for exemption. One of them is that the term does not exceed five years. Here it does not. The other is that the annual rent reserved does not exceed Rs. 50. Does this mean that there should be an annual rent reserved and that it should not also exceed Rs. 50? Mr. Justice Miller apparently thinks so. With great respect we are unable to agree. We think it only means that if an annual rent is reserved it should not exceed Rs. 50. Suppose no annual rent is at all reserved and the term is less than 5 years: why should it not fall within the exemption? A mere undertaking to cultivate or occupy is a lease within the definition contained in section 3 of the Registration Act. If there is such an undertaking for a term of three years, without more, are we to say that it is outside the exemption, while if a further term of a few rupees rent every year were added to the lease it would undoubtedly fall within it? We think not. If in the proviso the word "or" were inserted in place of "and", the effect of the change would be that a larger term than one year coupled with an annual rent would be outside the proviso. This was obviously not the intention of the legislature. That explains why we have "and" and not "or". But this should not lead to the inference that the provision of an annual rent is a condition to satisfy the requirements of the exemption. It has been held in several cases that a lease for a year with liberty to renew or until renewal or from year to year is a lease for a term which does not exceed five years *Virammal* v. *Rungayyangar*(1), *Murugesa Chetti* v. *Chinnathambi Goundan*(2) and *Ramaswamy Ayyar* v. *Tirupathi Naik*(3). By analogy we should feel inclined to say that where the rent reserved is Rs. 56 in a lease for three years the annual rent reserved does not exceed Rs. 50. One difficulty may however be suggested. Suppose the term is any period less than 5 years and one consolidated rent is fixed at a thousand rupees; are we then at liberty to hold, because there is no annual rent, that the annual rent reserved does not exceed Rs. 50. It is not necessary to answer the question. Whether in that case the amount of rent being divided by the period and exceeding Rs. 50 per annum upon such division we should say that there is an annual rent exceeding

(1) (1882) I.L.R., 4 Mad., 381. (2) (1901) I.L.R., 24 Mad., 421.
(3) (1904) I.L.R., 27 Mad., 43.

SANKARAN-NAIR AND KRISHNA-SWAMI AYYAR, JJ.

VENKATASAMI CHETTI v. SUPPA PILLAI.

Rs. 50 or that there is no annual rent reserved at all to bring the case within the proviso it is not perhaps easy to decide. But assuming such a case to fall within the proviso the present is not touched. We must therefore reverse the judgment of the learned Judge and also of the District Munsif and remand the case to the latter for disposal according to law. The costs hitherto incurred will abide and follow the event.

APPELLATE CRIMINAL.

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

1910. March 21, 22.

THE PUBLIC PROSECUTOR (APPELLANT),

v

SUNKU SEETHIAH AND OTHERS (ACCUSED).*

Penal Code, Act XLV of 1860, ss. 296, 39—Public worship, disturbance of—"Voluntarily", meaning of.

It is not necessary for the purpose of section 296, Indian Penal Code, that the accused should have an active intention to disturb religious worship. It is sufficient, if knowing they were likely to disturb it by their music they took the risk and did actually cause disturbance.

It is an offence under section 296, Indian Penal Code, to pass a mosque with music so as to disturb religious worship carried on during hours notified therefor. Section 79, Penal Code, cannot be pleaded in such a case.

Muthialu Chetti v. *Bapun Saib*, [(1878) I.L.R., 2 Mad., 140], followed.

Sundaram v. *The Queen* and *Ponnusamy* v. *The Queen*, [(1883) I.L.R., 6 Mad., 203], followed.

APPEAL under section 417 of the Code of Criminal Procedure against the judgment of acquittal passed on the appellant in Criminal Appeal No. 56 of 1909 by A. C. Dutt, Head Assistant Magistrate of Penukonda.

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

Public Prosecutor for appellant.

Dr S. Swaminathan for accused.

JUDGMENT.—We think it is satisfactorily proved in this case that certain hours, which are not attacked as unreasonable, were to the knowledge of the accused fixed for public worship in the

* Criminal Appeal No. 856 of 1909.

MUNRO AND SANKARAN-NAIR, JJ.

THE PUBLIC PROSECUTOR v. SUNKU SEETHIAH.

mosque and notified by the District Magistrate; that the hour between 6 P.M. and 7 P.M. is one of those hours; that the accused passed in procession before the mosque with music between 6 P.M. and 7 P.M. while public religious worship was going on, and that the accused by their action disturbed the worship. The charge against the accused is under section 296 of the Indian Penal Code. Under that section it is an offence voluntarily to cause disturbance to any assembly lawfully engaged in the performance of religious worship. A person is said to cause an effect voluntarily when he causes it by means whereby he intended to cause it, or by means, which at the time of employing those means, he knew, or had reason to believe to be likely to cause it (see section 39, Indian Penal Code). It is not therefore necessary for the purpose of section 296, Indian Penal Code, that the accused should have had an active intention to disturb religious worship. It is sufficient, if knowing they were likely to disturb it by their music they took the risk and did actually cause disturbance. According to the decisions of this Court in *Muthialu Chetti* v. *Bapun Saib*(1) and *Sundaram* v. *The Queen*, *Ponnusami* v. *The Queen*(2) the accused had no right to pass the mosque with music so as to disturb religious worship going on in the mosque during the hours which had been notified as the hours in which religious worship would be carried on. The Head Assistant Magistrate was therefore wrong in holding that the accused were protected by section 79, Indian Penal Code. We find the accused Nos. 1, 4, 7, 8, 10, 11, 12 and 13 guilty under section 296, Indian Penal Code. The first accused is fined Rs. 30 with three weeks' simple imprisonment in default. Accused Nos. 4, 7, 8, 10, 11, 12 and 13 are fined Rs. 5 each with one week's simple imprisonment in default.

(1) (1880) I.L.R., 2 Mad., 140. (2) (1883) I.L.R., 6 Mad., 203.

APPELLATE CRIMINAL.

Before Sir Arnold White, Chief Justice.

1910. February 2.

KANAGA SABAI, PETITIONER IN CRIMINAL REVISION CASE No. 489 of 1909 AND RESPONDENT IN CRIMINAL REVISION CASE No. 622 OF 1909,

RAMAMANI, PETITIONER IN CRIMINAL REVISION CASE No. 622 OF 1909 AND RESPONDENT IN CRIMINAL REVISION CASE No. 483 OF 1909,

v.

EMPEROR, RESPONDENT IN BOTH.*

Criminal Procedure Code (Act V of 1898), s. 517—Delivery of property under—Order of delivery of property on joint receipt—Validity of such order.

On the discharge of an accused person on a charge of theft of articles admittedly found in possession of that person, on the ground that the accused had a *bonâ fide* belief in a claim of right to their possession, that person cannot claim return of the articles under section 517, Criminal Procedure Code, as a matter of course.

Under section 517, Criminal Procedure Code, even where a party is charged with theft and that charge is dismissed or the party is discharged, an order can be made for the delivery of the subject matter of the alleged theft to some party other than the party in whose possession the property was found at the date of the alleged theft.

Kuppammal v. *Ramasawmy Udayan*; [Crl. R.C. No. 477 of 1905, (unreported)] followed.

Property, part of which is joint family property and part the self acquisition of an undivided member of the family may rightly be handed by the Court to the manager of the undivided family and the undivided member on their joint receipt.

Chalakondam Alasani v. *Chalakondam Ratnachalam*, [(1864) 2 M.H.C.R. 56], distinguished.

PETITIONS under sections 435 and 439 of the Code of Criminal Procedure praying the High Court to revise the order of J. G. Burn, Additional Sessions Judge of Madura, in Criminal Revision Petition Nos. 7 and 10 of 1909.

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

T. Rangachariar for petitioner in Criminal Revision Case No. 483 of 1909 and for respondent in Criminal Revision Case No. 622 of 1909.

* Crl. R. C. Nos. 483 and 622 of 1909.

The Hon. Mr. *T. V. Seshagiri Iyer* for petitioner in Criminal Revision Case No. 622 of 1909 and for respondent in Criminal Revision Case No. 483 of 1909.

The Public Prosecutor opposed both the petitions.

ORDER.—In these cases the second accused and a man with whom she is said to have eloped were charged with the theft of certain jewels. The case for the prosecution was that the jewels belonged to the mother of the second accused. The case for the second accused apparently was that the jewels belonged to herself. As to that the magistrate has held that there was no evidence to show that the second accused was the exclusive owner of the jewels or was in exclusive possession thereof. He further held that even on the assumption that she had contributed from her earnings towards their value, the joint control over and possession of the jewels were in the mother as the manager of the undivided family of which the second accused was a member. The second accused was discharged on the charge of theft. The question then arose as to who was entitled to an order for the possession of these jewels. The order which the magistrate made was that the jewels in question should be given over to the mother and the daughter on their joint receipt. These were appeals from this order; and the view taken by the Sessions Judge was that in every probability part of the property in question was joint family property and part was the self-acquired property of the second accused. In those circumstances he dismissed the appeals. Now there are two petitions before me, one by the mother who says an order ought to have been made for the delivery of the jewels to her, and the other by the daughter who says that the order ought to have been made for the jewels to be delivered over to her. It is not contended, and it could not be contended on behalf of the daughter, that she is entitled as of right to the order for which she asks solely upon the ground that, in respect of the charge of theft which was preferred against her with regard to these jewels, an order of discharge was made. There can be no question that, under section 517, Criminal Procedure Code, even where a party is charged with theft and that charge is dismissed or the party is discharged, an order can be made for the delivery of the subject matter of the alleged theft to some party other than the party in whose possession the property was found at the date of the alleged theft. In support of that proposition I need only refer to the

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decision of this Court in *Kuppammal* v. *Ramasawmy Udayan*(1). That being so, there was jurisdiction under the section for making an order, in favour of the daughter or in favour of the mother or to make it in the form in which it was made in this case, viz., in favour of both. Now the question is: Is the order of the magistrate right? I have been referred to the case of *Chalakonda Alasani* v. *Chalakonda Ratnachalam*(2) which is referred to by the magistrate and by the Sessions Judge. It seems to me, however, it does not support the contention preferred on behalf of the mother that she is entitled to an order in her favour for delivery of all the jewels, because in that case, it was held that the jewels were joint family property and it was on the basis of that finding that the order in favour of the party who claimed the jewels was made.

Here we have, though not exactly a finding, an expression of opinion by the learned Judge that part of the property was joint and part was self-acquired. Therefore it seems to me the 2 M.H.C.R. case does not help the mother. On the expression of opinion given by the learned Judge that part of the property was the self acquisition of the daughter and part was the joint family property. I think he had jurisdiction to make the order which he made under section 517, Criminal Procedure Code. I am not prepared to say that that order is wrong. Consequently both the petitions—petition by the mother No. 483 and petition by the daughter No. 622,—will be dismissed.

(1) Crl. R. C. No. 477 of 1905 (unreported). (2) (1864) 2 M.H.C.R., 56.

APPELLATE CIVIL.

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

1910. Feb. 2, 3. March 15.

NAGANADA AIYAR *alias* ESWARAPIER (PLAINTIFF), APPELLANT,

v.

KRISHNAMURTI AIYAR AND OTHERS (DEFENDANTS Nos. 1 to 63, 65 to 79), RESPONDENTS Nos. 1 to 78.*

Res judicata—*Cause of action, how to be determined—Civil Procedure Code, Act XIV of 1882, s. 103—Bar of suit under s. 158—Scope of.*

The plaintiff in the present suit sued one Srinivasa Aiyar in O.S. No. 7 of 1892 for on the ground that he was prevented from entering on his property and prayed for an injunction restraining the said Srinivasa Aiyar from obstructing plaintiff.

In the present suit plaintiff sued the successors in title of Srinivasa Aiyar alleging that Srinivasa Aiyar wrongfully got into possession prior to his filing O.S. No. 7 of 1892 and prayed for a declaration of title and possession:

Held, that the present suit was barred as *res judicata*.

Where the causes of action are substantially the same, the form in which they are stated or the difference in the frame of the relief will not affect the question.

Haji Hassam Ibrahim v. *Mancharam Kaliandas*, [(1879) I.L.R., 3 Bom., 137], followed.

Jibanti Nathkhan v. *Shib Nath Chakerbatty*, [(1882) I.L.R., 8 Calc., 819], distinguished.

A court is not precluded from comparing the issues in the two cases and from considering what the plaintiff had to prove or undertook to prove in either case, in considering whether the causes of action are identical.

Chand Kour v. *Partab Sing*, [(1889) I.L.R., 16 Calc., 98], explained.

Where in a suit at an adjourned hearing neither the plaintiff nor his pleader appears, the case may be dealt with under section 158 of the Civil Procedure Code, 1882. There is nothing in the language of that section which precludes its application to such a case.

Srimant Sagajirao v. *Smith*, [(1896) I.L.R., 20 Bom., 736], dissented from.

APPEAL against the decree of T. T. Rangachariar, Subordinate Judge of Kumbakonam, in Original Suit No. 61 of 1903.

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

K. Srinivasa Ayyangar for appellant.

T. R. Ramachandra Ayyar for 10th, 17th, 24th and 78th respondents.

* Appeal No. 128 of 1905.

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T. Rangaramanujachariar for 57th and 74th respondents.

T. Natesa Ayyar for 28th to 30th respondents.

S. Srinivasa Ayyangar for 57th to 60th respondents.

T. R. Venkatarama Sastri for 78th respondent.

T. V. Gopalaswamy Mudaliar for 73rd respondent.

S. Srinivasa Ayyar for 8th, 21st, 24th, 27th, 32nd to 35th, 37th, 40th, 41st, 61st to 63rd, 76th and 77th respondents.

M. Subramania Aiyar for 24th and 78th respondents.

ABDUR RAHIM, J.—This appeal is by the plaintiff in Original Suit No. 61 of 1903, against the judgment of the Subordinate Judge of Kumbakonam dismissing the suit. One of the grounds on which the learned Judge proceeded was that the present suit was not maintainable by reason of Original Suit No. 7 of 1892, instituted by the plaintiff against one Srinivasa Aiyar, predecessor in title of the present defendants having been dismissed by the Subordinate Judge of Negapatam on the 1st November 1892. He holds that the previous suit was disposed of under sections 157 and 102, Civil Procedure Code of 1882, and the bar arises by reason of section 103, Civil Procedure Code of 1882. But the learned vakil for the 74th defendant urges that the first suit was decided under section 158 of the Code, and the present suit is, therefore, barred on the ground of *res judicata*. The contention on behalf of the appellant is that the dismissal of the previous suit was under section 102, as held by the Court below, but that the causes of action in the two suits were not the same. If the plea in bar either under section 103, or by reason of *res judicata* is sustainable, it would be unnecessary to go into the question of limitation, the only other question raised in the appeal.

The property, to which both the suits relate, consists of certain villages. In the plaint in the suit of 1892, it is alleged that the villages belonged to one Narayanasawmi Aiyar, senior paternal uncle of the plaintiff, that he died about twenty-four years ago and after his death, the villages remained in the enjoyment of Narayanaswami's widow, Sellathammal, that, on Sellathammal's death on the 30th August 1891, the plaintiff became entitled to, and came into possession, of all her properties including the properties sued for, and that the plaintiff leased the latter properties to several persons in September 1891. It, then, goes on to allege that "on the strength of some opinion entertained by the revenue authorities, on an enquiry made by them after the

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said Sellathammal's death, the defendant who has no claim, for the last one month entered upon the undermentioned properties and has been causing disturbance. Besides, he has been causing disturbance to the plaintiff's enjoyment in several ways by frightening and intimidating the plaintiff's lessees and by instituting criminal complaints, etc., against them." In the sixth paragraph of the plaint, it is stated that "whatever might be the nature of the defendant's claim he had no right whatever to wrongfully enter upon the property remaining in the plaintiff's possession." And in the seventh paragraph, the cause of action is alleged to arise in January 1892, "when the defendant began to cause obstruction as against the plaintiff's possession." The relief prayed for is "perpetual injunction restraining the defendant from interfering with the property remaining in the plaintiff's possession."

The defendant in that suit denied the plaintiff's right to, and possession of, the land in dispute, contending that the property belonged to one Anapian, the father of Sitammal, that on his death without male issue, it devolved on his widow Parvathammal and that on Parvathammal's death Sellathammal succeeded to the property. The defendant claimed that on Sellathammal's death, he inherited the property as the sister's son of Anapian. The three material issues framed in the case were (*a*) whether the property belonged to Narayanaswami, the husband of Sellathammal, (*b*) whether the succession devolved on the plantiff after the death of Sellathammal and he has been in possession of the property since her death, and (*c*) whether the plaintiff was entitled to obtain the injunction solely on the strength of his possession without making out title to the property. The issues were settled on the 2nd April 1892, and the case was fixed for final hearing on the 26th August, on which date the plaintiff applied for an adjournment on the ground that he had not sufficient time to summon his witnesses, and the hearing was postponed to the 11th October. On the 11th October only two out of the twenty-four witnesses subpœnaed by the plaintiff appeared but neither the plaintiff nor his pleader appeared on that date. The Court, having waited for sometime, passed the following order:—"From the issues above mentioned, it will be seen that the plaintiff's claim is completely denied by the defendants. I should therefore dismiss the plaintiff's suit with costs." An

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application was subsequently made under section 103 of the Civil Procedure Code of 1882 to set aside the order of dismissal to the same Judge. He held that the dismissal must be considered to have been made under section 158 of the Code inasmuch as the case had been adjourned in order to enable the plaintiff to produce his evidence, and he failed to do so, and that therefore the plaintiff had no remedy under section 103. It is to be noted that the Subordinate Judge does not state that he decided the suit on its merits which I think he could have done under section 158. The other course open to him under section 157 was to dismiss the suit under section 102 of the Code on the ground that the plaintiff failed to appear. The order dismissing the suit does not mention the section under which it was made. But on reading the order, it would appear to have been made under section 102, read with section 157, rather than under section 158. The Subordinate Judge who heard the application under section 103, seemed to think that under the circumstances the suit could have been dealt with only under section 158; but that is appearently a wrong view of the law. The plaintiff did not appear at the adjourned hearing and therefore the case fell within the terms of section 157 (*Maharajah of Vizianagram* v. *Lingam Krishna Bhupati*(1)). I am also inclined to hold, as I have said, that the Subordinate Judge might have dealt with the case under section 158, if he chose to do so. The view taken in *Shrimant Sagajirao* v. *S. Smith*(2) however seems to be that, where the plaintiff does not appear, the suit cannot be decided under section 158, even though time had been granted at his request for the purpose of producing evidence or performing any other act necessary for the further progress of the suit. With great respect to the learned Judges who decided that case I am unable to agree in their construction of section 158.

There is nothing in the language of that section which precludes its application to a case where the plaintiff does not appear.

Section 158 generally empowers the Court under the circumstances mentioned therein to decide the suit whether the party at whose instance the adjournment was granted is present or not at the date fixed for hearing, and the judgment in *Shrimant Sagajirao*

(1) (1902) 12 M.L.J., 473. (2) (1896) I.L.R., 20 Bom., 736.

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v. *Smith*(1) does not give any reasons in support of a limited construction. It may, however be, that in such cases, the Court ought ordinarily to deal with the suit under section 157 and not section 158. Under section 158 the Court is [illegible] chooses to act under it to go into the questions raised in the action and to decide them on such materials as may be before it. But, as I have said, so far as it appears from the order of the Subordinate Judge in the previous suit he did not consider the case on the merits, although the suit might have failed because of the inability of the plaintiff to support his allegations by evidence.

The question, then, is whether the cause of action in the present suit is the same as that in the suit of 1892 within the meaning of section 103. In the plaint in the present suit, which is much fuller than the plaint in the other suit, the plaintiff states that the property originally belonged to Anaippier who died in 1836, leaving him surviving his wife Parvathammal and his mother Ammalammal, that before his death Anaippier authorised his wife to adopt a son, that after the death of Anaippier his widow gave birth to a posthumous child Sellathammal and that in 1837 the widow adopted one Ramasami. The property then vested in Ramasami, and Parvathammal looked after it as his guardian, Ramasami died in 1839 and the property devolved on Parvathammal as his heir and she enjoyed the same till her death in 1841. Then it is alleged one Sundaram Aiyar obtained possession of the property as guardian of Sellathammal and that such possession was adverse to the rights of the proper heirs of Ramasami and that Sellathammal when she came of age continued in adverse possession and thus acquired a right as absolute owner.

Sellathammal died in 1891, her husband Narayanasawmi having pre-deceased her in 1868. And the plaintiff says that he being a nephew of Narayanasawmi succeeded to the property on the death of Sellathammal, who had acquired an absolute right thereto by adverse possession, and, he further alleges, in the alternative, that the property was owned and possessed by Narayanasawmi adversely to Sellathammal, and in this view of the case also he is entitled to the property on the death of Narayanasawmi's widow Sellathammal. The plaint goes on to state that whatever right Srinivasa Aiyar, the defendant in the previous

(1) (1896) I.L.R., 20, Bom., 736.

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suit and father of defendants Nos. 1, 2 and 3 in the present case, possessed in the suit properties was extinguished by the adverse possession of Sellathammal and Narayanasawmi Aiyar. It further states that the Government took possession of the property probably as an escheat, but that eventually on certain misrepresentations being made by Srinivasa Aiyar, the predecessor-in-title of the defendants, the Government wrongfully put Srinivasa Aiyar in possession of the property in December 1891, which the plaintiff says is his cause of action. The main relief he asks for is declaration of his title to these properties and recovery of possession. It will be noticed that in the plaint in the previous suit allusion is made to the same order of the Government which is now alleged to be the cause of action. That order by which the plaintiff was dispossessed in December 1891 was passed before the institution of the previous suit. In the plaint in that suit he admits that the defendant had entered upon the land and was causing disturbance but he claims that he was in possession by reason of the fact that he had granted leases to several persons before the passing of the order by the Government. It is not now alleged that anything has transpired since the institution of the previous suit in the nature of infraction of the plaintiff's right. What appears to have been the case from the statements in the plaint in the previous suit, was that soon after the death of Sellathammal, there was the usual scramble for possession between the rival claimants and that the authorities supported the defendant's claim who on the strength of their order, entered upon the possession of the properties; but the plaintiff claimed that he was still in possession. His possession however had to be secured, and therefore he wanted a perpetual injunction against the defendant on the ground that he was entitled to the property on the death of Sellathammal. Whatever rights he has now to the property accrued on the death of Sellathammal by virtue of his relationship to her husband Narayanasami, and it is the same right which is in dispute in the present action. No doubt in the previous suit he alleged that the property belonged to Narayanasami and that he inherited it on the death of his widow who was in possession for 24 years after Narayanasami's death, while in the present suit he says that either the property belonged to Narayanasami, he having acquired it by adverse possession, or to his widow Sellathammal by virtue of adverse possession against

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the heirs of Anaippier, and that in either case he succeeded the property on the death of Sellathammal.

As I read the plaint in the first suit, the cause of action then was the denial of the plaintiff's right to the property accruing on the death of Sellathammal and Srinivasa taking possession of the property on the strength of the order of the authorities, though he claimed that such order of the Government and the action taken under it should not affect his title nor the possession he had by virtue of the leases. The main question then was: did the plaintiff acquire a right to the property on Sellathammal's death? And this is made clear by the issues framed in the case. It is true that the relief which he asked for then was perpetual injunction, but he could not have obtained that relief unless he was able to establish his title. As observed by their Lordships of the Privy Council, the cause of action has no relation to the character of the relief prayed for by the plaintiff, any more than to the defence which may be set up by the defendants. See *Chand Kour* v. *Partab Singh*(1). It has been urged by the learned vakil for the plaintiff that it is not open to us in this connection to travel outside the four corners of the plaint in order to ascertain what the cause of action was in the previous suit and he relies in support of this argument on the decision just referred to, where their Lordships observe that the cause of action refers entirely to the grounds set forth in the plaint as the cause of action, or in other words to the media upon which the plaintiff asked the Court to arrive at a conclusion in his favour. But these observations must be read in connection with the context in which they are made. So read, they only mean that a cause of action is not governed by the nature of the defence which the defendant may set up. I do not think, for instance, that their Lordships intended to lay down that we are precluded, in determining whether the cause of action in the two suits is the same, from referring to the issues which were raised in the first action for the purpose of finding out what the plaintiff had to prove and undertook to prove in order to support his claim as alleged in his plaint. The plaint in the suit of 1892 is extremely concise and vague, and it becomes necessary for the purpose of understanding the scope of that suit to refer to the issues. It has been argued with considerable emphasis that the plaintiff then

(1) (1889) I.L.R., 16 Cal., 98.

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alleged that he was in possession of the property although it may be that his allegation was false or founded on misconception. But the plaintiff also alleged in the previous suit that he had a right to the property and that Srinivasa Aiyar in disturbing his possession purported to do so under some claim of right. The suit was not a merely declaratory suit, nor based on mere possessory title, instituted under the special provisions of the Specific Relief Act; the entire scope of the suit was to obtain a decision that the plaintiff succeeded to the property on the death of Sellathammal. The plaintiff has in the present action merely varied the form of relief by asking for the recovery of possession instead of perpetual injunction, which means much the same thing in substance. If the causes of action in the two suits are substantially the same, the mere differences in the form in which they are stated or in the relief prayed for can make no difference in law. See *Haji Hasan Ibrahim* v. *Mancharam Kaliandas*(1) Otherwise a plaintiff who has allowed judgment to go against him by default could always get over the disability imposed by section 103 of the Code by simply manipulating the form of the plaint in a subsequent suit.

It is next argued that in the present suit the plaintiff's case is that the property belonged to Sellathammal or to her husband Narayanasami, while his case in the first suit was that it belonged to Narayanasami, and it was not alleged then that it belonged to Sellathammal in absolute right. In both the cases, whether the property belonged to Sellathammal absolutely or to Narayanasami, the plaintiff's title to it is based on his relationship to Narayanasami and arose on the death of Sellathammal. The media therefore, in the language of the Privy Council, on which the plaintiff in either case asks the Court to arrive at a conclusion in his favour is succession to the property in question on the death of Sellathammal and the denial of such right by Srinivasa Aiyar, the defendant, or his representatives in title. I may refer to a case in *Woomatara Debea* v. *Kristokaminee Dossee*(2), where the Judicial Committee of the Privy Council had to construe the phrase "cause of action" as used in section 2 of the Civil Procedure Code of 1859. The observations made in that case seem to bear closely on the facts of this case. There the plaintiff had

(1) (1879) I.L.R., 3 Bom., 137. (2) (1872) 18 W.R., 163.

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in a former suit admitted that no portion of the land then sued for was included in the limits of a taluk as originally settled and defined by the dowl but that she had as taluqdar of that taluq acquired title to it as towfeer, *i.e.*, by gradual squatting or encroachment. It was held in the suit subsequently brought by her that she could not claim to fall back upon the title to the land as included within the limits of her taluq. Their Lordships observe "the first question that occurs to their Lordships upon that section is what is meant by the cause of action. And in the present case they are clearly of opinion that the cause of action was the dispossession of the defendant by the fixing of the boundary that is now complained of and the other proceeding in the Act IV case. The result of these proceedings was to affirm the possession of the defendants in the land which was the subject of the first suit and to leave the party who felt aggrieved by them to her remedy by a civil suit." Then they go on to say "Now it is perfectly clear to their Lordships upon the proceedings that the real question in issue to be determined between the parties then was whether the lands then sued for which included the lands now sued for belonged as of right to the taluqdar, or whether they fell within lot 32 which belonged to the defendants. And it was open to the plaintiff, the present appellant, in the former suit, to shape her title in either of three ways. She might have said, as she did say, according to Mr. Doyne's argument to-day that the whole of the land then claimed was towfeer land; or she might have said a portion of the land fell within the taluq, as originally settled and formed part of the 7,000 and odd beegas mentioned in the dowl and the residue of it is towfeer land; or she might have put her case in the alternative and have said that she had a good title to a portion as her original land, but that, should the proof of that fail, that portion also was to be considered as towfeer land." "With the full knowledge of all the circumstances she chose to say, 'I admit that I am in possession of all that I was entitled to under the dowl, but I claim this land, the whole of it as towfeer land.' The contention now is that although she saw fit to take that course then, she has now a right to fall back upon the other title, and to say: 'The boundary was improperly drawn so as to include in the defendant's holding that which of right should have been within my originally settled taluq; and as I now claim in that way that which I might have claimed in the former suit, I am not precluded

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from bringing this second suit.' It appears to their Lordships that that contention cannot prevail against the clear terms of the section in question, or indeed, upon principle." Section 2 of Act VIII of 1859 on which the question arose was in these terms: "The Civil Courts shall not take cognizance of any suit on a cause of action which shall have been heard and determined by a court of competent jurisdiction between the same parties or the parties under whom they claim." That lays down a narrower principle of *res judicata* than section 13 of the Code of 1882; while the disability imposed by section 2 of Act VIII of 1859 seems to be the same as that laid down by section 103 of the Code of 1882 which precludes a second suit being brought on the same cause of action as in the first suit, even though the first suit was dismissed for default of the plaintiff and not heard and determined. In the present case therefore the subject of inquiry is the same as was in the case in *Woomatara Debea* v. *Kristokaminee Dossee*(1), *viz.*, the identity of the cause of action. Thus, to adopt the language of the Privy Council, it can make no difference in principle how the present plaintiff shaped his title if he was in a position at the time of the suit of 1892 to base his claim on two alternative titles which he has put forward in the present suit. Though section 13 is not applicable to this case, as the previous suit was not heard and finally decided within the meaning of that section, I think section 42 and section 43 are clearly applicable. Section 42 lays down that every suit shall as far as practicable be so framed as to afford ground for a final decision upon the subject in dispute and so to prevent further litigation concerning them. The real subject of dispute in this case was the title of the plaintiff to the property in question which accrued on the death of Sallathammal, and the plaintiff ought to have put forward the two alternative sets of facts which are now alleged in support of that title and which existed at the time of the previous action. What led the plaintiff to come to Court then as now was the order of the Government on the strength of which Srinivasa Aiyar obtained possession of the land and the denial of the plaintiff's title thereto by Srinivasa Aiyar. Section 43 lays down that the whole of the plaintiff's claim should be included and he must ask for all the remedies to which he may be entitled in respect of

(1) (1872) 18 W.R., 163.

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the same cause of action. One test, it seems to me, which may be usefully applied in order to see whether the causes of action are the same, is whether the sections 44, 45, 46 and 47 of the code which relate to joining causes of action would have any application to such a case as this. To my mind, it is obvious, that they would not. I may also refer to the case of *Moonshee Buzloor Ruheem* v. *Shumsoonissa Begum* and *Jodonoth Bose* v. *Shumsoonissa Begum*(1). There the question for consideration was whether the claim in the new suit was in fact founded upon a cause of action distinct from that which was the foundation of the former suit. The cause of action in the former suit of the respondent in the Appeal before their Lordships of the Judicial Committee was a refusal by her husband, the appellant, to restore, or his misappropriation of, the wife's property which she says she entrusted to him. The property sought to be recovered in the second suit was a particular company's paper which along with other property the subject of the first suit was *deposited* with the husband. This company's paper not having been sued for in the first action it was held that the plaintiff could not recover it in the new suit. The cause of action in both the suits was one and the same conversion.

None of the cases cited by the learned vakil for the appellant has, it seems to me, any bearing on this case. In *Pittapur Raja* v. *Suriya Rau*(2), the claim involved in the second suit in respect of the personality had not arisen at the time of the former suit. In *Ramaswami Aiyar* v. *Vythinatha Aiyar*(3), the two suits related to two distinct mortgages and as it is pointed out in *Thrikaikat Madathil Raman* v. *Thiruthiyil Krishnen Nair and others*(4), the cause of action in *Ramaswami Aiyar* v. *Vythinatha Aiyar*(3) arose out of two distinct contracts. In *Jibunti Nathkhun* v. *Sahib Nath Chukerbutty*(5) the previous suit which was one for declaration of title to and confirmation of possession of certain land, had been dismissed on the ground that the plaintiff was not in possession at the time of filing the suit and his title was not adjudicated upon. It was held that a subsequent suit for recovery of possession on the same title was not barred under section 43 because the causes of action were different. As the learned Judges point out, the previous suit was one of a declaratory

(1) (1867) 11, M.I.A., 551.
(2) (1885) I.L.R., 8 Mad., 520.
(3) (1903) I.L.R., 26, Mad., 760.
(4) (1906) I.L.R., 29 Mad., 153.
(5) (1882) I.L.R., 8 Calc., 819.

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nature and the plaintiff could not then have asked for anything more on his allegations in the plaint, and after the previous suit there had been an active disturbance of the plaintiff's possession. But if the Court in that case had found against the plaintiff both on the question of title and of possession he could not have subsequently brought another suit on the basis of his title although his first suit was liable to be dismissed on the question as to possession alone being determined against him. See *Peary Mohun Mukerjee* v. *Ambica Churn Bandopadhya*(1). So if the cause of action in the present case was the denial of the plaintiff's title to the land by succession to Sellathammal and the disturbance of his possession by Srinivasa Aiyar, it would not be open to the plaintiff to say that if he had prosecuted the suit and it was found that he was not in possession, then on that ground alone his suit might have been—though I do not think it would have been—dismissed.

I am therefore of opinion that the judgment of the Lower Court on this point is right and that the appeal must be dismissed with costs.

MUNRO, J.:—I concur.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Abdur Rahim.

1910. February 17, 28.

PEMMARAZU VENKIAH (PLAINTIFF), APPELLANT,

v.

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

Surveys and Boundaries Act IV of 1879, s. 12—Lease—Land with shifting boundaries—Lessee, rights of—Damages.

Where the boundaries of land to be leased are of a shifting character, the prospective lessee is entitled to rely upon the area stated in the lease and to be put into possession of an area which approximates to that which is mentioned in the lease.

Raja Durga Prosad Singh v. *Rajendra Naraian Bagchi*, [(1909.) 10 C.L.J., 570)], applied.

Where the lessor is unable to put the lessee into possession of the area stipulated in the lease, he is liable to compensate the lessee by way of damages.

Where the alteration to the land takes place after the lessee has been put into possession, the rule would be different.

(1) (1897) I.L.R., 24 Calc. 900. * Appeal No. 18 of 1905.

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PEMMARAZU VENKIAH v. THE SECRETARY OF STATE FOR INDIA.

APPEAL against the decree of F. H. Hamnett, District Judge of Godavari, in Original Suit No. 18 of 1903.

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

The Hon. Mr. *T. V. Seshagiri Ayyar* and *T. V. Muthukrishna Ayyar* for appellant.

The Government Pleader for respondent.

Sir ARNOLD WHITE, C.J. (The Chief Justice).—In this case I am unable to adopt the view which has been taken by the District Judge. I turn first to the order made by the Collector under section 12 of the Surveys and Boundaries Act IV of 1897. There I find this passage: "Unfortunately absolute certainty is not possible in this case owing to the shifting character of the river-bed and the disappearance of land marks referred to." Later the order goes on "I accordingly record my decision that the line indicated in that plan as the line indicated and intended by the Panchayatdars be accepted as the true dividing line between the two villages and that it be demarcated, the excess area of 109 acres odd referred to by the renter falling beyond the line being clearly an accretion to the land appertaining to the Gopalpur Zamindari."

Then I find in the written statement put in by the defendant these allegations in paragraph 4: "The plaintiff is entitled only to that land which was theretofore enjoyed as part of Sidhantam lanka subject to the changes due to the shifting character of the river-bed incidental to all lankas. He is put to the proof of his allegation that the suit land was leased to him." Paragraph 5: "The defendant submits that it is a well-known fact that the lankas in the bed of the river Godavari are subject to frequent changes both in shape, extent and surface soil by the action of the river." Paragraph 6: "The lanka land measuring acres 109 odd alleged to have been encroached upon by the Gopalpur proprietor is a gradual accretion to his lanka." In the pattah which was granted to the plaintiff by the Collector the land leased to him is described in paragraph 1 as lanka called Sidhantam lanka of Sidhantam village. The name of the lanka is given as Sidhantam lanka. The extent of the lanka given under the heading boundaries is acres 777 cents 64. Then the boundaries are set out and the northern boundary is Gopalapuram Badava Lanka (exhibit A). In the muchilika

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which was given by the plaintiff (exhibit IV) the name Sidhantam lanka is given and the area is given as 777 odd acres under the heading "appproximate extent."

It has been argued on behalf of the respondent that, having regard to the shifting character of these boundaries as found by the Collector in his proceedings under the Surveys and Boundaries Act and as alleged by the defendant in his written statement, the extent stated in the pattah may be disregarded and that it must be taken that when the plaintiff took the lease of Sidhantam lanka he knew he was taking a lease of a lanka the boundaries of which were for physical reasons liable to shift from time to time. I cannot draw from the fact that the boundaries were of a shifting character the inference which the Government Pleader invited me to draw. I think the fact that the boundaries are of a shifting character and the property leased is liable either to diminish or increase by a process of accretion entitles the man who is contemplating taking the lease to rely upon the area stated in the lease; and it seems to me in drawing that inference I am only proceeding in accordance with the well-known canon of construction which is laid down in the case of *Raja Durga Prosad Singh* v. *Rajendra Narain Bagchi*(1). The passage to which I refer is on pages 583 and 584 and runs as follows:—Consequently the result is that the quantity specifically stated in the lease is 400 bighas whereas the area contained within the boundaries mentioned therein is 275 bighas odd only. Returning now to the question of the true construction of the subject matter of this lease the primary canon of interpretation of a deed or grant where there is a conflict between the description of the boundaries of the land conveyed and the description of the quantity, unquestionably is, that the description of the boundaries if it is precise and accurate, dominate the description of the quantity; see *Llewellyn* v. *Earl of Jersey*(2), *Jack* v. *M'Intyre*(3), *Cowen* v. *Truefitt Ld.*(4), and *M. C. Juer* v. *Walker*(5). On the other hand, there is a supplementary canon equally well established, though instances of its application are much less frequent than those of the other, that if the description of the boundaries is vague and uncertain,

(1) (1909) 10 C.L.J., 570 at pp. 583, 584.
(2) (1843) 11 M. & W., 183; 63 R.R., 569.
(3) (1845) 12 Cl. & F, 151.
(4) (1898) 2 Ch., 551; (1899) 2 Ch., 309.
(5) (1819) 4 Wheaton W.S., 444.

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it yields to the description of the quantity; see *Harrick* v. *Sixby*(1); *Davis* v. *Sheperd*(2); *Miller* v. *Wilmesby*(3); *Horne* v. *Struben*(4); *Mewson* v. *Prijar's Lessee*(5). I do not mean to suggest that he is entitled to say, "I claim the physical possession of the precise area mentioned". He does not put his case higher than this: "those boundaries being admittedly of a shifting character and the area being stated, I am entitled to be put in possession of an area which approximates to the area which is mentioned in the lease".

Then it was suggested on behalf of the respondent that the case made here is not the case which was made in the plaint or which was presented before the learned Judge in the Court below. Mr. Seshagiri Aiyar on behalf of the appellant, puts his case alternatively. He said if the Collector was wrong in his order in the proceedings under the Surveys and Boundaries Act, and this land belongs to Government, I am entitled to be put in possession of the 109 acres odd. If, on the other hand, he is right and Government are not in a position to put me in possession of the 109 acres odd because it belongs to somebody else then I am entitled to damages for breach of the covenant to put me in possession of the land which was leased. I think he is entitled to put his case in that manner. Mr. Napier suggested that taking leases of this character partakes of the nature of gambling and that the lessee takes his chance whether by accretion or washing away during the currency of his lease he gets more or less than the extent provided for in the lease. I can quite understand that, but the gambling seems to me to be with reference to what happens after he has got possession of the land under the lease, not with reference to the area stated in the lease being approximately correct or otherwise.

Then Mr. Napier took the point of limitation and said that assuming the time to run from the date of the muchilika which is of course later in date than the pattah, the plaintiff's claim was time-barred under article 116 of the second schedule to the Limitation Act. No question of limitation was raised before the District Judge. However Mr. Napier is of course

(1) (1867) L.R., I.P.C., 436.
(2) (1866) L.R.I., Ch. App., 412.
(3) (1905) 2 Ch., 164.
(4) (1902) A.C., 454.
(5) (1822) 161 U.S., 229; 7 Wheaton U.S., 7.

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within his rights in taking it here and the law requires that we should deal with it. But as I have come to the conclusion that the case must go back to the District Court, I think the proper order with regard to the plea of limitation now raised is that the defendant will be at liberty to amend his written statement by raising the plea of limitation.

It seems to me that subject to this plea of limitation, if, when the suit was brought, the Government was not able to put the plaintiff into possession of 777 acres or thereabouts which is the extent given of the lanka, they are liable to compensate the plaintiff by way of damages. A party who lets premises agrees to give possession and if he fails to do so the lessee may recover damages against him. See *Coe* v. *Clay*(1). I say nothing as to the measure of damages I leave that to be dealt with by the Court below.

For the reasons which I have stated I hold that the decree of the District Court must be set aside and the case must go back to that Court to be dealt with in accordance with those observations. Costs will abide the event.

ABDUR RAHIM, J.—I agree in the order proposed by the learned Chief Justice.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Abdur Rahim.

1910. February 14, 15. March 11.

THIRUVENGADA MUDALIAR AND OTHERS (DEFENDANTS), APPELLANTS,

v.

SADAGOPA MUDALIAR (PLAINTIFF), RESPONDENT.*

Partnership—Partner whose remedy for general account is barred may sue to recover share of item received after dissolution.

A partner whose remedy against his co-partner for a general account is barred, can recover his share of a particular item of assets received after the dissolution of the partnership if it be open to the defendant co-partner to ask the Court to take accounts with a view to show that the plaintiff had received more than his share in the partnership assets.

(1) (5) Bing, 440, 30 R.R., 699.

* Appeal No. 222 of 1905.

WHITE, C.J., AND ABDUR RAHIM, J.

THIRUVENGADA MUDALIAR v. SADAGOPA MUDALIAR.

Sokkanadha Vanni Mundar v. *Sokkanadha Vanni Mundar*, [(1905) I.L.R., 28 Mad., 344], followed.

APPEAL against the decree of V. Subramaniam Pantulu, Subordinate Judge of Tanjore, in Original Suit No. 33 of 1904.

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

K. Srinivasa Ayyangar and *T. V. Gopalaswamy Mudaliar* for appellants.

T. R. Ramachandra Ayyar for respondent.

JUDGMENT.—The main question argued in this appeal was whether a partner whose remedy against his co-partner for a general account is barred, can recover his share of a particular item of the partnership assets which the co-partner received after the dissolution of the partnership. Mr. K. Srinivasa Ayyangar, who discussed the general principles relating to suits between partners at considerable length, was unable to cite any authority in support of his contention that such a suit cannot be maintained. He failed to convince us that there is anything in reason or in the principles which ordinarily guide the Court in actions between co-partners which should deter a Court from entertaining a suit like the present, if it be open to the defendant co-partner to ask the Court to take accounts with a view to show that the plaintiff had received more than his share in the partnership assets. This is the view of the law taken in *Sokkanadha Vanni Mundar* v. *Sokkanadha Vanni Mundar*(1), following *Merwanji Hormusji* v. *Rustomji Burjorji*(2) and *Dayal Jairaj* v. *Khatav Ladha*(3) and is supported by the observations of more than one member of the House of Lords, who delivered judgments in *Knox* v. *Gye*(4). It is not necessary for us to discuss the question at length as we generally agree with what is said on the subject in those cases. The plaintiff is, in our opinion, entitled to the half of Rs. 3,849–8–5 which was received by the defendant on the 2nd of February 1903. This sum is part of a sum of Rs. 4,000 which was deposited with the proprietor of the villages of which the plaintiff and the defendant took a lease in partnership. It was the case of the plaintiff that he had paid in the entire amount of Rs. 4,000, but even if so, he would be entitled in a suit like this to only half

(1) (1905) I.L.R., 28 Mad., 344.
(2) (1882) I.L.R., 6 Bom., 628.
(3) (1875) 12 B.H.C.R., 97.
(4) L.R., 5 H.L., 656.

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as prayed for. The first defendant appealed, but the appeal was dismissed. Ratna Asari instituted a suit against the first defendant for recovery of the house No. 3 and the half of the well given to her by Ayilandammal. This suit was ultimately dismissed by the High Court on appeal. Ratna Asari then conveyed all his rights in houses Nos. 1 and 2 and the entire well to the plaintiff. The plaintiff now sues for a declaration of his right to the entire well and an injunction against the first defendant and another claiming under her. The first defendant's claim is to one half of the well. The question has been raised whether the decree in either of the cases enures as *res judicata* in favour of the plaintiff or the first defendant.

As regards Suit No. 18 of 1898, it appears from the plaint in that case that no relief was asked for with reference to the well against the first defendant nor was any question raised as to the title of the first defendant to any portion of the well. On the other hand, the fourth issue which was the only one that related to the well ran as follows:—"Did the third defendant (the tenant) rent the same from the plaintiff as alleged in the plaint and did he enjoy the well with plaintiff's permission?" Enjoyment with permission was found and the injunction therefore was granted against the tenant. It is true that the first defendant in her appeal raised a ground about the well but this was entirely misconceived and no reference was made to it in the judgment of the High Court. We cannot therefore regard the decrees in Original Suit No. 18 of 1898, and, in appeal therefrom, as debarring the first defendant from setting up a right to the well in question. But, whether the plaintiff could treat the decision as binding between the parties or not as regards the well, he was at the time only a mortgagee and his rights could only have been adjudicated upon in that capacity. The decision could not negative the first defendant's rights whatever they were as owner of the equity of redemption, and all that passed to her under the gift by Ayilandammal was the equity of redemption in one half of the well. The plaintiff as a mortgagee with possession was certainly entitled to restrain the first defendant from using the well though that question was not raised for decision in that suit.

The first defendant's right to the equity of redemption in one half is certainly *res judicata* by the decision in Appeal Suit No.

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35 of 1901 on appeal from Original Suit No. 3 of 1898. Ratna Asari, the adopted son, sued to recover half the well from the first defendant and his suit was finally dismissed. The plaintiff, as purchaser from Ratna Asari, is not in a better position than Ratna Asari himself. Ratna Asari would be clearly debarred from disputing the first defendant's title to the equity of redemption in half the well. The plaintiff is bound therefore to recognize the first defendant's equity of redemption in a moiety. The plaintiff's suit for a declaration of his right to the entire well must therefore fail. Does he however stand in a better position with reference to his prayer for injunction? If his mortgage was subsisting he would be entitled to the injunction as it was a mortgage with possession. But is the mortgage subsisting? The debt had been paid off by means of the sale (exhibit E). With the discharge of the debt the security falls to the ground. The plaintiff's right to possession was an incident of the mortgage. If the mortgage is at an end he is not entitled to keep possession as mortgagee. Ratna Asari has conveyed to the plaintiff the two houses Nos. 1 and 2 and the entire well. As regards the houses the plaintiff has no doubt become the absolute owner but when the mortgage was discharged Ratna Asari had the equity of redemption only in a moiety of the well. His conveyance could only pass that moiety to the plaintiff. The mortgage interest in the other moiety is extinguished by the discharge of the debt and not transferred to Ratna Asari (see Fischer on 'Mortgages', paragraph 681). The executant of the mortgage, *i.e.*, the transferor of the interest in immoveable property is "the mortgagor" though he has parted with the equity of redemption. Section 91 of the Transfer of Property Act recognises his right to redeem. Section 60 entitles him on redemption to possession of the mortgaged property when the mortgage was one with possession. Section 15 of the English Conveyancing and Law of Property Act gives the mortgagor power to require the mortgagee to assign the mortgage debt to a third person as the mortgagor directs. But there is no such right in India. Section 74 of the Transfer of Property Act enables the subsequent encumbrancer not the mortgagor, to acquire the rights of the prior mortgagee by obtaining a receipt for payment of the prior mortgage debt. No assignment of the mortgage has been taken as a matter of fact by Ratna

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Asari. On the other hand, the intention of the parties to exhibit E is to pay off and extinguish the mortgage debt. If Ratna Asari becomes entitled to possession of a moiety of the well under section 60, he has no interest in the moiety to which the right to possession can attach itself as its incident. The equity of redemption having been parted with, Ratna Asari would only be a trustee for the first defendant, a mere conduit pipe to pass the possession to him (see section 94 of the Indian Trusts Act). In *Ex parte Bisdee*(1) Sir J. Cross stated the effect of the payment by the mortgagor of the mortgage debt on the interest of the transferee of the equity of redemption. He says at page 338 "with regard to the property in the Parish of Blagdon the bankrupt purchased the estates in fee simple subject to certain mortgages; and before the mortgages were paid off he deposited his title-deeds with the petitioner as a security for money advanced and afterwards he paid off the mortgages. I am of opinion that the petitioner is entitled to the full benefit of the security upon the lands which are comprised in the deposited documents exonerated (as those lands now are) from the prior encumbrance." The discharge of the mortgage merely enlarges the security of the subsequent encumbrancer or adds to the interest of the owner of the equity of redemption. It follows therefore that though the first defendant is merely the owner of the equity of redemption in a moiety under the gift and though the right to possession was outstanding in the mortgagee at the date of the gift, the mortgage having been discharged, she is entitled to possession of the moiety and cannot be prevented from using the well as the owner of such moiety. We must reverse the decrees of both the Courts below and dismiss the suit with costs throughout.

(1) 1 M.D. & De Gex., 333.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Krishnaswami Ayyar.

GOVINDASAMI TEVAN (FOURTH DEFENDANT), APPELLANT,

v

DORASAMI PILLAI AND OTHERS (PLAINTIFF AND DEFENDANTS Nos. 1 TO 3 AND 6 TO 8), RESPONDENTS.*

1910. March 4, 14.

Mortgage, subrogation of — Undertaking to pay subsequent incumbrance rebuts presumption of intention to keep alive prior mortgage.

Where property subject to two mortgages is sold and the purchaser who undertook to pay off both the mortgages with the purchase money, discharges the prior mortgage only, he cannot, as against the subsequent mortgagee, claim to stand in the shoes of the prior mortgagee. His right to use the prior mortgage as a shield is based on a presumed intention to keep alive the prior mortgage for his own benefit; and such presumption is rebutted when he undertakes to discharge both the mortgages.

SECOND APPEAL against the decree of F. D. P. Oldfield, District Judge of Tanjore, in Appeal Suit No. 141 of 1907, presented against the decree of V. Subramaniam Pantulu, Subordinate Judge of Tanjore, in Original Suit No. 38 of 1905.

Suit to recover amount due on a mortgage bond executed in favour of plaintiff by first defendant on his own account and as guardian of defendants Nos. 2 and 3 on 26th January 1899. Prior to this mortgage some of the mortgaged properties (items Nos. 1 to 13 of the plaint) had been mortgaged to one *C*. The plaintiff not having as stipulated in his mortgage discharged this debt, the defendants Nos. 1 to 3 sold the properties mortgaged to *C* and other properties included in the plaintiff's mortgage to the fourth defendant who undertook to pay off *C* and also the sum actually due to plaintiff in his hypothecation bond. The fourth defendant discharged the debt due to *C* but did not pay off the plaintiff. Plaintiff sued to recover the amount actually paid by him under his hypothecation bond. The fourth defendant pleaded that he had priority over plaintiff in respect of items Nos. 1 to 13 for the amount paid by him to *C*. The Subordinate Judge passed a decree in favour of the plaintiff allowing the priority claimed by the fourth

* Second Appeal No. 718 of 1908.

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defendant. On appeal, this decree was modified by disallowing the claim of the fourth defendant.

Fourth defendant appealed.

G. S. Ramachendra Ayyar for appellant.

K. Srinivasa Ayyangar for first respondent.

JUDGMENT.—The question in this case relates to subrogation. Is the fourth defendant, the purchaser of items Nos. 1 to 26, entitled to stand in the shoes of Chengammal, the first mortgagee, against the plaintiff, the puisne encumbrancer? Chengammal had a mortgage on items Nos. 1 to 13. The fourth defendant agreed to pay off Chengammal's mortgage with part of the purchase money and it was so discharged. He also agreed to discharge the plaintiff's mortgage with the remainder of the purchase money but failed to do so. He contends that he is entitled on the principle of the decision in *Gokaldas Gopaldas* v. *Puranmal Premsukh Das*(1) to keep alive Chengammal's mortgage as it is for his benefit to do so. The District Judge relying on *Srinivasa Chari* v. *Gnanaprakasa Mudaliar*(2) has refused to uphold his contention. We may at once say that the decision in *Srinivasa Chari* v. *Gnanaprakasa Mudaliar*(2) has no application. There the first mortgagee had an encumbrance upon many items of properties of which a few were conveyed to the purchaser. It was held that the payment having released the remaining items from the encumbrance, it was impossible to assume the subsistence of the first mortgage upon the items purchased to be used as a shield against the intermediate encumbrancer. The presumption in *Gokal Das's* case for the benefit of the subsequent purchaser (*see* page 1046) is rebutted when the intention to release the properties from the first charge is otherwise clear. In the present case it is clear on the facts that the intention to keep alive the first mortgage as against the puisne encumbrancer, cannot be presumed as the object of the fourth defendant's transaction was not to keep alive a mortgage against the puisne encumbrancer, but to discharge the puisne encumbrance as well (*see* Jones on 'Mortgages', section 858). The question has been elaborately discussed by Mr. Justice Mookerjee in *Surjiram Marwari* v. *Barhamdeo Persad*(3) and that decision has been followed in *Bisseswar Prosad* v. *Lala Sarnam*

(1) (1884) I.L.R., 10 Calc., 1035 at p. 1046. (2) (1907) I.L.R., 30 Mad., 67.
(3) (1905) 2 C.L.J., 288 at p 298.

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Singh(1) (*see* also *Narayanasamy Nayudu* v. *Narayana Rau*(2)). The rule as to subrogation only applies when the purchaser has not covenanted to discharge the previous encumbrance (*see* Sheldon on Subrogation, section 28). In the present case both the previous mortgages were arranged to be discharged by the purchase and not merely the first mortgage. As the principal of subrogation by payment to the prior encumbrancer rests upon the presumption of an intention to keep alive the first mortgage as a shield against the puisne encumbrancer, we are safe in holding that that presumption is rebutted when the transaction in question contemplates the discharge of the puisne encumbrance by payment out of the purchase money. We must therefore dismiss the second appeal with costs.

APPELLATE CIVIL.

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

1910. March 2, 16.

THE OFFICIAL ASSIGNEE OF MADRAS (COUNTER-PETITIONER), APPELLANT,

v.

LUPPRIAN (PETITIONER), RESPONDENT.*

Insolvency in Presidency Town—Appeal under the Letters Patent, s. 15—Indian Insolvency Act, 11 & 12 Vict., Ch. 21—High Court Act, 24 & 25 Vict., Ch. 104. Banker and customer, relationship of—Fiduciary capacity, money held in.

A further appeal lies under section 15 of the Letters Patent from the judgment of two Judges of the High Court who differ in opinion in an appeal from the Commissioner in Insolvency.

Under section 11 of the High Court Act, 24 and 25 Vict., Ch. 104, the Indian Insolvency Act, section 73, is not applicable to the High Court it being inconsistent with section 15 of the Letters Patent.

A customer instructed his banker to purchase a Government promissory note with money standing to his credit with the banker. Before doing so the banker failed. On a motion by the customer to have his amount paid in full:

Held, per Miller, J.—A mere direction by a customer to a banker to apply money at credit of the former's account in a particular way does not alter the relationship between banker and customer.

(1) (1907) 6 C.L.J., 134. (2) (1894) I.L.R., 17 Mad., 62 at p. 64.

* Letters Patent Appeal No. 138 of 1909 in O.S.A. No. 50 of 1908 reported in 33 Mad., 145.

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Per Munro, J. (Dissenting from his judgment in the same case reported in I.L.R., 33 Mad., at p. 146). The bare undertaking of the banker to purchase a note could not have the effect of transferring the ownership of the sum of money necessary for the purchase from the banker to the customer.

APPEAL under section 15 of the Letters Patent against the judgment of Munro, J., in Original Side Appeal No. 50 of 1908.

The facts of this case are fully stated in the judgment.

D. M. C. Downing for appellant.

K. Ramanath Shenai for respondent.

JUDGMENT.—The insolvency jurisdiction is conferred upon the High Court by section 18 of the Letters Patent and that section gives the High Courts the power to hear an appeal from the Commissioner in Insolvency. Section 15 of the Letters Patent provides for an appeal to the High Court from the judgment of two Judges of the High Court who differ in opinion. The appeal from the Commissioner is heard by the High Court and, (leaving out of consideration section 73 of the Indian Insolvency Acts) section 15 of the Letters Patent applies to the judgment in it unless there is something in some other section of the Letters Patent which prevents its application. Section 18 confers the power to hear the appeal, the power that is to say which is given by section 73, but it does not of itself deny the right of further appeal and there is thus nothing in the Letters Patent to prevent the application of section 15. But section 73 of the Indian Insolvency Act provides that the order made by the Court of appeal shall be final and conclusive. If however that provision is inconsistent with the provisions of section 15, then by virtue of the provision of section 11 of the High Court Act, 24 and 25 Vict., ch. 104, it is not applicable to the High Court.

We think therefore the preliminary objection fails. This appeal being argued on merits on Wednesday and Thursday the 2nd and 3rd days of March 1910 and having stood over for consideration till this day, the Court delivered the following judgments:

MILLER, J.—In this case it was suggested on behalf of the Official Assignee that we should consider whether, in the event of a decision that the insolvents held the money in a fiduciary capacity, the money could be followed, the contention being as I understood it that the cash balance in the hands of the insolvents at the date of the insolvency was insufficient to meet the demands upon them by persons entitled to be paid

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in full as out of trust funds. This question was not raised below and no evidence was adduced as to the sufficiency or insufficiency of the assets held in cash at the time of the insolvency; we therefore declined to allow it to be argued in this appeal. On the merits I agree in the conclusion arrived at by Abdur Rahim, J., that at the time of the insolvency Mr. Lupprian was simply a creditor of Arbuthnot & Co. to the amount of his current account. There can be no doubt that on the 10th of October 1906 the money was the banker's money. A mere direction by a customer to a banker to apply money at credit of the former's account in a particular way has, never, so far as I know, been held to alter the relationship between the banker and the customer; there must, it seems to me, be something to show that the banker not merely undertook to change the position in the future, but that by taking some step to apply the money or otherwise, he did effect a change of position Here I do not think there is any evidence of change of position. I find nothing to indicate that Lupprian intended the money to be transferred from his current account to any other account. Till the purchase of the promissory note, the money was to remain the banker's money. On the 10th of October Lupprian was told that his instructions (to buy the promissory note) would be carried out in due course. What then was the agreement? Messrs. Arbuthnot & Co. owed Lupprian, say Rs. 1000. Lupprian says, "Instead of paying me what you owe me buy me a Government promissory note"; and Messrs. Arbuthnot & Co. reply "We will do so in due course." There is nothing that I can see in the affidavit, which forms the only evidence to suggest that the purchase was to be made with Lupprian's money and not with Arbuthnot's money which they owed to Lupprian nothing to suggest that either party treated or intended to treat the current account as closed before the purchase, to suggest, *i.e.*, any transfer made or intended to be made of any of Arbuthnot & Co.'s funds to a trust fund of which Lupprian was the beneficial owner. Lupprian might no doubt have directed Arbuthnot & Co. to transfer the money to another account and Arbuthnot & Co. might or might not have agreed to do so, but it seems to me that the affidavit does not disclose any such proposal on Lupprian's part. Arbuthnot & Co. promised to buy him a Government promissory note and so pay their debt and then failed to do so

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before they stopped payment. I do not think that there is anything more in the case upon the evidence, and I must hold that at the date of the insolvency the money was held by Arbuthnot & Co. as debtors of Lupprian and not in a fiduciary capacity. It is then argued for the respondent that the Official Assignee can be required to perform the contract and buy a Government promissory note for him. It is probably a sufficient answer to that contention that that is not what is asked for in the notice of motion. It was not suggested that the learned Commissioner should either specifically enforce the contract or give the respondent damages against the Official Assignee. I would therefore allow the appeal with costs throughout.

MUNRO, J.—On further consideration I have come to the conclusion that the view which I formerly took of this case cannot be supported. All that appears in this case is that the respondent directed Arbuthnot & Co. to buy a Government promissory note for Rs. 1,000 on his account, that Arbuthnot & Co. undertook to do so, and that the respondent had at the time to the credit of his current account a sum sufficient to cover the cost of the note. There is nothing to indicate that the ordinary procedure should not be followed, viz., that Arbuthnot & Co. should buy the note and debit the respondent's current account with the cost of it. The direction of Arbuthnot & Co. was a direction to purchase out of their own funds for the amount standing to the respondent's credit was not the respondent's money, but merely represented the extent to which Messrs. Arbuthnot & Co. were his debtors. The bare undertaking by Arbuthnot & Co. to purchase the note could not have the effect of transferring the ownership of the sum of money necessary for the purchase from Arbuthnot & Co. to the respondent. The undertaking was nothing more than an undertaking by Arbuthnot & Co. to purchase with their own funds. I am therefore of opinion that nothing had occurred at the date of the insolvency to affect the relation of debtor and creditor which previously had existed between Arbuthnot & Co. and the respondent and agree in allowing the appeal with costs throughout.

ABDUR RAHIM, J.—I concur and do not wish to say anything more than what I have already said.

Messrs. *King & Patridge*, attorneys for appellant.

Messrs. *Grant & Greatorex*, attorneys for respondent.

APPELLATE CIVIL.

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

THE OFFICIAL ASSIGNEE OF MADRAS, APPELLANT,

v.

MELAPPARANGAVUR SARVAJANA SAHAYA NIDHI (LIMITED), RESPONDENT.*

1910. March 3, 16.

Insolvency—Banker and customer—Money held by banker in suspense account—Fiduciary relationship.

Certain monies were held by A & Co., bankers, in suspense on the claimant's account. Pending negotiations as to its investment the bankers failed.

Held per MILLER & MUNRO, JJ. (ABDUR RAHIM, dissenting).

That the money was not held in a fiduciary capacity and the relationship of banker and customer existed between the parties.

Per MILLER, J.—When a man pays money into a bank whether he is a customer or not, the presumption, in the absence of other evidence, will be that he pays the money in to be held by the banker as bankers ordinarily hold the moneys of their customers.

Official Assignee v. *Smith*, [(1909) I.L.R., 32 Mad., 68], followed.

Per ABDUR RAHIM, J.—Money held by a banker to a suspense account does not amount to payment to the banker.

Commercial Bank of Australia v. *Official Assignee of the Estate of Wilson & Co.*, [(1893) A.C., 181], followed.

APPEAL under section 15 of the Letters Patent against the judgments of Abdur Rahim, J., in Original Side Appeal No. 30 of 1908, presented against the order of the Court of the Insolvency Commissioner in Petition No. 181 of 1906.

The facts of this case are sufficiently stated in the judgment :—

D. M. C. Downing for appellant.

M. D. Devadoss for respondent.

MILLER, J.—In this case we do not know what were the contents of the letters which accompanied the remittances in May, July and September. But from exhibit B-2, we find that all the remittances were held by Arbuthnot & Co. in suspense

* L.P. Appeal No. 140 of 1909.

MILLER, MUNRO AND ABDUR RAHIM, JJ.

THE OFFICIAL ASSIGNEE OF MADRAS v. MELAPPARANGAVUR SARVAJANA SAHAYA NIDHI.

on the claimant's account. The question is whether they held them as bankers or not. I take it from the affidavit that negotiations were proceeding as to the final disposal by way of investment with Arbuthnot & Co. of all the remittances, and from exhibit A that the claimant's intention if he could do so on his terms was to place all the money on fixed deposit. There is this difference between this case and *Official Assignee of Madras* v. *Smith*(1) that in that case there was no question of settling terms. The money was to be placed in fixed deposit as soon as a second remittance was received. But I think this makes no real difference. I cannot accept the arguments for the respondent that the money was not held as money of the bankers because the terms on which they could place it on fixed deposit account were not finally settled. The contract as to the form of investment was no doubt not completed but it by no means follows that pending the completion of the negotiations the money did not belong to the bankers. I agree with what I conceive to be the decision in *Official Assignee of Madras* v. *Smith*(1), viz., that when a man pays money into a bank whether he is a customer or not, the presumption in the absence of other evidence will be that he pays the money in to be held by the banker as bankers ordinarily hold the moneys of their customers. Here it is clear that the money was intended to be held by Arbuthnot & Co. as bankers, whether the claimant could have withdrawn the money if he could not come to terms as to interest, period or minimum amount of fixed deposit is really beside the question. There seems to me to be nothing to suggest that so long as Arbuthnot & Co. held the money they were not holding it as bankers. They held it "in suspense," but what does that mean? I will take it that they did not give the claimant a cheque book or a pass book and I will assume that had he drawn cheques against his remittances they would have dishonoured them so long as the money was "in suspense." Even so, I cannot see why they should not be held to have the ownership of the money. If the claimant did not mean them to hold as bankers pending the negotiations he need not have remitted the money or if he remitted it he could have directed them what to do with it. I should draw from the evidence the conclusion that he did intend them to use it as bankers; and so far as they are concerned I see

(1) (1909) I.L.R., 32 Mad., 68.

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no reason to suppose that their intention was different. They held the money "in suspense" but in the circumstances seeing that they knew that the money was intended for investment with them, I take it that "in suspense" means no more than that the exact terms as to interest and period of deposit were not fixed and that once those were fixed the arrangement would take effect from that date or possibly—I do not think it material to the result—from the date of the remittances. It was suggested that the decision of the Privy Council in *Commercial Bank of Australia* v. *Official Assignee of the Estate of Wilson & Co.*(1) shows that a suspense account is in the nature of an account of a trust fund but that case it seems to me does not decide anything which could affect the present case one way or the other; whether the bankers in that case were or were not entitled to use the money for their own profit so long as it lay with them was not a question in the case respectfully agreeing as I do with the decision in *Official Assignee of Madras* v. *Smith*(2), and finding here no evidence to rebut the presumption arising from payment into a bank, I think this appeal ought to be allowed with costs throughout.

MUNRO, J.—I adhere to my former judgment and agree to the proposed order.

ABDUR RAHIM, J.—I regret I am unable in this case to agree with Miller, J., and Munro, J., as to the principle which should govern its decision. It does not seem to me that there is any difficulty in ascertaining the facts and it does not lie in the mouth of the Official Assignee to ask us to assume that the letters written by the claimant to Arbuthnot & Co. if produced would have shown that the circumstances in which the amounts in question were paid in were at all different from those to be gathered from Arbuthnot & Co.'s letters. The letters written to Arbuthnot & Co. would be in their custody and should have been produced by the Official Assignee if they were available and he wanted to rely on them. The gist of what is proved is that the manager of the Nidhi and Arbuthnot & Co. could not agree as to the terms on which the latter was to hold the money in deposit and pending further instructions from the claimant they said they would hold the money in suspense. I do not think that this case can be distinguished from D. Rajam Iyer's case and I have heard nothing in

(1) (1893) A.C., 181, at p. 185. (2) (1909) I.L.R., 32 Mad., 68.

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the course of argument which should induce me to change my opinion as I expressed in that case on appeal from the order of the learned Commissioner. On the other hand the case of *Commercial Bank of Australia* v. *Official Assignee of the Estate of Wilson & Co.*(1), which has now been brought to our notice confirms me in the view I hold. That case lays down that money held by a banker to an especial suspense account even though under an agreement which entitles the banker to appropriate the money to his own use whenever he chooses, does not amount to payment to the banker if the latter has not in fact appropriated the money to his own use. I should therefore dismiss the appeal with costs.

Messrs. *King & Patridge*, atterneys for appellant.

M. K. Ramasamy Ayyar, attorney for respondent.

APPELLATE CIVIL.

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

1910. March 3, 4, 16.

THE OFFICIAL ASSIGNEE OF MADRAS (COUNTER-PETITIONER), APPELLANT,

v.

KRISHNA BHATTA (PETITIONER), RESPONDENT.*

Banker and customer—Fiduciary relationship—Demand for repayment—Effect of.

Money held by a banker after his customer has demanded repayment is not held by him in a fiduciary capacity.

A creditor cannot transform his debtor into a trustee by merely demanding repayment of the debt.

APPEAL under section 15 of the Letters Patent against the judgment of Munro, J., in Original Suit Appeal No. 29 of 1908.

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

D. M. C. Downing for appellant.

K. Ramanath Shenai for respondent.

MILLER, J.—Krishna Bhatta had Rs. 1,500 on fixed deposit with Messrs. Arbuthnot & Co. from the 17th October 1905 to the 17th October 1906. The conditions being that after the

(1) (1893) A.C., 181, at p. 185.

* Letters Patent Appeal No. 141 of 1909.

MILLER, MUNRO AND ABDUR RAHIM, JJ.

THE OFFICIAL ASSIGNEE OF MADRAS v. KRISHNA BHATTA.

17th October 1906 no interest should be payable unless the deposit was renewed. He sent up his deposit receipt in due course for repayment of the money but before repayment was made Messrs. Arbuthnot & Co. failed. It is argued on behalf of Krishna Bhatta that from and after the 17th October 1906 the money was held by Messrs. Arbuthnot & Co. in a fiduciary capacity. I am unable to find anything in the contract as disclosed by the evidence, to indicate that the relation of banker and customer came to an end on the 17th October 1906. As I understand it after that date the money remained as a deposit but bearing no interest till renewal, the reason being that the bankers were not willing to pay interest at 5 per cent. on loans repayable by them on demand, though they would do so on loans for a fixed term. And I cannot see that the demand for repayment makes any difference. Messrs. Arbuthnot & Co. were doubtless bound to repay and failed to do so but a creditor cannot, it seems to me, transform his debtor into a trustee by demanding repayment of the debt. It is true that the creditor might have directed the bankers from a certain date to hold the money due from them for a special purpose on his behalf and they might have agreed to do so, but a simple demand and promise to repay the money does not amount to an agreement of that kind. I agree with Abdur Rahim, J., that cases like *ex parte Ward, In re Couston*(1) have no bearing on the present case, if only for the reason that here the money belonged to the bankers; they were not the reputed owners, but the real owners thereof. I think this appeal should be allowed and the application dismissed with costs.

MUNRO, J.—I am now satisfied that the view I formerly took in this case is erroneous and that a mere demand for payment as in this case could not have the effect of changing the pre-existing relationship of debtor and creditor. I therefore agree to the proposed order.

ABDUR RAHIM, J.—I agree and have nothing to add to what I have already said on the point.

Messrs. *King & Patrigde*, attorneys for appellant.

C. Vijiaraghavalu Nayudu, attorney for respondent.

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(1) (1872) 8 Ch. Ap., 144.

APPELLATE CRIMINAL.

Before Mr. Justice Wallis and Mr. Justice Krishnaswamy Ayyar.

1910. August 2, 26.

K. S. VEERARAGHAVULU (ACCUSED), PETITIONER,

v.

THE PRESIDENT OF THE CORPORATION OF MADRAS (COMPLAINANT), RESPONDENTS.*

City Municipal Act, Madras, III of 1904, ss. 121, 125, 172 and 177—Right of appeal—Scope of section 172—Assessment, finality of order of, when no objection made within 15 days.

Petitioner's name appeared in the classification made under section 121, Madras City Municipal Act of 1904 and he was served with a notice to pay profession tax under section 125 of the Act. He did not pay the tax nor did he apply for revision within fifteen days of the notice.

Held, that under section 177 the assessment was final and that no appeal lay.

Profession tax is a matter within the scope of section 172. The first clause of section 172 of the Act of 1904 is wider than the corresponding clause of section 190 of Act I of 1884. Section 172 of the Act of 1904 must be construed to mean that all complaints against any tax or toll leviable under Part IV, and all applications for revision in respect of any such tax or toll are cognisable by the President and two commissioners. It should not be read so as to limit the complaints and the applications for revision to the question of classification.

Muthusawmy Ayyar, J., in Davies v. President of the Madras Municipal Commission, [(1891) I.L.R., 14 Mad., 140 at p. 144], not followed.

Municipal Council of Cocanada v. The Standard Life Assurance Company, [(1901) I.L.R., 24 Mad., 205], distinguished.

PETITION under sections 435 and 439 of the Code of Criminal Procedure praying the High Court to revise the order of S. Venkatarama Doss Nayudu, Third Presidency Magistrate, Georgetown, in C.C. No. 2865 of 1910 sentencing the accused to pay a fine of Rs. 22-8-0. The facts of this case are fully stated in the judgment.

T. S. Rajagopala Ayyar for petitioner.

P. Duraiswami Ayyangar for complainant.

WALLIS, J.—In this case, the Third Presidency Magistrate has convicted the petitioner under section 125 (1) of the Madras City Municipal Act, 1904, for failure to pay profession tax for the first half year of the financial year 1909-10. It is

* Criminal Revision Case No. 175 of 1910.

common ground that the petitioner's name appeared in the classification drawn up by the President of the Corporation under section 121, and, it was shown, that a notice had been served on him under section 125, but he alleged that he had not exercised any profession within the City for sixty days during the current half year, and the Presidency Magistrate convicted him merely observing that he had no witnesses; but this appears to have reference to the failure of the petitioner to produce witnesses as to the service of notice, and the contention raised on behalf of the Corporation was that the fact of notice to pay the tax for the half year having been served on the petitioner was conclusive of his liability to pay in view of his failure to apply for revision within fifteen days of the notice. This part of Act III of 1904 re-enacts without much modification the provisions of the previous Act I of 1884, and it will be of assistance to compare the provisions of the two Acts and to see what was the state of the law under the old Act, and if it has been altered by the present Act. Under section 101 of that, as under section 118 of the present, Act the President is required to keep lists of persons liable to pay this among other taxes. Sections 103 and 120 respectively make persons exercising a profession or holding an appointment in the City liable to pay the tax. Section 104 of the Act of 1884 empowers the President to determine in which of the scheduled classes "any such person," that is to say, any person exercising a profession or holding an office in the City is to be placed, and to revise such classification from time to time, and also empowers any person dissatisfied with such classification to appeal therefrom. Section 121 of the present Act is to the same effect, but "any person" is substituted for "any such person." Section 105 of the old, corresponding to section 126 of the new Act, provides that the tax for each half year shall become payable after the profession has been exercised or the appointment held for sixty days in the half year. Section 124 of the present Act, which is new, provides that no person shall be liable to the tax in respect of any half year in which he has exercised a profession or held an appointment for less than sixty days within the City. Section 106 which corresponds to section 125—the section now in question—is as follows:—"If in a half year any person exercises any such . . . profession . . . or holds any such . . . appointment for sixty days without paying the sum due in

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respect of such half year, the President may, so soon as he is informed thereof cause to be served on such person a notice that if within fifteen days from the date of such service, such payment be not made such person will be prosecuted for such default. If such person omits to make such a payment together with the costs of service, the President may, at the expiration of the said fifteen days, cause the person so in default to be prosecuted before a Magistrate." Section 125 of the present Act is virtually to the same effect except that it omits the words "so soon as he is informed thereof." Then section 107 of the old Act provides that "if the Magistrate finds that such person is liable and that such default has been made and that such notice has been duly served, such person shall be liable to a fine not exceeding twice the amount of the tax and shall also pay the tax, the costs of service of notice, and such other costs as may be provided by the Magistrate." In accordance with the scheme of the new Act, the penalty for this and other breaches is provided for by section 420 read with schedule XVI which imposes a penalty not exceeding twice the amount of the tax.

Sections 190 to 196 of the old Act correspond generally to sections 172 to 177 of the new Act and deal with complaints against taxes or classification, providing for the finality of the decisions given on such complaints and of the original demand in the absence of such complaint. So far as the profession tax is concerned the language of section 172 of the new Act appears to me to be if anything larger than that of section 190 of the old Act because, section 190, so far as it relates to profession tax, dealt only with complaints or applications for revision preferred under section 104, which deals with revision of classification, whereas section 172 of the new Act deals generally with "all complaints against, and all applications for revisions of classification in respect of, any tax or toll leviable under Part IV." I have inserted the commas but the grammatical construction appears to me equally plain without them. Then as regards the sections as to finality the provision in section 196 against suits to recover back taxes levied under the Act, provided the provisions of the Act had been substantially complied with, is omitted in section 177. Further, in section 191 which corresponds to section 208 of the old Act and saves irregularities due to defect of form, the words "provided the directions of the Act be in substance and effect complied with"

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are omitted. In the face of these last-mentioned alterations, the decisions under the District Municipalities Act that persons not liable to the tax can sue to recover it back, *The Municipal Council, Cocanada* v. *The Standard Life Assurance Company*(1) and the cases therein cited, have become clearly inapplicable under this Act as they proceed upon language which is not used in the present Act.

A question as to the extent of the right of complaint given under the old Act was raised in *Davies* v. *President of the Madras Municipal Commission*(2) where it was held against the contention put forward by the Municipality that a partner in a firm carrying on business in Madras who had been wrongly classified as personally liable as distinct from his firm was entitled to apply for revision under section 190 read with section 104 and that his right to apply for revision was not limited to complaints as to the class in which he had been placed. Then if he had right of complaint and failed to exercise it, the provisions of section 190 would appear to preclude him from questioning the original demand. The question whether a person who had not applied for a revision could insist on the question of his liability being gone into in a prosecution under section 107 did not arise and Shephard, J., did not deal with it, but Muttusamy Aiyar, J., at the bottom of page 144 observed that "section 107 makes non-liability to be taxed available also as a matter of defence in cases of prosecution." It is however not apparent how, if the provisions as to finality in section 196 applied to proceedings under section 107, the defence of non-liability was open; and if they did not apply, why the prosecution should be relieved of proving liability as part of its case. That the provisions of section 196 did apply seems to follow from the decision of the learned Judges themselves, for if a person who had a notice served on him under section 196 had a right of complaint under section 190 on the ground of non-liability to pay, is there any reason for refusing in proceedings under section 107 to give effect to the provisions of section 196 that where no complaint has been made the assessment revision or demand of the tax shall be final, that is to say, not open to question? I have not been able to find any satisfactory reason for so holding, and it appears to me that in a prosecution under section

(1) (1901) I.L.R., 24 Mad., 205 (2) (1891) I.L.R., 14 Mad., 140 at p. 144.

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107 of the old Act in order to procure a conviction it was enough to prove classification, notice under section 106, failure to complain within 15 days of such notice, the time limited by section 191(*a*) and failure to pay pursuant to the notice. To say that the provisions of section 196 as to finality apply to proceedings to recover the tax by distraint or suit, but not to proceedings under section 107 which is perhaps the most ordinary method of enforcing payment appears to me to be restricting unduly the provisions of section 196, nor do I see any sound reason for the distinction.

Now, if failure to complain of classification within the time limited under sections 104 and 190 was conclusive under the old Act I can find no reason in any of the changes in the recent Act which have been set out above why failure to complain under sections 121 and 172 of the present Act should not have the same effect. On the contrary the language of section 172 of the new Act as already pointed out is if anything wider than that of section 190 of the old Act, so that the scope of section 177 is enlarged in this way also, as well as by the omission of the second part of section 196 which suggested limitations on the finality conferred by that section. In my view the decision of the Magistrate was right and the petition must be dismissed.

KRISHNASWAMI AYYAR, J.—The accused in this case has been convicted under sections 125 and 420 of Madras Act III of 1904. He was called upon to pay profession tax by notice under section 125 and having failed to pay it within the time limited by that section he was prosecuted by the President of the Municipal Corporation and convicted by the third Presidency Magistrate, Georgetown. The accused impugns the legality of the Magistrate's order on the ground that under section 125 no offence could be committed unless he exercised a profession, art, trade or calling and that there was no enquiry or determination by the Magistrate as to the exercise of a profession, etc., by the accused. The Magistrate's order simply says that the accused had no witnesses. It is however admitted before us that the absence of witnesses had reference only to the plea that the notice was not duly served, but not to the question whether the accused exercised the profession. Was the Magistrate right in declining to enquire into the plea of non-exercise of the profession? The question thus raised is one of some difficulty but I have come to the conclusion that he was right.

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Section 172 of Madras Act III of 1904 provides "that all complaints against and all applications for revision of classification in respect of any tax or toll leviable under part IV shall be heard and decided by the President and two Commissioners." Section 175 provides an appeal against the order of the President and two Commissioners to Magistrates. Section 176 authorises a reference by the Magistrates to the High Court. Section 177 declares the finality of the decision of the respective authorities in the following terms:—"The assessment, revision or demand of any tax or toll, when no complaint, application or objection is made as hereinbefore provided, and the adjudication of an appeal by the Magistrates shall be final." It will be noticed that the declaration of finality is not merely with reference to the decision of Magistrates or of the President and Commissioners but, in case no complaint or objection is made, with reference also to the original assessment. Whatever question therefore can be raised by way of complaint or application for revision under section 172 must be finally set at rest by virtue of the last clause of section 177 and cannot be availed of by way of defence to a distress under section 180 or a suit under clause 1 of section 188 or a prosecution under section 125 or the 2nd clause of section 188. We have then to determine what are the matters that can be dealt with under section 172. The 1st clause of the section which I have above quoted is somewhat different from the 1st clause of section 190 of the old Act I of 1884 which ran as follows:—"All complaints against, on application for, revision of any classification or tax, preferred under sections 104, 115, 181 and 188; and all complaints against, and objections to any valuation or measurement and assessment, preferred under sections 130 and 131, and all complaints against any other tax or toll assessed or demanded by the Commissioners, shall be heard and disposed of, etc." Now it will be seen at a glance that the 1st clause of section 172 of the present Act is more compendious. It will also be noticed that instead of specifying complaints or applications under particular sections of the Act all complaints and applications relating to any tax or toll leviable under part IV are stated to be within the cognisance of the President and two Commissioners. Although punctuation is not a very safe guide in the interpretation of a legislative enactment (see 'Maxwell', pp. 61 and 62), we may note that section 190 of the old Act was largely punctuated so as to furnish a clue to the interpretation of

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that section. The 1st clause of section 172 on the other hand is not punctuated at all. The difficulty arises as to how it should be read. But I think the meaning is tolerably clear that all complaints against any tax or toll leviable under part IV and all applications for revision of classification in respect of any such tax or toll are cognisable by the President and two Commissioners. It seems to me that the section ought not to be read so as to limit the complaints and the applications for revision to the question of classification. Even apart from the history of that section, namely, that it is in substance a reproduction of section 190 of Act I of 1884, such an interpretation is inadmissible on the ground that there is no question of classification under the Act as regards tolls or the tax on carts or the tax on vehicles dealt with in part IV of the Act and yet complaints in respect of them must certainly have been intended to fall within the scope of section 172 as they certainly fell under the express language of section 190 of the old Act. There are various taxes or tolls leviable under several sections in part IV of the Act such as sections 120, 129, 145, 148, 150, 158, 164. It is only in the case of certain of the taxes or tolls that revision is expressly provided. For example, section 121 provides for revision in the case of the profession tax as regards classification; section 139 provides for revision of valuation; section 155 speaks of the vehicle tax being the subject of an appeal as hereinafter provided. There is no other provision as regards the right to complain against any tax or to apply for its revision. Yet it must be conceded that if the President declines to remove a person's name from the assessment book under clause C of section 136 it ought to be competent to him to apply to the President and Commissioners for the removal of his name on the ground that he is not the owner liable to the tax on the buildings. Again if the President declines "to remit the tax when a building has been vacant for thirty consecutive days or more" in proportion to the number of days of vacancy (*vide* section 142) the owner should not be refused the liberty of proving to the President and two Commissioners that the house was vacant for a sufficient number of days to entitle him to remission. If the President refuses to grant exemptions under section 129 or section 151 or section 159 or section 168 it cannot be supposed that complaints to the President and two Commissioners are excluded. Even the question of non-liability on account of the non-exercise of the

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profession for sixty days or more under section 124 can be determined after notice under section 125 by the President and two Commissioners under section 172. For section 174, clause (*a*), provides that, within fifteen days after notice under section 125, an application for revision may be made under section 172. I conceive that by the mention of "all complaints against any tax or toll leviable under part IV" the competency of the aggrieved party to make a complaint against any tax or toll and to apply for revision of classification in respect of it is distinctly recognised. If I am right in this view it follows that the provision as to finality in section 177 must be given its full effect and no question can then be allowed to be raised by way of defence to a prosecution or to a distress or to a civil suit. I am therefore inclined to hold that as the petitioner did not complain against the assessment as provided by the Act it has become final. If section 172 was limited to the bare question of classification as clause 2 of section 121 appears to be (cf. *Wood* v. *Corporation of the Town of Calcutta*(1)) the clause as to finality in section 177 might be restricted to the question of classification. But upon the interpretation I have placed on section 172 it is impossible to hold that the defence of non-exercise of the profession is open to the petitioners in a prosecution before the Magistrate. Nor is there any hardship in the adoption of such a view. For the Act has provided in substitution the larger remedy of appeal to two Magistrates with the further advantage of a reference to the High Court. The observations of Mr. Justice Muttuswami Aiyar in *Davies* v. *President of the Madras Municipal Commission*(2) that the defence of non-exercise of the profession is open to the accused in a prosecution under section 107 of the old Act I of 1884 for non-payment of the profession tax do not appear to be in accord with his general reasoning as regards the competency of the Magistrates in appeal from the President and two Commissioners to determine the question of liability to the profession tax as well as of the proper class under which a person is liable. The decision in the *Municipal Council, Cocanada* v. *The Standard Life Assurance Company*(3) is based upon the language of sections 101 and 262 of the District Municipalities Act IV of 1884 which differs

(1) (1881) I.L.R., 7 Calc., 322. (2) (1891) I.L.R., 14 Mad., 140 at p. 144.
(3) (1901) I.L.R., 24 Mad., 205.

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materially from that of the corresponding provisions of Act III of 1904. I think the conviction in this case is right and would therefore decline to interfere.

APPELLATE CRIMINAL.

Before Mr. Justice Miller.

PANAGANTI PARTHASARATHY NAYANIM GARU, PETITIONER,

v.

PALLIKAPU VENKATASAMI REDDY AND ANOTHER, RESPONDENTS.*

Criminal Procedure Code, Act V of 1898, s. 145—Possession—Title, proof of—Evidence.

Evidence of title is admissible in an inquiry under section 145, of the Code of Criminal Procedure, Act V of 1898, to enable the Court to decide the question of actual possession, but proof of title is not proof of actual possession.

PETITION, under sections 435 and 439 of the Code of Criminal Procedure and section 15 of the Charter Act, praying the High Court to revise the order of F. B. Evans, Joint Magistrate of Ranipet, in Miscellaneous Case No. 52 of 1909, dated 26th November 1909.

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

T. Rangachariar for petitioner.

T. Narasimha Ayyangar for respondents.

Order.—What the Magistrate has to do under chapter XII of the Code of Criminal Procedure is to decide which of the parties was in actual possession at the date of his preliminary order, and this he has to decide without reference to the merits of the claims of any of the parties to a right to possess the subject of dispute. I do not doubt therefore that the Magistrate may, if necessary, take and consider evidence of title to enable him to decide the question of actual possession, but proof of title is not proof of actual possession, and here the Magistrate, though he says he admits evidence of title to 'supplement' evidence of user, still does not say that he uses it to enable him to decide on which side

* Criminal Revision Case No. 668 of 1909.

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the truth as to user lies. On the other hand, he finds that the evidence does not establish exclusive possession by either party and that both parties have been from time to time using the land; and he uses the evidence of title to supplement this evidence in this sense that he takes the user of the one party and the title to be, in some way which I do not understand, more 'actual' possession than the user of the other party. It seems to me that this is to decide the case with reference to the claims of the parties to a right to possess the subject of dispute, and that is what the Code forbids (*vide* in the matter of the petition of *Kali Kristo Thakur* v. *Golam Ali Chowdry*(1) and *Ram Dyal Mahton* v. *Kedarnath*(2)). I must set aside the Magistrate's order and direct him to make a fresh order according to law either under section 145 or section 146, Criminal Procedure Code, as the case may be.

APPELLATE CRIMINAL.

Before Mr. Justice Miller.

PALANIAPPA ASARY AND OTHERS

v.

EMPEROR.*

1910. March 10.

Criminal Procedure Code (Act V of 1898), ss. 117 and 242—Bond to keep the Peace—Inquiry, sufficiency of.

A Magistrate proceeding under section 117, Criminal Procedure Code (Act V of 1898) as nearly as practicable in the same way as under section 242, Criminal Procedure Code, must state to the accused the particulars of the matter against them and ask them if they can show cause why they should not be required to execute bonds.

Held, that the question "are you willing to execute the bonds required or do you wish for further inquiry?" answered by a statement that the accused would execute bonds is not a sufficient compliance with section 117.

CASE referred for the orders of the High Court under section 438 of the Code of Criminal Procedure by A. R. Cumming, District Magistrate of Nilgiris, in his letter, dated 20th October 1909, and also case taken on perusal of the judgment of the District Magistrate in Criminal Appeal No. 18 of 1909.

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

(1) (1881) I.L.R., 7 Calc., 46. (2) (1907) 6 C.L.J., 182.

* Criminal Revision Case No. 604 of 1909; (referred case No. 131 of 1909).

MILLER, J.

PALANIAPPA ASARY. v. EMPEROR.

A. S. Cowdell for accused.

The Public Prosecutor—*Contra.*

ORDER.—The Sub-Divisional Magistrate proceeding under section 117 as nearly as practicable in the same way as under section 242, Criminal Procedure Code, had to state to the accused so to style them, the particulars of the matter against them and ask them if they could show cause why they should not be required to execute bonds.

He says that he made an order under section 112, an order which appears in the form of a summons and I understand that that order was explained to the accused.

But the Sub-Divisional Magistrate instead of asking them if they were prepared to show cause why they should not be required to execute bonds put this question to them.

Are you willing to execute the bonds required, or do you wish for further enquiry ?

And they replied that they would execute bonds. It seems to me that this was a misleading question not calculated to ascertain the truth of the information against the accused. They were not asked whether the information was true or false and they did not admit its truth. By section 117 the Magistrate is required to satisfy himself by enquiry of the truth of the information before making an order for the execution of the bond and though it may be that the question put under section 242 is sufficient enquiry if it produces an answer which shows that the information is true, no such answer was obtained in the present case.

The enquiry under section 117 being irregular the order of the Sub-Divisional Magistrate must be set aside.

It is not clear to me, and it is not necessary to decide, that the procedure of the Second-class Magistrate was irregular as the District Magistrate suggests : nor do I decide whether the District Magistrate was right in his view of his powers under section 125, Criminal Procedure Code. The decision to which he refers has however been overruled by a Full Bench of the Calcutta High Court (*Nabu Sardar* v. *Emperor*(1).

It is probable that there exists no reason for further proceedings and the Public Prosecutor does not ask for any order.

The orders are set aside and the bonds cancelled.

(1) (1907) I.L.R., 34 Calc., 1.

APPELLATE CRIMINAL.

Before Mr. Justice Miller.

BOGRA

v.

EMPEROR.*

1910. March 24.

Evidence—Irregularity in taking, under s. 360, Criminal Procedure Code, Act V of 1898—Perjury—Prosecution of witness for, on deposition irregularly taken—Effect of irregularity.

Where a deposition has been read over to a witness in Court and has been admitted by him to be correct in the presence of the Judge, the fact that another witness was being examined at the time is no defence to a prosecution of the deponent for giving false evidence in the deposition so read over.

Kamatchinathan Chetty v. *Emperor.* [(1905) I.L.R., 28 Mad., 308], commented on.

Though a deposition so recorded might invalidate the conviction of the accused in the case in which the deposition was so recorded, the deponent having admitted its correctness may be properly convicted of perjury thereon.

Singiri Eradu v. *Empress*, Crl. R.C. No. 453 of 1894 (unreported), (II Weir's Crl. Rul., 435), distinguished.

CRIMINAL revision case presented against the conviction and sentence of H. O. D. Harding, Sessions Judge of South Canara, in Criminal Appeal No. 90 of 1909.

The facts of this case are fully stated in the judgment.

The Public Prosecutor for the Crown.

JUDGMENT.—It was held by Collins, C.J., and Parker, J., in *Singiri Eradu* v. *Empress*(1) that procedure identical with that adopted by the Sessions Judge in the present case is materially irregular. The deposition taken in the Sessions Court was therefore irregularly taken and it may be that a conviction based upon such evidence could not be sustained. But in the present case the person concerned is the witness who made the deposition, and not the accused against whom it was made, and it has been read over to the witness admitted to be correct and signed. It is very difficult, I think, to see any good reason why this admission of the witness should not be taken to be a proof of the correctness of the document. There is no doubt direct authority in this Court for the view that a deposition not read over in the hearing of the

* Cri. Rev. C. No. 29 of 1910.

(1) II Weir's Crl. Rul., 435 ; Crl. Rev. C. No. 453 of 1894 (unreported).

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Judge and the vakils (in a civil case) is not a deposition at all and cannot be used as evidence for any purpose (*Kamatchinathan Chetty* v. *Emperor*(1)) but that decision seems to be in part based on the reasoning that the presence of the Judge and vakils at the reading is required for the protection of the witness. I very respectfully differ from that, if that is what is meant by the learned Judge. The presence of the Judge and the vakils or the accused is required to make it sure that the deposition is correctly recorded and the accused or the Crown or the defendant or plaintiff is not prejudiced by any mistake in the recorded evidence. But when the deposition has been read over to the witness and he has admitted it to be correct there seems to be no good reason why that admission should not so far as he is concerned be regarded as a proof of its correctness. I cannot see why a deposition irregularly recorded is necessarily to be treated as a nullity for all purposes even as against the man who made it and who has admitted that it represented what he said. It, of course, may be open to him to prove that the record was incorrectly made but that is not suggested in the present case. I am not, holding this view, therefore, prepared to hold that the conviction is illegal.

The accused has not himself applied for the revision of the Sessions Judge's decision, and I do not think it necessary to do more than point out that the deposition was undoubtedly irregularly recorded, and that the provisions of the code and the law as laid down in this Court must be followed in the recording of evidence by the Courts of this Presidency.

(1) (1905) I.L.R., 28 Mad., 308.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Abdur Rahim.

SREE RAJA DATLA VENKATA SURYANARAYANA JAGAPATHIRAJU BAHADUR GARU AND ANOTHER (DEFENDANTS NOS. 1 AND 2), APPELLANTS,

v.

GOLUGURI BAPIRAJU (PLAINTIFF), RESPONDENT.*

1910. February 24, 25. April 21.

Immoveable property—Sale of, in Court Auction—Fraud, sale vitiated by—Vendee benamidar of purchaser—Suit to cancel sale—Who can sue—Indian Contract Act, ss. 231 and 232.

Where a sale of property is vitiated by fraud on the part of the vendor, the person who bought the property at Court Auction though only a benamidar can maintain an action to cancel the sale.

Pether Permal Chetty v. *Muniandy Servai*, [(1908) I.L.R., 35 Calc., 551], distinguished.

A benami transaction does not vest any title to immoveable property, the subject of such transaction, in the benamidar, and therefore such a person cannot maintain a suit which is based on title, namely, a suit in ejectment. But where an agent of an undisclosed principal enters into a contract for the purchase of land and the land is conveyed to him in pursuance of the contract he acquires rights and liabilities under the contract (see sections 231 and 232, Indian Contract Act, IX of 1872), and can sue in respect thereof.

APPEAL against the decree of Y. Janaki Ramayya, Subordinate Judge of Cocanada, in Original Suit No. 6 of 1904.

The defendants Nos. 1 and 2 appealed.

The facts of this case are fully stated in the judgment.

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

P. Narayanamurti for respondent.

JUDGMENT.—The respondent in this appeal, who was the plaintiff in the Court of First Instance, bought two villages for Rs. 19,100, at a Court sale, held on the 27th April 1901, in the execution of a decree obtained by defendants Nos. 1 and 2, in Original Suit No. 29 of 1900, against defendants Nos. 5 to 8. Defendants Nos. 3 and 4 who also had a judgment against defendants Nos. 5 to 8 received a portion of the purchase money paid by the plaintiff in rateable distribution. The plaintiff sued, on the 29th

* Appeal No. 8 of 1906.

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January 1904, to have the sale cancelled and for a decree for Rs. 25,000, Rs. 19,100 thereof being the amount paid by him and the balance Rs. 5,900 interest on that sum. The grounds on which the plaintiff bases his case for relief are that, he was induced to bid at the sale by the false and fraudulent misrepresentations of defendants Nos. 1 and 2 inasmuch as they stated in the proclamation of sale that the defendants Nos. 5 to 8 possessed full interest in the villages which were liable to the payment of Rs. 204-8-0 only as Government assessment, and that there were no encumbrances on the same, suppressing the following material facts :— that the villages were granted to the fifth defendant and the father of defendants Nos. 6 and 7 on service tenure, the defendants Nos. 5 to 8 had no right to alienate them; that it was a condition of such tenure that on the family alienating the villages the alienee would be liable to pay assessment at the rate of 12 annas per rupee on the annual income; and that the property was subject to a mortgage for Rs. 30,000 in favour of one Gunnam Peddayya. They, also, alleged that, since the sale the Government had given notice to the plaintiff calling upon him to pay enhanced assessment, and that, having regard to the real nature of the tenure, the villages would not be worth more than Rs. 3,000. The defence to the suit as disclosed in the written statement of defendants Nos. 1 and 2 was that one Basivi Reddi was the real purchaser and the plaintiff merely his benamidar; that the assessment of Rs. 204-8-0 mentioned in the plaint was correct; that the entire interest of defendants Nos. 5 to 8 in the subject of sale was sold, that the plaintiff and Basivi Reddi knew that the villages were Mokhasa and the Government had an interest in them; that the mortgage for Rs. 30,000 was a collusive transaction and without consideration concocted by the fifth defendant and his brother in order to defraud the first and second defendants and that the fifth defendant had given up the mortgage deed to them and that the defendants Nos. 1 and 2 had not been guilty of any fraud. The defendants further pleaded that the suit was barred by the law for limitation of suits.

The learned Subordinate Judge who tried the suit found upon the evidence that the real purchaser of the villages was Basivi Reddi and that the plaintiff was only his benamidar and the learned vakil who appeared for the respondent has not contested that finding, so far as it is one of fact, before us. But the

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Subordinate Judge held that the plaintiff was nevertheless entitled to maintain this suit, the suit was not barred, the sale was vitiated by fraud as alleged and that the defendants Nos. 5 to 8 had no saleable interest in the villages. He gave a decree to the plaintiff setting aside the sale and directing the defendants Nos. 1 and 2 and the defendants Nos. 3 and 4 to pay to the plaintiff Rs. 20,405 and Rs. 1,816-8-0, respectively, with the usual provision for costs and payment of further interest from date of plaint till date of payment.

The defendants Nos. 1 and 2 alone have appealed against this decree; and Mr. Sundara Ayyar who appeared for them has contested the conclusion of the first Court on each one of the points mentioned above.

It will be convenient to deal first of all with the question of fraud which is covered by the issues 2 and 3 as framed at the trial. This matter is fully discussed in the judgment of the Court of First Instance and in our opinion not only is the conclusion of the Subordinate Judge correct on this point but we agree generally with his reasoning. We shall satisfy ourselves with mentioning the salient considerations which have weighed with us on the present question. The defendants Nos. 1 and 2 had a judgment against the defendants Nos. 5 to 8 for about Rs. 19,100 and the latter had no property except the two villages. It was therefore in the interest of the appellants to obtain as high a price for the property as possible. The evidence of the first defendant himself shows that he knew all about the villages before the sale proclamation, Exhibit A was issued, he knew that the villages were service Mokhasa villages, that as an incident of such tenure the assessment was liable to enhancement on alienation being made by the defendants Nos. 5 to 8, and that the Government would enhance the assessment by fixing it at three-fourths of the rental in 1882 or three-fourths of the ten years' average rental. And yet, what is the description of the property as given in Exhibit A which was drawn up on information supplied by the first defendant himself? Under the heading "description of property including name of village, extent, boundaries, etc.," the names of the two villages are mentioned, the boundaries and their area is given as 1,404 acres, and, in the third column, the revenue or rent assessed on the land is mentioned as Rs. 204-8-0, and under the heading "extent of interest of

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judgment-debtor as far as ascertained" the entry is "Has complete right"; in the column for incumbrances, it is stated "this property has to be sold completely"; and, under the heading "any other facts material to be known relating to the property" the entry is "none." Any one reading this document would conclude that the judgment-debtors had an absolute proprietary right in the villages subject only to the payment of Rs. 204-8-0 a year to the Government for revenue and that is how the plaintiff himself understood it. There is nothing in Exhibit A to suggest that the judgment-debtors held the villages under a service Mokhasa tenure so that on sale the tenure itself would come to an end and the villages in the hands of the purchaser would be held on materially different and less advantageous terms than in the hands of the judgment-debtors. On the Government determining to exercise its full right of assessment, as it has actually done, the villages would hardly be worth more than 3 or 4 thousand rupees. We have no hesitation in holding that the description of the property as given in Exhibit A is false and misleading, and was deliberately so given with a view to obtain a much greater price for the property than what it could have fetched if the true nature of the judgment-debtor's tenure was disclosed. And we agree with the finding of the Subordinate Judge that neither the plaintiff nor Basivi Reddi the real purchaser knew of the true nature of the interest which the judgment-debtors possessed in these villages and that they were induced to buy the property by the statements contained in Exhibit A. The facts bearing on the question are fully discussed in the judgment of the lower Court (paragraphs 20, 21 and 22) and bear out the conclusion reached by it.

As regards the non-mention of the mortgage in favour of Gunnam Peddayya, the first defendant says that it had been discharged at the date of the sale and that he had obtained a deed of release from Peddayya paying him Rs. 1,000. Upon the materials available in this case it is not possible to find definitely that the incumbrance does not subsist; the so-called release is not registered nor is there any admission by the mortgagees that they have no claim under the mortgage. In these circumstances there is at least a considerable risk of the purchaser of the property being involved in heavy litigation should the mortgagees choose to put forward a claim. At the same time the possibility of the appellant having believed in good faith that there was no valid

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or subsisting claim in respect of the mortgage, is not in our opinion excluded. The deed of mortgage is in their possession and exhibit IVb was executed in 1899 on payment by them of Rs. 1,000 odd. And if the defendants Nos. 1 and 2 believed as the first defendant says he did that the mortgage in favour of Peddayya was a colourable transaction they would not be expected to make any mention of it in the sale proclamation.

Upon these facts the first question for decision is, whether the plaintiff who is benamidar of Basivi Reddi is entitled to maintain this suit on the ground that the sale was vitiated by the fraud of the appellants, the decree-holders. The plaintiff actually bid at the auction and the property was knocked down to him; it was he who paid the purchase money and the sale certificate was issued to him. But Basivi Reddi was present at the time of the sale and it was under his directions that the plaintiff made the bids and Basivi Reddi supplied the purchase money, the arrangement being that he and not the plaintiff was to be the owner of the property. So far as Basivi Reddi and the plaintiff are concerned it was never intended that the title of the property should vest in the latter and in that sense the plaintiff is undoubtedly a benamidar. Those being the facts, Mr. Sundara Aiyar contends that for the purposes of this suit we must treat the plaintiff as a mere *alias* of Basivi Reddi, and that Basivi Reddi alone is entitled to seek any relief with respect to the sale. It may be mentioned here that Basivi Reddi was examined as a witness in this case and he disclaims all title to the property. The fact however is as proved by the evidence that he was the real purchaser, and a false statement made by him in the witness box cannot affect the question as to whether the plaintiff can maintain the action (see *Hari Gobind Adhikari* v. *Akhoy Kumar Mozumdar*(1)). The learned vakil for the appellants relies strongly on the decision of the Privy Council in *Pether Permal Chetty* v. *Muniandy Servai*(2), where their Lordships cite with approval a passage from Mr. Mayne's book on Hindu Law on the effect of benami transactions entered into with a view to defraud a third person. The passage cited lays down that once a transaction is made out to be a mere benami, the benamidar absolutely disappears from the title he being simply an *alias* for the person beneficially interested. The actual questions for

(1) (1889) I.L.R., 16 Calc., 364. (2) (1908) I.L.R., 35 Calc., 551.

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decision before the Judicial Committee were firstly, whether a person who had executed a benami deed of sale for the purpose of defeating the claim of an equitable mortgagee could recover the property from the benamidar when it is found that the purpose of the fraud was not effected; secondly, whether it was necessary to have the benami deed set aside as a preliminary to the plaintiff obtaining possession of the property. They answered the first question in the affirmative and the second question in the negative. The only proposition bearing upon the point under discussion that can be deduced from that case is that a person in whose favour the owner of a property has executed a benami deed of sale acquires no title to the property, so as to resist a suit for possession by the owner. The other Privy Council ruling cited by Mr. Sundara Aiyar, *Annada Pershad Panja* v. *Prasanna Moyi Dasi*(1), has no closer bearing on the present question. In that case all that was decided was that the real owner of a property which was sold under a decree, the result of a fraudulent arrangement between the benamidar and a third person, could recover the property from the latter, and that to such a case section 95 of the Limitation Act did not apply. The other cases cited in support of the appellant's contention, for instance, *Kutha Perumal Rajali* v. *The Secretary of State for India*(2), *Hari Gobind Adhikari* v. *Akhoy Kumar Mozumdar*(3), *Subbarayar* v. *Asirvatha Upadesayyar*(4) and *Mohendra Nath Mookerjee* v. *Kali Proshad Johuri*(5) lay down that a benamidar cannot sue to recover possession of the property standing in his name inasmuch as he has no title to the property. The proposition therefore which may be taken to be established is that a benami transaction does not vest any title to an immoveable property, the subject of such a transaction in the benamidar, and therefore such a person cannot maintain a suit which is based on title, such as a suit in ejectment. But none of the cases relied on by the appellant are authority for the contention that where a person who is really acting for another but does not disclose the fact enters into a contract for the purchase of land and the land is conveyed to him in pursuance of the contract, he cannot sue for any relief in respect of the contract.

(1) (1907) I.L.R., 34 Calc., 711 at p. 717. (2) (1907) I.L.R., 30 Mad., 245.
(3) (1889) I.L.R., 16 Calc., 364. (4) (1897) I.L.R., 20 Mad., 495.
(5) (1903) I.L.R., 30 Calc., 265.

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Some of the rulings just mentioned recognize the distinction between a suit to recover possession of land and one based on contract in connection with a benami transaction. It is difficult to see how the analogy of the law relating to benami transactions such as enunciated in *Pether Permal Chetty* v. *Muniandy Servai*(1) can be applied to suits either based on or seeking to avoid a contract of sale, for, in cases of the latter class, the person actually entering into the contract acts, as a matter of fact, as agent of an undisclosed principal, and it cannot be contended that such a person acquires no rights and incurs no liability under the contract (see sections 231 and 232 of the Contract Act). It may be that though such a person is really an agent in the matter of the contract he can be properly called a mere benamidar so far as the title to the property conveyed in his name is concerned, for neither the legal nor the beneficial estate in the property is intended to vest in him. A benamidar properly so called is not a trustee, for he is not the owner of the legal estate, although he holds the property for the benefit of the real owner; nor can a trustee in whom the legal estate is vested properly be called a benamidar. Similarly, it would be a misnomer to call an agent, who has entered into a contract but without disclosing the fact that he is an agent, benamidar of his principal in the sense of *Pether Perumal Chetty* v. *Munandi Servai*(1). This is the substance of what is laid down in *Kutha Perumal Rajali* v. *The Secretary of State for India*(2) though the learned Judges at one place in their judgment would seem to suggest that in some cases the benamidar may be a trustee or agent of an undisclosed principal.

But it is argued that the present suit does not seek relief in respect of any contract because the sale was *in invitum* and the officer conducting the said sale cannot be said to have entered into any contract with the plaintiff. But we do not see why the acceptance of the plaintiff's bid by the officer should not have the effect of a contract with such officer simply because the rights and liabilities arising under it are regulated in many respects by the special provisions of the Civil Procedure Code. The present suit seeking to avoid the contract by which the plaintiff became purchaser of the property on the ground of fraud committed by

(1) (1908) I.L.R., 35 Calc., 551. (2) (1907) I.L.R., 30 Mad., 245.

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the appellants in connection with such sale is brought under the general law and there is nothing in that law, as we have tried to show, which disentitles him to maintain such an action. And, if we have regard to the provisions of the Civil Procedure Code, they certainly seem to suggest that the person who bids for the property is the proper person in circumstances like the present to maintain the action. The plaintiff, as the person declared to be the purchaser, has to pay the amount of deposit (section 306), within a certain time (section 307), and in default of payment by him he loses all claims to the property and to the money deposited (section 308). If the sale is set aside under section 310A the purchase money or compensation would be payable to the plaintiff, he can apply to have the sale set aside on the ground that the judgment-debtor has no saleable interest in the property (section 313); and if the sale is set aside, the plaintiff would receive back the purchase money (section 315), and when the sale became absolute, the certificate of sale would be issued to him (section 316) and no suit could be maintained against the plaintiff who is the certified purchaser on the ground that the purchase was made on behalf of any other person (section 317). It would be impossible to hold in face of these sections that the plaintiff as certified purchaser did not acquire any rights under his certificate (See *Ravji* v. *Mahadev*(1) and *Khushal Panachand* v. *Bhimabai*(2), while the policy underlying them certainly points to the certified purchaser being the proper person to seek relief in a case of this nature. In our opinion therefore there is no force in the objection that this action is not maintainable by the plaintiff.

The next question is, whether the suit is barred; and that depends upon a determination whether article 12 applies to the case, as contended for by the appellant, or article 95, as held by the Subordinate Judge, or 120, if neither of the other two articles applies. We feel no hesitation in holding that the suit is governed by article 95, and we entirely agree with what is said on the point in *Sham Lal Mandal* v. *Nilmani Das*(3) where the question is fully discussed. If as we think article 95 is applicable, the suit is clearly within the prescribed limit of time.

(1) (1898) I.L.R., 22 Bom., 672. (2) (1888) I.L.R., 12 Bom., 594.
(3) (1906) 5 C.L.J., 385.

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There is one other question raised in the case and we wish to state as briefly as possible, the view we take of it, though having regard to the conclusions which we have come to on the points raised by the appellant it is not necessary to determine this question. Did the judgment-debtors have a saleable interest in the two villages? The learned Subordinate Judge has answered the question in the negative. The point is not free from difficulty, but on the whole it seems to us that it is going too far to say that the judgment-debtors had no saleable interest in the villages because the conditions under which the purchaser would hold the property would be materially different from those under which the judgment-debtors themselves held it.

However as in our opinion the plaintiff is entitled to relief on the ground the sale is not binding on him by reason of the fraudulent misrepresentations contained in exhibit A and the suit is brought within time, the appeal fails and must be dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Munro.

1910. April 28, 29.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (FIRST DEFENDANT), APPELLANT,

v.

GOPISETTI NARAYANASWAMI NAIDU GARU, RECEIVER, NIDADAVOLE AND MEEDUR ESTATE, (PLAINTIFF), RESPONDENT.*

Survey and Boundaries Act, (Madras), Act IV of 1897, *ss.* 13, 24, 25—'*Date of decision' for purposes of limitation is the date when it is communicated to the parties.*

The starting point of limitation for an appeal by way of a suit against a final decision under section 24 of Act IV of 1897 is the 'date of decision' under section 13. The date of the decision is the date when the decision is passed; and the decision cannot be said to be 'passed' until it is in some way pronounced or published under such circumstances that the parties affected by it have a reasonable opportunity of knowing what it contains. Till then, though it may be written, signed and dated, it is only the decision which the officer intends to pass.

* Appeal No. 95 of 1905.

MILLER AND MUNRO, JJ.

SECRETARY OF STATE FOR INDIA IN COUNCIL v. GOPISETTI NARAYANASWAMI NAIDU.

It does not however follow that in all cases the decision under section 24 must be considered to be passed on the day on which the information required by the section reaches the party to whom it has to be given. The officer may give the parties sufficient notice of the day on which he will pass his decision, to enable them, if they choose, to be present and hear his decision; and limitation will commence from such date, if the decision is announced, though the parties may not be present. That is the date of communication though the parties may not care to listen.

If however the decision is published by sending copies to the parties, the date of communication will be different. It will not necessarily be the date on which the copy actually comes into the hands of the party.

APPEAL against the decree of F. H. Hamnett, District Judge of Gódávari, in Original Suit No. 10 of 1903.

This was a suit brought to determine the boundary between the Government villages of Kikaram and Poolla and the Zamindari villages of Pattipuram, Amudalapalli, Bayyanapalli, Thokalapalli and Devaragopavaram. The suit was filed by the Receiver of the Nidadavole Estate, and the defendants were the Secretary of State for India in Council and two others. The boundary was determined by the Survey officer under the provisions of the Boundaries Act, in February 1902. The plaintiff sought for a declaration that the boundary fixed by the Survey officer excluding from the Zamindari some 336 acres which the plaintiff claimed, should be declared to be wrong and that the boundary should be fixed so as to include this area.

The defendants pleaded, *inter alia*, that the suit was barred by limitation. The judgment of the lower Court on this point was as follows:—

"The point raised under the first part of issue 2 is, whether the suit is time-barred by section 13 of Act V of 1897? Section 13 of the Act no doubt provides that the suit must be brought within a year from "the date of the order or decision" of the Survey officer which it is sought to set aside; but there is nothing in the scheme or wording of the Act, which, in my opinion, makes it inadmissible to apply to it the principle of equity laid down in the rulings of the Madras High Court with respect to the corresponding section (section 25) of the Old Boundaries Act XXVIII of 1860. In I.L.R., 6 Mad., 189, and I.L.R., 12 Mad., 1, the High Court laid down that, if there was any decision of the Survey officer at all it could not date earlier than the date of communication to the parties. This principle of equity is just

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as applicable to the new Act as to the old. Neither of these Acts contain any provision corresponding to section 198, Civil Procedure Code, and section 366, Criminal Procedure Code, which require that notice shall be given to the parties concerned of the date on which judgment will be delivered. In the absence of such a rule of procedure, it must always be inequitable to start the period of limitation allowed for a remedy against an order from the date on which that order may happen to be written or pronounced in the absence of the parties affected. Survey officers are, moreover, itinerating officers, and they probably on many occasions write their orders in a different district from that in which they have held the enquiries on which such orders are based. It would be manifestly unfair to parties concerned by such orders to expect them to take notice of them on the dates they are written. Although the time for a suit has been extended to one year under the new Act, it is quite conceivable that an order passed by an itinerating Survey officer might not, through an oversight or through the parties' addresses not being properly known, be communicated to some of the parties concerned for over a year. Such parties under the new Act as under the old would lose their right of suit even though the period for filing a suit has been extended to a year."

"On these grounds I have no hesitation in applying the principle of the rulings under the old Act to the new Act, and, in the result, I rule that the period of limitation in this suit only began from the 14th February 1903, the date on which the Survey officer's order was communicated to the plaintiff, and that the suit is not barred by section 13 of Act IV of 1897."

The case was tried on the merits and the plaintiff's claim decreed.

The first defendant appealed to the High Court.

The Government Pleader for appellant.

P. R. Sundara Ayyar for respondent.

JUDGMENT.—Under section 25 of Act XXVIII of 1860 (Madras), the starting point of limitation for the appeal by way of suit allowed by that section was the passing of the Survey officer's decision, and in *Annamalai* v. *Cloete*(1) and *Seshama* v. *Sankara*(2), it was held that the decision was passed when it was communicated to the parties.

(1) (1883) I.L.R., 6 Mad., 189. (2) (1889) I.L.R., 12 Mad., 1.

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The language of section 13 of Act IV of 1897, Madras, is somewhat different. The starting point is the date of the decision of the Survey officer, and in the present case that is a decision to which the provisions of section 24 are applicable, and section 13 is made by section 25 to apply, *mutatis mutandis*, in the case of a final decision passed under section 24. The starting point is therefore the date of the decision passed under section 24. We find no difficulty in holding that the date of the decision is the date on which the decision is passed, and therefore that the starting point is the date of the passing of the decision. The precedents seem therefore to be in point, there being no material difference between the earlier and the later acts so far as the present matter is concerned.

Section 24 of Act IV of 1897 requires the decision to be recorded in writing with its reasons and communicated to the parties, but these provisions do not very greatly help us to determine on what date the decision is passed. Both sides rely on section 11 (3) read with 12 (*a*), the Government Pleader as showing that there is a difference between the date of the order and the date of communication thereof, and Mr. Sundara Aiyar as making it plain that it is only a communicated order that sets limitation running. The somewhat peculiar provisions of section 12(*a*) may perhaps be explained by the fact that in section 11(3) the making of the order and its communication are intended to be practically simultaneous—the communication is to be "forthwith". Though, therefore, this provision supports the Government Pleader to the extent that it shows that the date of the order and the date of communication may in the contemplation of the legislature be different dates, still it does not support the more important inference that the Act contemplates the starting of limitation before the communication of the order to the parties.

There is some difficulty in the matter, but on the whole we think we ought to follow the authorities to which we have referred which hold that the date of a decision is the date of its communication to the parties. A decision cannot properly be said to be passed until it is in some way pronounced or published under such circumstances that the parties affected by it have a reasonable opportunity of knowing what it contains. Till then, though it may be written out, signed and dated, it is nothing but the decision which the officer intends to pass. It is not passed so long as it is

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open to him to tear up what he has written and write something else.

We do not say that in all cases the decision under section 24 of the Act (IV of 1897) is passed on the day on which the information required by that section reaches the party to whom it has to be given. There seems to be nothing to prevent the survey officer from giving parties sufficient notice of the day on which he will pass his decision, to enable them, if they choose, to be present and hear it, and if that is done limitation would run from that day if the decision is announced on that day. That is the date of communication though the parties may not care to listen.

But if the course adopted in the present case is taken, and the survey officer publishes his decision by sending copies of it to the parties, the date of communication will be different. It will not necessarily be the date on which the copy actually comes into the hands of the party, and on that point the Government Pleader had something to say. But we do not think we ought now to institute an inquiry as to what is the true date of communication in this case; it seems to have been accepted in the Court below that the date of receipt of the order is the date of communication. We therefore overrule the contention of the Government Pleader that the suit is barred by limitation.

On the merits we are not prepared to say the District Judge has come to a wrong conclusion. It is the case of both parties that two channels Enugakodu and Mattavanikodu formerly existed, and the decision of the question at issue turns upon the position of Mattavanikodu. We find now on the ground a drainage channel dug by the Department of Public Works some five years prior to the survey officer's enquiry, and also a channel some distance to the north. It is between these channels that the land in dispute lies. The plaintiff's case is that the drainage channel occupies the bed of the Mattavanikodu. The case for the first defendant is that Mattavanikodu was further to the south. But no such channel is now in existence, nor is there any evidence that any such channel ever existed. On the other hand, there is evidence to support the plaintiff's case, and one of the first defendant's witness admitted that the drainage channel might have been dug on the site of Mattavanikodu. As to the relative positions of Enugakodu and Mattavanikodu there is no doubt, for exhibits H and K show that the former was north of the latter. Again according to the survey

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officer the drainage channel war dug along the lowest line of country, and he assumes, and the assumption is reasonable, that there was along the line an important stream. If this were so and the stream was known as Enugakodu we should expect to find it given as the northern boundary of Amadalapalli just as it is given as the northern boundary of villages to the west. We think therefore that all the probabilities point to the present drainage channel as the site of Mattavanikodu and to the northern channel being Enugakodu. This would also fit in quite well with the boundaries given in the old account for the village of Amadalapalli.

The appeal is therefore dismissed with costs. This decree should be satisfied within three months from this date.

APPELLATE CIVIL.

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

1910. January 28, 31. March 8.

MATHEW HENRY ABRAHAM (PLAINTIFF), APPELLANT,

v.

THE LODGE "GOOD WILL" No. 465, BELLARY, REPRESENTED BY C. E. RHENIUS, WORSHIPFUL MASTER, AND OTHERS (DEFENDANTS), RESPONDENTS.*

Contract Act IX of 1872, s. 63—Release conditional on a future event valid—Evidence Act, s. 95—Evidence aliunde admissible to prove claim released.

It was not the intention of the Legislature in enacting section 63 of the Contract Act to depart from the English law, under which releases contingent on the happening of a future event are valid. Such releases are valid under the Contract Act. Unlike the English law which requires consideration in the case of releases not under seal, the Contract Act reqaires no consideration in the case of releases.

When a deed of release is silent as to the claim released, evidence *aliunde* is admissible under section 95 of the Evidence Act to show what claim was intended to be released.

APPEAL against the decree of A. T. Forbes, District Judge of Bellary, in Original Suit No. 4 of 1904.

The facts of the case are fully set out in the judgment.

C. R. Tiruvenkatachariar for appellant.

* Appeal No. 218 of 1905.

MUNRO AND ABDUR RAHIM, JJ.

MATHEW HENRY ABRAHAM v. THE LODGE "GOOD WILL."

The Hon. Mr. *T. Richmond* for respondents.

ABDUR RAHIM, J.—The learned District Judge has dismissed the suit brought by Mr. Henry Abraham as Executor of Mathew Abraham for recovery of money due on a promissory note executed on the 12th November 1891 in the latter's favour by certain Office-Bearers of the Lodge "Good Will", No. 465, of Bellary, on the ground that though the document marked as exhibit IV in the case and executed by Mathew Abraham on the 21st February 1902 is not operative as a release, yet, since the Lodge regarded it as such, being led so to regard it by the conduct of Mathew Abraham at the time of its execution and completed the building of the Lodge premises on the faith of such belief the plaintiff is estopped from enforcing his claim. No estoppel however was ever pleaded, and the issues did not raise the question, nor is there any evidence on the point except a statement of the last witness of the defendant, elicited in the course of re-examination. The District Judge therefore was not right in dismissing the suit, on that ground. The real question in the case is "Whether the District Judge is right in holding that Exhibit IV is not a good and effective release." It is in these words.

"Know all men by these presents that I, Mathew Abraham, proprietor of Messrs. Abraham and Company, Bellary, do covenant and agree with the Worshipful Master and Wardens of Lodge, Good Will, No. 465, for the time being, that if the Masonic Lodge building which has been burnt down is resuscitated, I shall have no claim, whatever, upon the building or any of the property of the said Masonic Lodge.

Signed, sealed and delivered by me, this twenty-first day of February, one thousand nine hundred and two. M. ABRAHAM."

One reason, why it is said, it is not a good release is that there is no mention of the promissory note there, and that neither at the time of its execution, nor afterwards did Mr. Abraham have any claim upon the building or the property of the lodge. There can be no doubt whatever, and this has not been disputed by the learned vakil for the plaintiff-appellant, that the document refers to the claim of Mr. Mathew Abraham under the promissory-note as that was the only claim he had against the lodge. It is true that until a decree was obtained on the note and executed, Mr. Abraham would have no charge upon the building of the lodge or its property, but it is clear that the promissory-note was

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intended to be satisfied out of the assets of the lodge and not personally by those office-holders of the lodge who executed it. In fact in the plaint itself judgment is prayed for against the assets and property of the lodge. The evidence on the point, which is admissible under section 95, Evidence Act, makes it quite plain that the claim referred to in exhibit IV is with reference to the money due on the promissory-note. The other question with reference to exhibit IV is whether its operation being made conditional on the happening of a future event, it comes within the provision of section 63 of the Contract Act. The illustrations appended to the section are no doubt cases in which performance is dispensed with unconditionally. But the words of the section itself are wide enough to cover conditional releases, and there is no reason to think that the Indian Legislature contemplated a departure on this point from the English law under which a release contingent on the happening of a future event is a good release. The point on which section 63 differs from the English law is that it does not require consideration to support a release while under the English law a release without consideration is a *nudum pactum* unless made by an instrument under seal; see *Davis* v. *Cundasami Mudali*(1), *Manohur Koyal* v. *Thakur Das Naskar*(2), *Naoroji N. Thoonthi* v. *Kazi Sidick Mirza*(3). It has also been suggested that exhibit IV is a mere contract to release the debt and does not purport to be a release. But I do not think this is a sound contention. Mathew Abraham did not contemplate the doing of any further act on his part, the discharge of the liability was to come into operation as soon as the building was completed and the building was in fact completed before the institution of the suit. And it can hardly make any difference whether a creditor says "I release this debt" or "I agree to release this debt"; and this I think, is to be gathered from the cases just cited and the English law on the subject of release unless perhaps it was within the contemplation of the releasor that he was to do something more in order to carry out his intention. I am of opinion therefore that no question of consideration really arises in the case. If however exhibit IV required consideration to support it I should be inclined to hold there was no consideration for it within the

(1) (1896) I.L.R., 19 Mad., 398. (2) (1888) I.L.R., 15 Calc., 319.
(3) (1896) I.L.R., 20 Bom., 636 at p. 644.

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meaning of the Contract Act. There is no evidence, and it has not even been alleged that Mathew Abraham ever requested the other members of the lodge to rebuild the premises. What apparently happened was, the members of the lodge decided upon rebuilding the lodge premises, provided they had sufficient money for the purpose and Mr. Abraham would release his claim upon the note. Mr. Abraham agreed to give up his claim. But that does not mean that Mr. Abraham desired them to rebuild the lodge. However as I hold that Exhibit IV was a valid release I would dismiss this appeal with costs.

I may observe that as regards the form of the action it is not open to the defendants to rely on the objection on the score of an order under section 30, Civil Procedure Code, not having been obtained, as the objection was not pressed before the District Judge.

MUNRO, J.—I am of the same opinion. The appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Krishnaswami Ayyar.

PANDIRI BANGARAM (DECEASED) AND OTHERS (PLAINTIFF AND PLAINTIFF'S REPRESENTATIVES), APPELLANTS,

1910. May 3, 5.

v.

KARUMOORY SUBBARAJU AND OTHERS (DEFENDANTS), RESPONDENTS.*

Transfer of Property Act IV of 1882, s. 43—Benefit of section can be claimed only by person who has acted on the erroneous representation of another.

The benefit of section 43 of the Transfer of Property Act can be claimed only where the person claiming such benefit has acted on the erroneous representation of the party whose subsequently acquired interest he claims.

An undivided Hindu father had two sons *A* and *B*. *A*, who was entitled only to one-third of the family property, mortgaged one-half of it to *C*, who knew that *A* was entitled only to one-third and did not bargain and pay for a half share. Subsequently *A's* father died and *A* having become entitled to a half share, *C* sued on his mortgage seeking to make *A's* half share liable:

* Appeal No. 152 of 1906.

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Held, that he could enforce his mortgage only against the one-third share which belonged to *A* at the time of mortgage.

APPEAL against the decree of C. G. Spencer, District Judge of Godavari, in Original Suit No. 38 of 1905.

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

T. V. Muthukrishna Ayyar for second and third appellants.

The Hon. The Advocate-General for second, fourth and fifth respondents.

V. Ramesam and *M. V. Krishnaswamy Ayyar* for *P. Narayanamurti* for first respondent.

JUDGMENT.—The plaintiff has obtained a decree against the one-third share of the first defendant. He purported to mortgage one-half during his father's life-time when he was only entitled to a third. It is found by the District Judge in paragraph 17 of his judgment, and we entirely agree with him, that the plaintiff knew at the date of the mortgage that the first defendant was only entitled to a third share in the property. We are also clear that the plaintiff did not bargain and pay for a half share. Under these circumstances the question is raised whether the plaintiff can bring his case within the four corners of section 43 of the Transfer of Property Act. We are asked to say that, in the absence of words in section 43 to the effect that, the benefit of that section can only be claimed by a person who has believed in and acted upon the representation the plaintiff is entitled to proceed against the added interest of the father. We are unable to accept this view It is true section 41 of the Act requires a person who has obtained a transfer from the ostensible owner to have done so in good faith and after due enquiry in order to become entitled to the interest purported to be transferred. But, as pointed out by the learned Advocate-General, the difference in language between sections 41 and 43 of the Act may be due to the fact that under the latter section mere belief in and acting upon the representation may be sufficient to pass the subsequently acquired interest while under section 41 such mere belief of the transferee is insufficient. The case of *Angannayya* v. *Daroor Narasanna*(1) does not decide the question under consideration. On the other hand the Advocate-General has drawn our attention to the observations in *Mokhoda Debi* v. *Umesh Chandra Banerjee*(2)

(1) (1908) 18 M.L.J., 247. (2) (1908) 7 C.L.J., 381, 1383.

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and *Gangabai* v. *Baswant*(1) which seem to show that the principle of section 43 of the Transfer of Property Act is the acting by the transferee on the erroneous representation of the transferor. Further the well-known maxim of the law to which effect is given in section 41 is interest feeds the estoppel. That section only enunciates a rule which is an illustration of the general principles of estoppel not confined to the law of evidence but extending to the region of substantive law. No authority has been cited to us to induce us to take a different view of the section. We must therefore hold that the decree of the District Judge is right. It is unnecessary to express any opinion on the other questions, and especially on the genuineness of the will. We dismiss the appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Krishnaswami Ayyar.

1910. March 17. April 1.

PADMANABHAYA (DECEASED) AND OTHERS (PLAINTIFFS AND HIS LEGAL REPRESENTATIVES), APPELLANTS,

v

RANGA AND OTHERS (DEFENDANTS NOS. 1, 2, 4, 5, 6, 8, AND 9 TO 11), RESPONDENTS.*

Landlord and tenant—Lease before Transfer of Property Act IV of 1882, forfeiture of—Suit for ejectment by landlord, maintainability of, without subsequent act evincing intention to forfeit—Waiver—Claim for rent in suit for ejectment does not amount to waiver.

Under the law applicable to leases before the Transfer of Property Act, forfeiture is incurred when the denial of title occurs; any subsequent act of the landlord, electing to take advantage of the forfeiture, is not a condition precedent to the right of action for ejectment. The bringing by the landlord of a suit for ejectment is simply a mode of manifesting his election.

Where a tenant, holding under a lease prior to the Transfer of Property Act, denies the title of his landlord, the landlord can maintain a suit for ejectment, without having done, prior to the suit, any act evincing his intention to determine the lease.

(1) (1910) I.L.R., 34 Bom., 175 at page 182.

* Second Appeal No. 1861 of 1908.

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A claim for rent in the suit for ejectment will not amount to a waiver of the forfeiture. The election to forfeit is complete and irrevocable when the suit for ejectment is instituted.

Venkatramana Bhatta v. *Govindaraya*, [(1908) I.L.R., 31 Mad., 403], considered.

SECOND APPEAL against the decree of R. B. Wood, District Judge of South Canara, in Appeal Suit No. 167 of 1907, presented against the decree of V. B. Ramaswami Ayyar, District Munsif of Coondapoor, in Original Suit No. 486 of 1906.

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

B. Sitarama Rau for second and third appellants.

K. Yagnanarayana Adiga for first, second, fourth, fifth and seventh to ninth respondents.

JUDGMENT.—The suit is in ejectment. The defendants are permanent lessees. They denied the title of the landlord, the plaintiff, by a notice, dated the 28th August 1905, before the institution of this suit. The District Judge held that the terms of this letter did not create a forfeiture. He was also of opinion that the lessor has done no act to show his intention to determine the lease, and further that, the forfeiture had been waived by the lessor suing for the rent subsequent to the date of the forfeiture.

Dealing with the last question first, we observe that the prayer was for past and future profits and not for rent, though the rent previously fixed appears to have been taken as the measure of the annual profits. But, apart from this, if the forfeiture had been incurred, we fail to see how the suit for rent could operate as a waiver. If section 112 of the Transfer of Property Act applied, the suit in ejectment having been instituted, the second proviso to that section would prevent waiver even from acceptance of the rent. But the lease having been executed long before the Transfer of Property Act the question is whether under the law in force before that Act the claim for rent in the action for ejectment could operate as a waiver. We are not aware of any authority for holding, where the lease had determined by the plaintiff's election to treat the lease as at an end, that the claim for rent prosecuted along with a prayer for ejectment could negative the plaintiff's title to seek ejectment.

Exhibit GG is the defendant's reply to the plaintiff's notice. It says: "I do not enjoy any property under you. I am not liable to pay any rent whatever to you. I have never till now paid you any

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rent whatsoever." This certainly amounts to a claim of title in the defendants and would therefore work a forfeiture. In our opinion it is not necessary that the denial of the landlord's title should be accompanied by an assertion in terms of the title of the defendant. If the landlord's title be denied, it involves the assertion that the title is either in the defendant or some third person.

The question remains whether the lessor had done some act showing his intention to determine the lease. As we have said already the Transfer of Property Act does not apply to this case. Section 2, clause (*e*). Clause (*g*) of section 111, therefore has no application. But the principle of that clause has been applied in *Venkatramana Bhatta* v. *Gundaraya*(1) to a lease executed before the Transfer of Property Act. In that case there was a mulgeni lease of 1866. There was a clause for re-entry on failure to pay rent on the due dates. On default in the payment of rent the plaintiff sued for possession and for arrears of rent Following the decision in *Anandamoyee* v. *Lakhi Chandra Mitra*(2) this Court held that the plaintiff has shown no intention to avail himself of the forfeiture and determine the lease, and that, in consequence, he was not entitled to obtain possession. This was a case in which the forfeiture might have been relieved against, on the principle of section 114 of the Transfer of Property Act. But the Court held that no forfeiture had been incurred under section 111, clause (*g*). The decision in *Anandamoyee* v. *Lakhi Chandra Mitra*(2) was one under the Transfer of Property Act. It does not appear to have been brought to the notice of the Court in *Venkatramana Bhatta* v. *Gundaraya*(1) that the lease under consideration was not governed by the provisions of the Transfer of Property Act, having been executed in 1866. There was, consequently, no discussion in the Madras case as to the principles applicable to an action in ejectment on the ground of forfeiture of a tenancy created before the Act. We do not therefore feel bound to apply the principle of that decision to the present case.

Clause (*g*) of section 111 provides that a forfeiture is incurred by a denial of title or by the breach of an express condition providing for re-entry, when, in either case, the lessor does an act showing his intention to determine the lease The lease therefore

(1) (1908) I.L.R., 31 Mad., 403. (2) (1906) I.L.R., 33 Calc., 339.

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is not determined by forfeiture before the lessor has done an act showing his intention to determine the lease. As no cause of action accrues to sue in ejectment before the lease has determined, it is impossible to treat the institution of the suit as itself the act necessary for determining the tenancy. But does this rule apply to a lease not governed by the Transfer of Property Act? The forfeiture there was not incurred by the breach of the condition or denial of title coupled with the act of signifying the intention to determine the tenancy. It arose by the breach of the condition which provided for re-entry or by the setting up by the tenant of a title in himself or a third person. The tenant was not entitled to take advantage of his own wrong and claim any benefit from his own breach of a condition, but the landlord had the right of election which was signified by re-entry or by the doing of some other act showing an intention to put an end to the tenancy. But it was not necessary that this election should be anterior to the suit. The principles are well stated in Warvelle on 'Ejectment,' section 47. "At Common law, however, the condition was not self-executing but required some action on the part of the grantor, evincing an intention on his part to take advantage of the forfeiture, and, unless he was actually in possession, this was accomplished by a re-entry upon the land conveyed. The earlier cases in this country (the United States of America) follow the common law rule, and announce the doctrine that re-entry for breach of a condition subsequent is necessary to defeat an estate of freehold which has once vested, and that a forfeiture cannot be effected merely by bringing an action for the recovery of possession. Under this doctrine it will be seen that ejectment will not lie until there has been an actual re-entry. But later statutory enactments, defining the character of the action of ejectment and providing for the interests that shall be sufficient to sustain it, have materially altered the old rule by removing much of the reason which occasioned it, and it is no longer necessary that the common law ceremony of a re-entry shall be performed as a condition precedent to the prosecution of an action to recover possession of lands affected by a forfeiture." In *Goodright* v. *Cator*(1) Lord Mansfield delivering the judgment of the Court of King's Bench said "We have looked very particularly into the

(1) 99 E.R., 304 at p. 309.

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cases for two hundred years back, and we find a great deal of contrariety on the question whether an actual entry is necessary in order to maintain an ejectment, on a clause of re-entry, for non-payment of rent; but, in the most distant period the better opinion has been, that it is not * * * * * An ejectment being a mere creature of the Court, framed for the purpose of bringing the right to an examination, an actual entry can be of no service." But if an entry was unnecessary the doing of some unequivocal act which was equivalent to entry such as a demise of the premises to a new tenant or a new demise to a tenant or sub-tenant in possession was deemed to be sufficient. In William and Yates on "Ejectment," page 68, the learned authors say "Before the Common Law Procedure Act, 1852, the service of a declaration in ejectment was held to determine the lease. Since that Act the bringing of an action of ejectment was held to be equivalent to an entry and to determine the term. And since the Judicature Acts Fry, J., said that "an action of ejectment was equivalent to the old entry" (*Evans* v. *Davis*(1)). In *Jones* v. *Carter*(2) Baron Parke delivering the judgment of the Court of Exchequer said "We think that the bringing of an ejectment for a forfeiture and serving it on the lessee in possession, must be considered as the exercise of the lessor's option to determine the lease." There the lessor served on the lessee a declaration of ejectment for a forfeiture. In a suit for rent due and for breach of certain covenants it was held that the service of the declaration operated as a final election to determine the term though there had not been any judgment in the ejectment proceeding. In *Grimwood* v. *Moss*(3) where lessors brought ejectment against the tenant on the ground of forfeiture for breaches of covenants which provided for re-entry it was held that a distraint for rent after commencement of the action and before trial did not operate as a waiver and the plaintiffs were entitled to judgment. In *Clough* v. *London and North-Western Railway Company*(4) dealing with a case of avoiding a transaction on the ground of fraud Mr. Justice Mellor delivering the judgment of the Exchequer Chamber observed "The principle is precisely the same as that on which it is held that the landlord may elect to avoid a lease and bring ejectment when

(1) (1878) 10 Ch.D., 747 at p. 763.
(2) (1846) 71 R.R., p. 800 at p. 807.
(3) 7 C.P., 360.
(4) (1871) 7 Ex., 26 at p. 34.

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his tenant has committed a forfeiture. If with knowledge of the forfeiture, by the receipt of rent or other unequivocal act, he shows his intention to treat the lease as subsisting, he has determined his election for ever, and can no longer avoid the lease. On the other hand, if by bringing ejectment he unequivocally shows his intention to treat the lease as void, he has determined his election, and cannot afterwards waive the forfeiture" In *Serjeant* v. *Nash, Field and Company* (1), the Court of Appeal held that the issue and service of the writ to recover possession of the premises operated as a final election by the lessor to determine the term. The principle of these cases rests upon the ground that the forfeiture is complete when the breach of the condition or the denial of the title occurs. But, as it is left to the lessor's option to take advantage of it or not, the election was not a condition precedent to the right of action but the institution of the action was simply a mode of manifesting the election. The same principle has been applied in actions for relief on the avoidance of fraud as in *Clough* v. *London and North-Western Railway Company*(2) or where a reversioner avoids a lease by a Hindu widow after her lifetime *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi*(3) (see Foa's "Landlord and Tenant", pages 322 and 656). It will be clear on the foregoing review of the authorities that under the law applicable to leases before the Transfer of Property Act, the institution of the action on the ground of forfeiture would itself amount to the manifesting of the intention to determine the tenancy. The defendants in the present action are therefore liable to be turned out of the property.

There is a dispute as to the amount of rent which the defendants were liable to pay. The Courts below allowed cash rent at the rate of Rs. 12-4-0 per annum while the plaintiff claims fifteen. The lease deed provides for an annual rent of Rs. 15 and sundry articles. The Courts below have deducted Rs. 2-12-0, as due to a mortgagee under a judgment—Exhibit J. The plaintiff was no party to the suit of the mortgagee in 1865 in which he was decreed Rs. 2-12-0 out of the rents payable by the defendant's predecessor to the plaintiff's predecessor in interest. It is not stated that the defendant had paid the mortgagee for the suit faslies. The plaintiff is therefore entitled to recover the full rent provided for

(1) (1903) 2 K.B., 304. (2) (1871) 7 Ex., 26 at p. 34.
(3) (1907) 34 I.A., 87.

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him under the lease. In reversal of the decrees of the Courts below the plaintiff must have a decree for the properties sued for together with profits claimed by him. The defendants will pay the plaintiff's cost throughout.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Krishnaswami Ayyar.

KANDASWAMY PILLAI (PLAINTIFF), APPELLANT,

1910. March 10, 1

v.

AVAYAMBAL *alias* THANGACHI AMMAL (DEFENDANT), RESPONDENT.*

Limitation Act, XV of 1877, *sch. II, arts.* 61, 83, 116, 120—*Indian Contract Act, IX of* 1872, *ss.* 70, 222—*Suit by agent against principal to recover moneys spent by him falls under art.* 61 *of sch. II of the Limitation Act and not under art.* 116 or 120.

The duty of the principal under section 222 of the Contract Act to indemnify the agent is an obligation imposed by law and is attached to the relation of principal and agent constituted by act of parties. Where a registered contract of agency does not provide for such indemnity, such obligation cannot be treated as a term or part of such contract; and a suit by the agent for recovering moneys spent by him on account of his principal will not for purposes of limitation fall within article 116 of schedule II of the Indian Limitation Act.

Article 83 of the Limitation Act will not apply; and even if it did, limitation will begin to run from the date of such payment and not from the termination of the agency.

The fact that the agent has under section 217 a right of retainer out of sums received on account of his principal and a right of lien under section 222 will not postpone the right of action until the termination of the agency.

The right of the agent to recover is conferred by section 70 of the Contract Act, and there is nothing to prevent his making his claim immediately after he has expended his own moneys.

The article applicable to such cases is article 61 of schedule II of the Limitation Act. That article is not confined to cases where the defendant is under a legal liability to make the payment but is also applicable to cases falling under section 70 of the Contract Act.

SECOND APPEAL against the decree of F. D. P. Oldfield, District Judge of Tanjore, in Appeal Suit No. 1128 of 1906, presented

* Second Appeal No. 29 of 1908.

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KANDASWAMY PILLAI v. AVAYAMBAL *alias* THANGACHI AMMAL.

against the decree of K. Sundaram Chetty, District Munsif of Negapatam, in Original Suit No. 142 of 1906.

The facts are set out in the judgment of the District Munsif, the material portion of which was as follows:—

"This is a suit to recover Rs. 510 spent by plaintiff for the defendant, while the plaintiff was working as the defendant's agent."

The plaint sets forth that the defendant being a female, was unable to appear in public in Courts and other offices; that the defendant therefore appointed the plaintiff as her agent under a power of attorney, dated 23rd April 1884, that the plaintiff had been doing business in Courts for the defendant, with her permission; that the defendant cancelled the said power of attorney by means of a registered notice, dated 4th April 1903, which reached the plaintiff on 7th April 1903, that the agency terminated since this date; and that the plaintiff having spent sums of money for the defendant in the claim case in Original Suit No. 20 of 1897 on the file of the Sub-Court, Negapatam, and in Original Suit Nos. 54 and 70 of 1899 on the file of the District Munsif's Court, Tirutturaippundi, is entitled to recover Rs. 510.

Defendant pleaded *inter alia* that the suit was barred by limitation.

The judgment of the District Munsif on this issue was as follows:—

"The plaintiff admittedly became the agent of the defendant in 1884. Exhibit G shows that the defendant appointed the plaintiff as her agent, for the management of all her affairs. The plaintiff alleging that he paid certain sums of money in the three cases referred to in the plaint for defendant's sake, now sues to recover Rs. 510 from the defendant. This is merely a suit for the recovery of a specific sum of money, which the plaintiff professes to have spent on defendant's behalf. There are admittedly no accounts kept by plaintiff for the alleged payments. Certain public copies were filed by plaintiff (*vide* exhibits A to E) as evidence of the amounts spent by him for the defendant. It is apparent from these exhibits that the latest payment was made on 6th March 1901 and that the other payments should have been made prior to that date. Even assuming for a moment that the sums mentioned in exhibits A to E were really paid by plaintiff out of his own money and not from the defendant's (his principal's) funds, it seems to me that the present suit, for the recovery of those sums, is clearly barred by limitation. The plaint was first presented on 4th April 1906."

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"The plaintiff fixed the date of the termination of his agency as the starting point for limitation for this suit. The suit would be within time if this be the correct starting point. For the defendant's notice revoking the authority of her agent (the plaintiff) is, dated 4th April 1903 (*vide* exhibit H). The revocation of the agent's authority takes effect from the moment of its communication to the agent. And the plaintiff has alleged in the plaint that this notice reached him on 7th April 1903. If article 89 of the Limitation Act be applicable to the present suit, it may be contended that the date of the termination of the agency should be taken as the starting point for limitation. But this article is applicable to a suit brought *by a principal* against *his agent* for moveable property (including also money) received by the latter and not accounted for. In fact, articles 88, 89 and 90 apply only to suits by *principals* against the *agents*. It is also observed in Mitra's book on the 'Law of Limitation' (4th edition), at page 894, that suits *by agents* against the principal are not provided for, by articles 88, 89 and 90.

The only article of the Limitation Act, which seems to me to be applicable to the present suit, is article 61. This article is as follows:—

Description of suit.	Period of limitation.	Starting point.
For money payable to the plaintiff for money paid for the defendant:—	3 years.	When the money is paid.

The plaintiff's present suit is exactly a suit of the description given in this article. The plaintiff alleges in the plaint that a sum of Rs 510 is payable to him for the money paid by him for the defendant. There is no other article in the schedule to the Limitation Act, which is applicable to the present suit. The plaintiff's pleader was not able to point out that there is any other appropriate article, which would be applicable to the present suit. I was not referred to any authority to show that the starting point for limitation given in the plaint for the present suit, is correct. This suit is not even a suit for an account or for settlement of accounts. I am clearly of opinion that this suit is governed by

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article 61 and the alleged payments having been made more than 5 or even 6 years before the date of suit, it is barred by limitation."

The District Munsif dismissed the suit and his judgment was confirmed on appeal.

Plaintiff appealed to the High Court.

V. V. Srinivasa Ayyangar for appellant.

T. R. Ramachandra Ayyar and *G. S. Ramachandra Ayyar* for respondent.

JUDGMENT.—The plaintiff was the defendant's agent under a power-of-attorney, the original of exhibit G. He sues for the recovery of payments made by him for the expenses of certain litigations conducted by him on behalf of the defendant. The last of such payments was on the 6th of March 1901. The suit was instituted on the 4th April 1906. The Courts below have held the suit barred under article 61 of the Limitation Act. The appellant contends in the first place that article 116 applies. That relates to a suit for compensation for breach of a contract in writing registered. There is no promise in the power-of-attorney to pay the plaintiff for advances made by him on account of his principal. Section 222 of the Contract Act provides that the employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him. Illustrations (*a*) and (*b*) to that section show that expenses incurred by the agent on behalf of the principal are consequences of the lawful acts of the agent in exercise of his authority. But the principal's duty to indemnify is no part of the contract. It is an obligation imposed by the law and is attached to the relation of principal and agent constituted by act of parties. Such an obligation therefore cannot be treated as part of the contract in writing registered. The decisions in *Krishnan Nambiar* v. *Kannan*(1) and in *Seshachala Naickar* v. *Varada Chariar*(2) were referred to, to show that obligations not expressed in writing but imported by the law in the case of sale have been treated as in writing when the sale is made by a written instrument. We do not think that these cases compel us to hold that an indemnity which is not a term of the contract, nor to be deemed a part of the contract, but a mere

(1) (1898) I.L.R., 21 Mad., 8. (2) (1902) I.L.R., 25 Mad., 55.

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obligation cast on the principal by the operation of law, is in writing registered within the meaning of article 116.

It is next argued that article 120 alone applies, and not article 61. But, before we go to this residuary article, we have got to see whether there is no other article which can be made applicable to the case. Articles 83 and 61 have been suggested. We think we must reject the former article for practically the same reason for which we rejected 116. Article 83 relates to a suit "upon any other contract to indemnity." If we are right in thinking that the obligation of the principal to indemnify under section 222 of the Contract Act is not a contract to do so, article 83 ceases to be applicable. But even if it did apply there would remain the question as to the starting point which is when the plaintiff was actually damnified. Now, when is the agent damnified as regards the advances made by him on account of the principal in the course of his agency? In the absence of a contract to the contrary we think it must be taken that the agent is damnified when he makes the payment. The expenses referred to in illustrations (*a*) and (*b*) to section 222 of the Contract Act are recoverable as soon as they are incurred. And if they are recoverable there is nothing unreasonable in holding that the agent is damnified when they are recoverable, and that time begins to run at once. It was contended that the agent had a right of retainer under section 217 out of all sums received on account of the principal in the business of the agency of all moneys due to himself in respect of expenses properly incurred. It was also pointed out that the agent under section 222 of the Contract Act had a lien. It is true that the right of retainer and the lien may be enforced long after the expenses have been incurred so long as moneys or the goods of the principal in connection with the agency are held by the agent irrespective of the period that has elapsed since the expenses themselves were incurred. But is that a reason for holding that if the agent is obliged to sue for moneys spent by him in the business of the agency his right of action is postponed until the termination of the agency? Story says in section 350 of his book on agency, "It may be generally stated that an agent may insist upon deducting all his advances, expenses, disbursements, and losses, arising in the course of his agency, whenever they are definite and certain and do not merely sound in damages, from the pecuniary

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funds in his hands belonging to his principal, by way of recouper, discount or set off. Or where no such funds exist, he may maintain an action at law, or a bill in equity, as the case may require, for the recovery thereof." The agent is not entitled to wait for the termination of the agency before he makes his claim. And the fact that he has a lien or a right of retainer in the case of claims for recoupment irrespective of the statute of limitations is no reason for holding that the statute itself does not run. In *Spears* v. *Hartly*(1), it was held by Lord Eldon that if by custom and usage of trade, a party was entitled to a lien on goods for a general balance, and he got possession of the goods of his debtor, he might hold them till he satisfied the whole demand, even though a part of it was barred by the statute of limitations. In *Curwen* v. *Milburn*(2), in which a question arose as to the lien of a solicitor on deeds and documents belonging to the clients, for amounts that had become barred, Lord Justice Cotton said:— "Statute-barred debts are due though payment of them cannot be enforced by action." The Court of Appeal held that the solicitor had a lien on the documents, and that it was the duty of the taxing master to tax all the items of the bill without regard to the statute of limitations The existence therefore of a right of retainer and of a lien would in no way prevent the operations of the statute Is there any rule of law that postpones the agent's claim to the termination of the agency or the general settlement of accounts? The agent has no duty apart from any special contract to spend his own moneys in the business of his agency. His expenditure therefore of moneys belonging to himself in the business of the agency would be recoverable under section 70 of the Contract Act. There is nothing to prevent his making his claim for recoupment immediately after he expended his own moneys. It seems to us clear that assuming that article 83 applied, the plaintiff was damnified when the expenses were incurred, and the suits instituted more than three years from that date would be out of time.

We think however that the Courts below were right in applying article 61 to this case. That relates to a suit for money payable to the plaintiff for money paid to the defendant. It was argued that this article was confined to cases where the defendant

(1) (1800) 6 R.R., 814. (2) (1889) 42 Ch.D., 424.

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was under a legal liability to make a payment. We see no reason for limiting the scope of the article. Cases falling under section 70 of the Contract Act are certainly covered by the language of this article.

In *Sentence* v. *Hawley*(1), where an agent had paid out of his own money for sugar bought by the principal it was held that the agent might sue the principal for the price as money paid to his use at his request. Applying article 61 we are of opinion that the suit is barred. The second appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Krishnaswami Ayyar.

1910. March 4.

KONDAPA RAJAM NAIDU AND OTHERS (DEFENDANTS), APPELLANTS,

v.

DEVARAKONDA SURYANARAYANA AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Incorporeal rights, enjoyment of, for less than the statutory period—Person in such enjoyment entitled to protection against trespassers.

It is well settled law that a trespasser, in enjoyment of land for less than the statutory period, is entitled to be maintained in possession against all persons except the true owner.

The same principle is applicable to incorporeal rights, such as rights to light and water-courses.

A person in enjoyment of a water course for less than 20 years is entitled to protection in such enjoyment against persons who have no right to such water-course.

SECOND APPEAL against the decree of T. T. Rangachariar, District Judge of Ganjám in Appeal Suit No. 89 of 1906, presented against the decree of T. Gopalakrishna Pillai, District Munsif of Chicacole, in Original Suit No. 367 of 1905.

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

(1) 13 C.B. (N.S.), 455.

* Second Appeal No. 468 of 1908.

BENSON AND KRISHNASWAMI AYYAR, JJ.

KONDAPA RAJAM NAIDU v. DEVARAKONDA SURYANARAYANA.

The Hon. The Advocate-General for appellants.

P. Narayanamoorthi for *V. Ramesam* for respondents.

JUDGMENT.—The plaintiffs were in enjoyment of a water course. For the purpose of this case, we may assume that they had not acquired an easement by prescription, for the enjoyment did not extend to 20 years. The defendants who have no manner of right to the water course or the land over which it flowed, obstructed the plaintiff's user. The District Judge has given the injunction asked for. It is argued by the learned Advocate-General that the plaintiffs not having acquired a complete title, they would not be entitled to restrain the defendants from interference. The law is well settled that if the plaintiff was in possession of land for less than the statutory period he would be entitled to protect that possession against any one but the true owner. We do not think that there is any distinction in principle because the right now claimed to be protected is in the nature of an incorporeal right in process of acquisition. Incorporeal rights are in many cases capable of possession just as much as rights to corporeal hereditaments. In *Jaffies* v. *Williams*(1), it was held by Baron Parke that a trespasser on adjoining land was not entitled to cause a subsidence by working mines to the prejudice of the mines in the plaintiffs' enjoyment though he had not acquired a title to the same. This was followed in *Elizabeth Bibby* v. *Carter*(2), where the plaintiff who had not acquired a title was held entitled to sue for damages against a trespasser on adjoining land who caused injury to the plaintiffs' buildings. The principle of these cases has been applied in India to cases of light where, before the right had matured, a trespasser interfered with it. (See *Jootoor Acchanna* v. *Vanamala Venkamma*(3) and *Dhuman Khan* v. *Muhammad Khan*(4).) We think that the District Judge is right in applying the same principle to the present case of a water course enjoyed for less than the prescriptive period. We must dismiss the second appeal with costs.

(1) 5 Ex., 792.
(2) 4 Hurlstone and Norman's Report, 153.
(3) (1895) 5 M.L.J., 24.
(4) (1897) I.L.R., 19 All., 153.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Krishnaswami Ayyar.

1910. February 21. March 7.

MUTHIA RAJA (SECOND DEFENDANT), APPELLANT IN BOTH,

v.

APPALA RAJA, MINOR BY HIS NEXT FRIEND MANGAMMAL AND ANOTHER (PLAINTIFF AND FIRST DEFENDANT), RESPONDENTS IN BOTH.*

Mortgagee of undivided share—Effect of subsequent partition—Mortgage takes effect on substituted share.

A mortgagee of an undivided share in common property, or of one of the joint properties before partition from one of the sharers is only entitled to proceed against the substituted property which falls to the share of the mortgagor at the partition unless the partition has been unfair or in fraud of the mortgagee.

SECOND APPEALS against the decrees of T. Varada Rao, Subordinate Judge of Tuticorin, in Appeal Suit Nos. 401 and 404 of 1906, presented against the decree of V. R. Kuppusami Aiyar, District Munsif of Srivilliputtur, in Original Suit No. 522 of 1905.

Suit for a declaration and to recover possession.

The facts of this case are fully set out in the judgment of the Subordinate Judge as follows:—

The first defendant and the plaintiff were the sons of one Periya Bangaru Raja by his senior and junior wives respectively. Peria Bangaru Raja died in May 1904. Owing to misunderstanding between his father and the first defendant, they lived separately and divided the produce from the family lands. On 30th October 1901, a partition was effected between the father and the two sons each of them taking a third share. The plaintiff and his father remained in enjoyment and possession of the two shares taken by them in partition until the latter's death. The father executed a deed on 15th April 1904, under which he gave his third share to the plaintiff. On the 27th July 1901, *i.e.*, about two months before the date on which lists of lands allotted in partition to the respective parties were made, the first defendant executed a registered mortgage deed to the second defendant,

* Second Appeal Nos. 411 and 412 of 1908.

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his father-in-law, for Rs. 600. Plaintiff in this suit sought for a declaration that this mortgage debt was not binding on the plaint lands, all of which fell to his share on partition. He also sought to obtain possession of the said lands alleging that they were trespassed upon in May 1904. The lower Court came to the conclusion that the alleged trespass in May 1904 was entirely false. The District Munsif gave the plaintiff a decree for one-third share in the plaint properties, on the ground that the mortgage created by the first defendant could not affect his share.

As regards the share of the deceased father, the District Munsif held that the plaintiff was barred by limitation as he had not sued within the prescribed period to set aside the document. On appeal, the Subordinate Judge held that no such suit was necessary, and that the second defendant was entitled to proceed only against the share allotted to the first defendant. He therefore decreed possession of the entire property, as the partition was not proved to be in fraud of the mortgagee.

Second defendant appealed.

K. Bashyam Ayyangar for appellant.

P. R. Ganapati Ayyar for *S. Srinivasa Ayyar* for first respondent.

JUDGMENT.—There is no ground for Second Appeal No. 411. It relates to the two-thirds share belonging to the plaintiff and his father. It must be dismissed with costs.

Second Appeal No. 412 relates to the one-third share in the suit properties which was originally the share of the first defendant. The mortgage by the first defendant was before the partition. At the partition the whole of the suit properties fell to the plaintiff's share. It is not alleged that the partition was otherwise than fair and equal. It was not in fraud of the mortgagee. The authorities are clear that a mortgagee of an undivided share in common property, or of one of the joint properties before partition from one of the sharers is only entitled to proceed against the substituted property which falls to the share of the mortgagor at the partition, unless the partition has been unfair or is in fraud of the mortgagee. The principle is well explained in Domat's Civil Law, section 1671. In *Byjnath Lall* v. *Ramoodeen Chowdry*(1), the Privy Council has adopted the

(1) (1873) 1 I.A., 106.

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same principle though the partition in that case was made by the Revenue authorities under a Regulation, and the partition, or Butwara proceedings had been started at the date of the mortgage, and the martgagee could not be a party to the proceedings under the Regulation. But the broad principle above referred to has been applied in numerous cases. See *Hem Chunder Ghose* v. *Thako Moni Debi*(1), *Amolak Ram* v. *Chandan Singh*(2), *Shahebzada Mahomed Kazim Shah* v. *Hills*(3) and *Hakim Lal* v. *Ram Lal*(4).

In the last case Mr. Justice Mookerjee has discussed and explained the rule at some length. We do not think that the decision in *Lakshman* v. *Gopal*(5) is opposed to it. In that case the partition was found to be in fraud of the mortgagee. It is pointed out by Mr. Justice Ranade that the mortgagee should have been made a party to the partition suit according to the practice in Bombay. The partition was, therefore, ordered to be re-opened so as to assign to the mortgagor-cosharer the properties which had come to the plaintiffs at the partition. That decision fully recognizes the authority of the Calcutta cases. We must therefore hold that the Subordinate Judge was right in decreeing possession to the plaintiff of the entire property.

We must dismiss the second appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Krishnaswami Ayyar.

AUDIRAZU VEERAYYA (PLAINTIFF), APPELLANT,

v.

AUDIRAZU SANGAYYA (FIRST DEFENDANT), RESPONDENT.*

1910. February 3, 4. March 1, 7, 14.

Hereditary Village Offices Act (Madras) III of 1895, s. 3—'Other' offices, meaning of.

The words 'other hereditary village offices' in clause 3 of section 3, Madras Act III of 1895 do not mean offices of a description different from those referred to in clauses (1) and (2) of the section but offices other than those in the localities dealt with by those clauses.

(1) (1893) I.L.R., 20 Calc., 533.
(2) (1902) I.L.R., 24 All., 483.
(3) (1908) I.L.R., 35 Calc., 388.
(4) (1907) 6 C.L.J., 46.
(5) (1899) I.L.R., 23 Bom., 385.

* Second Appeal No. 615 of 1906.

BENSON AND KRISHNASWAMI AYYAR, JJ.

AUDIRAZU VEERAYYA v. AUDIRAZU SANGAYYA.

A suit for the recovery of the office of karnam in an inam village falls within clause (3), and not clause (1) of section 3 of the Act, and is not cognisable by the Civil Courts.

SECOND APPEAL against the decree of M. D. Bell, District Judge of Kistna at Masulipatam, in Appeal Suit No. 438 of 1905, presented against the decree of K. Sundaram Chetty, District Munsif of Bezwada, in Original Suit No. 186 of 1904.

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

P. Nagabhushanam for appellant.

T. Prakasam for respondent.

JUDGMENT.—The suit is for the recovery of the karnam's office in an inam village in the Kistna district and of certain emoluments attached to that office. The Munsif decreed the claim to the office. The District Judge on appeal has dismissed the suit, holding that the Civil Courts have no jurisdiction. It is to be regretted that he has not pointed out the particular provision of the law under which the jurisdiction is ousted. But we think he has arrived at the right conclusion. We have had the case twice argued before us. On the first occasion it appeared to us that the case fell within clause 1 of section 3 of Act III of 1895. But, on a closer examination, we are satisfied that that clause does not apply. Madras Act IV of 1864 had no application to inam villages which were not for purposes of village administration grouped with ryotwari villages. The Government notification, dated the 25th of July 1878, did not therefore extend to the agraharam we have to deal with. Madras Act IV of 1893 which applied to local areas to which Act IV of 1864 was extended did not touch the suit agraharam. It is therefore clear that the office now in question does not fall within clause (1). This result is also made clear by the amendment made by Act IV of 1907 which repeals Madras Act IV of 1893 altogether, and modifies the language of clause (1) of section 3 of Act III of 1895. The suit, however, is governed by the Act as it stood before the amendment; but that the meaning was the same is borne out by the history of the enactment. Although we are clear that clause (1) does not apply, we think clause (3) does. It deals with other hereditary village offices in proprietary estates. The agraharam is a proprietary estate according to the provision in section 4 of Act III of 1895 read with section 4 of Act II of 1894.

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AUDIRAZU VEERAYYA v. AUDIRAZU SANGAYYA.

We have been somewhat exercised over the word "other." Clauses (1) and (2) deal with the office of village accountant among others. Is that office excluded from the purview of clause (3) by the word "other"? We think not. If the office of karnam were excluded by the word "other", there would be no meaning in excepting it from the offices in clause (3) by the further words "in proprietary estates wherein Regulation 29 of 1802 remains in force the office of village accountant." We ought therefore to put a construction on the phrase "other hereditary village offices" which does not render the exception meaningless, if we can possibly do so. By "other hereditary village offices" we may understand, not necessarily offices of a different description, but offices other than those in the localities dealt with by clauses 1 and 2. This construction will not exclude the office of karnam or village accountant from the "other hereditary village offices" in clause 3. We think this interpretation produces a result in accordance with the policy of the legislature as regards the determination of the tribunal which should deal with the succession to the office of karnams in inam villages. We are of opinion that the conclusion of the District Judge is right, and we dismiss the second appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Krishnaswami Ayyar.

RAMASAMY AYYANGAR (PLAINTIFF), APPELLANT,

v.

SHUNMUGAM PILLAI (REMOVED), RECEIVER AND MANAGER, PALACE ESTATE, AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1910. April 22. May 6.

Rent Recovery Act, Madras, VIII of 1865—Tenant, who is—Transfer puts an end to holding without notice to landlord—Tenant at the beginning of fasli is tenant for the fasli, notwithstanding subsequent transfer.

A transfer of the holding by the tenant puts an end to the tenancy without notice to the landlord, unless the tenant under certain circumstances is estopped from denying its continuance. There is nothing in the Rent Recovery Act to warrant a contrary view.

* Second Appeal No. 252 of 1907

BENSON AND KRISHNASWAMI AYYAR, JJ.

RAMASAMY AYYANGAR v. SHUNMUGAM PILLAI.

A tenant who is a tenant at the beginning of the fasli continues to be the tenant for the fasli, notwithstanding a subsequent transfer of the holding, and is liable to be proceeded against under the Rent Recovery Act.

SECOND APPEAL against the decree of F. D. P. Oldfield, District Judge of Tanjore, in Appeal Suit No. 544 of 1906, presented against the decree of A. N. Anantarama Aiyar, District Munsif of Tanjore, in Original Suit No. 419 of 1905.

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

S. Srinivasa Ayyangar for appellant. Only the actual tenant can be made to accept a patta, and only the subsisting tenant at the date of the tender of a patta is liable to pay rent. Here, the relations existing are those of melvaram and kudivaram holders rather that of landlord and tenant. In any case there cannot be a split patta.

S. Varadachariar, for the Hon. the Advocate-General, for respondent.

The usufructuary mortgagor of a leasehold who has entered into a muchilika with the landlord for twelve years is estopped from refusing to pay the rent when his interest ceases if no notice is given to the landlord of the transfer, and until notice is in fact given he cannot dispute the relationship of landlord and tenant.

[Krishnaswami Ayyar, J.—If the relationship has in fact ceased can estoppel be pleaded? No notice is required under the Rent Recovery Act.]

Further here the transfer took place during a fasli and so the relationship of landlord and tenant surely applies to that fasli.

Krishnamacharlu v. *Rangachariar*, (16 M.L.J., 489), referred to.

JUDGMENT.—The plaintiff was a usufructuary mortgagee of the tenant's interest in a holding under the Tanjore Palace estate, of which the defendant was the receiver. He sues for the recovery of a cow and calf distrained by the defendant for the rent of fasli 1314 and for damages. The mortgage was redeemed by one Raghaviengar, who was the purchaser of the equity of redemption on the 3rd September 1904. The defendant tendered a patta to the plaintiff on the 22nd June 1905, and distrained on the 21st August 1905. The plaintiff contends that he was not the tenant under the Rent Recovery Act for the suit fasli, and that the distraint was, in consequence, illegal. The District Judge is of opinion that, as the plaintiff gave no notice of the termination of his tenancy to the landlord, the distraint was legal. It has been held by this

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Court that there is no warrant in Act VIII of 1865 for the view that a tenant, who has validly transferred his holding, continues to be liable for future rent if he has not given notice to his landlord of the transfer. *See Vythilinga Pillai* v. *Natesa Mooppan*(1) *Narasigadu* v. *Butchereddi*(2) and *Kunjayee* v. *Chinnasawmy Odayan*(3). A transfer of the holding puts an end to the tenancy without notice to the landlord. Whether he may not be estopped from disputing the continuance of the tenancy under certain circumstances is another question. If the landlord has delivered the patta to the original tenant for the fasli in question and has been misled into not tendering it to the successor, the former tenant may be bound to pay the rent though he has not taken the produce. But, in the absence of estoppel, he ceases to be liable after the transfer of the holding. If the liability to rent is under a contract of lease the lessee would not by transfer cease to be subject to the obligations under the lease. *See* section 108, clause (*j*) of the Transfer of Property Act. But the kudivaramdar who is the tenant under the Rent Recovery Act is not in the same position. Though only a mortgagee, the plaintiff had for many years received patta from the landlord and executed his muchilika. But when the mortgage was discharged he ceased to be the tenant. There is no room for the plea of estoppel, for Raghaviengar, who paid off the mortgage, gave notice of it to the landlord on the 3rd February 1905 (*vide* exhibit E), and it is immaterial that it did not emanate from the plaintiff. The respondent, however, argues that the plaintiff was the tenant for the fasli in question as the discharge of the mortgage was not until the month of September in the fasli. It is true the instalments of rent are only payable from November, but the dates of payment do not affect the fact of tenancy for the fasli in question. Such tenancy having commenced on the 1st July, and it being competent to the landlord to tender a pattah and take a muchilika on that very date, it is impossible to treat the plaintiff as no longer tenant for the fasli after the transfer of September. Mr. Srinivasa Ayyangar rightly contended that the Act contemplates the tender of pattah only to one tenant of a holding, and not to successive

(1) Second Appeal No. 1213 of 1906 (unreported).
(2) Second Appeal No. 735 of 1908 (unreported).
(3) Second Appeal No. 1714 of 1908 (unreported).

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holders for the same fasli. If the plaintiff and not his successor would be liable in case the muchilika was executed by him at the commencement of the fasli, he would not cease to be liable if there was a mere tender of pattah early in the fasli or the tender was delayed till after the transfer of the holding. It is, however, pointed out that proceedings under the Act contemplate the subsistence of the relation of landlord and tenant when they are initiated, and some of the sections of the Act were relied on. We are not satisfied that this view is well founded. Sections 10, 12 and 41 presuppose, it was said, the tenant proceeded against being in possession of the holding. Sections 2, 8 and 9 were referred to as showing that, at the commencement of the proceedings, the parties occupied the relative position of landlord and tenant. Now this line of argument, if sound at all, proves too much. The parties are spoken of as landlord and tenant even when a fresh pattah in pursuance of the Court's decree has got to be tendered, or the latter institutes proceedings to set aside a distraint, or for the recovery of damages, even though, at that time, he may have parted with the holding. We think we are bound to reject this contention. A tenant is defined by the Act as including all persons bound to pay rent to the landholder. The obligation attaches to the person who is entitled to the holding during the fasli in question. If we are right in thinking that, when the fasli has commenced, the person entitled to the holding at the commencement of the fasli is bound to pay the rent without reference to the question of the time of payment, he is the tenant against whom proceedings may be instituted under the Act. Suppose a lessee, under section 13, for a term of years assigns the lease after the expiry of some years of the term, and is in arrears in respect of those years, is it to be contended that no proceedings under the Act can be taken against him for the arrears of those years because at the time of the institution of the proceedings he has parted with the remainder of the term? We must therefore hold that the transfer of the holding in September does not disentitle the landlord to distrain the plaintiff's cattle for the rent of fasli 1314.

The law with reference to distress in England appears to rest on a different footing and does not afford any assistance in determining a question falling under the Rent Recovery Act. At common law a distress could only be made during the continuance of the demise, although the tenant continued in occupation

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afterwards. *Williams* v. *Stiven*(1) Section 6 of 8 Anne, Cap. 14, authorised the distraint after the termination of the lease provided it was made within six months thereafter but during the continuance of the landlord's interest and of possession by the tenant. Again, it is said, the right to distrain depends upon the possession of the legal reversion. (See Foa's "Landlord and Tenant," page 485 and *Stavel* v. *Altcock*(2)). The goods distrained must be on the demised premises, Encyclopædia of the Laws of England, Vol. IV, page 291 (1st edition), and the right of distress extends to the goods of a stranger, page 294. In this country there is no right to distrain under the Transfer of Property Act and, where it exists under the rent law, there is no limitation as to the situation of the goods. We think the question of the legality of the distraint in the present case is governed entirely by the provisions of the Rent Recovery Act. As we have already stated, we are of opinion that the distraint was legal. We must dismiss the second appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Miller.

1910. March 8.

RANGANATHA RAO (SECOND DEFENDANT—JUDGMENT-DEBTOR), PETITIONER,

v.

ANANDA CHARIAR (PLAINTIFF—DECREE-HOLDER), RESPONDENT.*

Indian Insolvency Act, ss. 7, 27, 49—Salary earned by Insolvent after vesting order and before discharge vests in Official Assignee, who however must get an order under section 27.

The earnings of an insolvent, including salary, after his insolvency and before his discharge vest in the Official Assignee under section 7 of the Insolvency Act. The effect of section 27 of the Act is not to cut down the operation of section 7, but to require the Official Assignee before obtaining payment of any salary due to insolvent to obtain an Order of Court as to the amount necessary for the maintenance of the insolvent.

A judgment-creditor of the insolvent who is aware of the insolvency and whose judgment-debt is included in the schedule, cannot attach such salary without giving the Official Assignee an opportunity of obtaining an order under section 27.

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* Civil Revision Petition No. 391 of 1909.

(1) 9 Q.B.R., 14. (2) 16 Q.B.R., 636.

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The insolvent debtor has the right to object to such attachment as it is open to him to show that property attached as his belongs to another.

PETITION under section 25 of Act IX of 1887 praying the High Court to revise the order of A. N. Anantanarayana Aiyar, Subordinate Judge of Kumbakonam on E. P. No. 299 of 1909 in Small Cause Suit No. 329 of 1902.

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

P. Nagabhushanam for petitioner.

C. Narasimhachariar for *R. Sadagopachariar* for respondent.

JUDGMENT.—In this case it is stated, on behalf of the petitioner, that the order, as it stands, is not made against him but against his brother, but that the Subordinate Judge intended to make it against him and that it was applied for against him though he was wrongly styled first defendant in the application instead of second defendant. I have not rejected his petition as premature, because it appears that this mistake has been made and that all that is necessary is for the Subordinate Judge to have the necessary amendments made; and the respondent did not ask me to refuse the petitioner a hearing. It seems more satisfactory that I should dispose of the matter, both parties being willing, because if I hold the Subordinate Judge right he can get the amendments made and review his order so as to correct the mistake, while if I hold him wrong, it may be that no further proceedings will be necessary in the matter.

The petitioner is drawing a salary of 60 rupees a month. Some years ago, a vesting order was made against him under section 7 of the Indian Insolvency Act and he has since obtained his personal discharge under section 48. The respondent is a creditor who prior to the insolvency proceedings had obtained a decree against the petitioner and was among the creditors whose claims were entered in the schedule. He now attaches the petitioner's salary in execution of his decree, and the petitioner objects.

It seems to me that the view of Farran, J., *In the matter of C. M. J. Donaghue*(1) where he holds that salary vests in the Official Assignee under section 7 is correct, and that the effect of section 27 is not to cut down section 7 but to require the Official Assignee

(1) (1895) I.L.R., 19 Bom., 232.

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before he can obtain payment of the salary to obtain the Order of the Court as to the amount which is necessary for the maintenance of the insolvent.

In *In re Robers*(1) the Court of Appeal held that after bankruptcy and before discharge whatever property a bankrupt acquires belongs to his trustee save only what is necessary for his support. That was a case of personal earnings, but for this purpose there seems to be no material difference between personal earnings and salary and nothing in section 7 to suggest a contrary view in this country. The salary as I understand the matter, vests in the Official Assignee, but he cannot get any of it until the court makes an order under section 27.

It was argued that the debtor has no right to object to the attachment but no authority was cited in support of the contention, and I do not know of any good reason why a debtor should not be allowed to show, if he can, that property which is attached as his, does not belong to him but to some one else.

It remains to be considered what is the proper order to make under the circumstances. The decree is a decree of 1902, and the insolvent was according to his affidavit discharged under section 48 of the Indian Insolvency Act in that year. It is therefore not improbable that other creditors are still unsatisfied, and I think the Official Assignee should have an opportunity of obtaining on their behalf an order under section 27 before the Subordinate Judge's order of attachment is carried into effect. My order will therefore be that the execution be suspended under section 49 of the Indian Insolvency Act until the further order of the Subordinate Judge, leaving it to the respondent to take such steps as he may be advised, in order to bring the matter to the notice of the Official Assignee.

Paragraph 3 of the petitioner's affidavit which is not denied, shows that the respondent had the necessary notice of the insolvency proceedings. The respondent must therefore under section 49 pay the petitioner's costs here and below.

(1) (1900) 1 Q.B., 122.

APPELLATE CRIMINAL.

Before Mr. Justice Miller and Mr. Justice Krishnasawmi Ayyar.

1910. August 25.

EKAMBARASWARA IYER, PETITIONER,

v.

VEERABADRA THEVAN AND OTHERS, COUNTER-PETITIONER.

Criminal Procedure Code, Act V of 1898, s. 195—Sanction to prosecute—Jurisdiction—Subordination of Courts—Transfer of case out of local jurisdiction, power to.

A petition asking for sanction to prosecute for certain offences under section 195 (*b*) and (*c*), Criminal Procedure Code, Act V of 1898, should not be transferred to a Court to which the Court before which the petition for sanction was pending is not subordinate, as the sanction of such a Court would be ineffective.

The High Court cannot transfer a case under section 110, Criminal Procedure Code, to any Magistrate other than one within whose local jurisdiction the person is found against whom proceedings are instituted. *In the matter of the petition of Amar Singh* [(1894) I.L.R., 16 All. ,9.)].

Held, that the same principle applies to section 195, Criminal Procedure Code.

APPLICATION to the High Court praying for the transfer of Criminal Miscellaneous Petition No. 27 of 1910 from the file of the Sessions Court of Madura to that of some other Sessions Court.

A petition was filed in the Sessions Court of Madura asking for sanction to prosecute a person for offences under section 195 (*b*) and (*c*) of the Criminal Procedure Code, Act V of 1898, alleged to have been committed before that Court. The petitioner now applied to the High Court under section 526, Criminal Procedure Code, to transfer the above petition to some other Sessions Court.

M. K. Narayanaswami Ayyar for petitioner.

Dr. *S. Swaminadhan* for counter-petitioners.

ORDER.—This is an application for transfer of a petition to grant sanction to prosecute a person accused of offences falling within clauses (*b*) and (*c*) of section 195 of the Code of Criminal Procedure. That section enacts that no Court shall take cognizance of any of the offences enumerated in clauses (*b*) and (*c*) of the section except with the previous sanction or on the complaint of the Court

* Criminal Miscellaneous Petition No. 258 of 1910.

SANKARAN-NAIR, J.

MUTHU PILLAI *v.* EMPEROR.

any other clause, a finding that he is an habitual offender under the other clause may be taken into consideration when deciding the charge under clause (*f*) it is unnecessary to consider and probably it will not be of any practical use to consider that question, as in that case an order could be passed, without reference to clause (*f*). But I am clearly of opinion where a person is solely charged under clause (*f*) evidence of general repute is not admissible, as a provision of law which is an exception to the general rules of evidence must be only applied to the cases to which it is confined by the legislature. Excluding such evidence, there is none to support the order appealed against and it is accordingly set aside.

PRIVY COUNCIL.

SRINIVASA MOORTHY (DEFENDANT),

v.

VENKATA VARADA AIYANGAR AND ANOTHER (PLAINTIFFS).

P.C.* 1911. Feb. 1, 2, 3. May 9.

[On appeal from the High Court of Judicature at Madras.]

Jurisdiction—Letters Patent, High Court, clause 12—"Dwelling" within the jurisdiction of the Court—Executor, Liability of—Repudiation of will—Executor and trustee setting up adverse title to property disposed of by will—Estoppel—Removal of trustee and executor from office—Joint and acquired property.

This was a suit on the Original Side of the High Court by three of the executors and trustees of a will against the fourth executor and trustee, (who was the son of the testator) for the removal of the defendant from his office and for administration of the estate by the Court. Probate had been granted to the executors by the High Court at Madras and the assets realised under the grant had come into the possession of the defendant who subsequently repudiated the will and alleging that the property of the testator was joint claimed in this suit to be entitled to the estate by survivorship. The defendant was domiciled and resided in the State of Mysore, but some months previously to the institution of the suit he left his house there in charge of a servant, and hired a house in Madras to which he brought his wife and family, and apprenticed himself for a year to a Vakil of the High Court with a view to become in due course enrolled as a vakil himself. He was in Madras on 30th April 1901 when the plaint was filed, but left on 31st before the summons was served. The First Court made a

* *Present*:—Lord MACNAGHTEN, Lord ATKINSON, Lord ROBSON, and Sir ARTHUR WILSON.

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decree removing the defendant from his office as executor and trustee which was affirmed by the High Court, and both Courts decided that the cause of action arose partly within the jurisdiction of the Court, and that the Court could therefore entertain the suit.

Held (affirming the decision of the High Court) that the defendant was at the time the suit was brought "dwelling" within the jurisdiction within clause 12 of the Letters Patent of the High Court.

Held also that no person who has accepted the position of a trustee and has acquired property in that capacity can be permitted to assert an adverse title on his own behalf until he has obtained a proper discharge from the trust with which he has clothed himself. On the question whether the property dealt with by the will was joint or acquired, their Lordships of the Judicial Committee also agreed with the Courts below that on the evidence it was self-acquired and that the testator therefore had power to dispose of it as he had done in the will.

APPEAL from judgments and decrees* (11th January and 1st March 1906) of the High Court at Madras in its appellate jurisdiction which respectively affirmed and varied decrees (11th October 1904 and 16th March 1905) of the same Court on its Original Side; and also from a decree (12th July 1904) of the same Court.

The suit out of which this appeal arose was instituted in the High Court of Madras, on 30th August 1901, by three of the executors of the will (dated 3rd August 1892) of one Venkatavarada Aiyangar, against the remaining executor, the present appellant who was the son of the testator. It was brought to remove the defendant from the office of trustee and executor, to compel him to account for the assets of the deceased which had come into his hands, and to have the trusts of the will carried out and the estate administered.

The testator at the time of his death (24th August 1892) was domiciled in the State of Mysore, but he left property in the Presidency of Madras, and also property in the jurisdiction of the British Court of the Civil and Military Station at Bangalore. Probate was granted to the four executors by the said Court at Bangalore, and on 20th February 1893 they applied to the High Court at Madras for, and eventually obtained on 5th May 1893, probate to enable them to deal with the property situate in that Presidency.

The defendant undertook the management of the testator's estate and duly fixed the usual inventory and account in the High Court; and for some time he acted on the provisions of the will;

* I.L.R., 29 Mad., 239.

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but in August 1898 he intimated to the plaintiffs and to the legatees that he repudiated his position as executor and trustee under the will, as he found that the property referred to in it was joint property of himself and his father over which the latter had no power of testamentary disposition, but to which he (the defendant) had title by survivorship. Hence the suit.

Leave to institute the suit had been obtained under clause 12 of the Letters Patent of the High Court. Against that order the defendant preferred an appeal which was, however, dismissed by an order, dated 12th July 1904.

The defence was that the property disposed of by the will constituted the joint estate of the testator and the defendant of which fact he was ignorant at the time of his application for probate; and that the testator had no power to dispose of it as he had done in the will; that the suit was a suit for land within the meaning of clause 12 of the Letters Patent of the High Court; that the defendant did not at the time of the institution of the suit "dwell" within the ordinary original civil jurisdiction of the High Court; that no part of the cause of action had arisen within the jurisdiction of the High Court; and that the testator, the defendant, the plaintiffs and the legatees were all foreigners domiciled in the Mysore State; the property, the subject matter of the suit, was situate in the said State; and the trusts created by the will were to be executed in the said State.

The issues raised on the pleadings, so far as they are now material were: (1) Has this Court no jurisdiction for the reasons set out in the written statement, on any and which of them? (2) Was the defendant a trustee under the will and did he act as such? Is he estopped by his conduct from denying that he was a trustee under the will? (7) Are any and if so which of the properties dealt with by the will properties which the testator was not capable of disposing of by will?

Mr. JUSTICE MOORE before whom the suit came gave a preliminary judgment on 11th October 1904 in which he held on the first issue that the suit was not one for land within clause 12 of the Letters Patent; that the defendant did not "dwell" within the limits of the jurisdiction of the High Court at the date of the institution of the suit; that some part of the cause of action arose in Madras, and thus the High Court had jurisdiction to entertain the suit, a jurisdiction which was not ousted by the fact that the

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defendant was a foreigner domiciled in the State of Mysore. On the second issue he came to the conclusion that the defendant was a trustee under the will and had acted as such, but he expressed no opinion on the question of estoppel. In regard to the seventh issue he was of opinion that the testator was in possession of ancestral property and also of self-acquired property; that he could not ascertain how much of the testator's wealth was attributed to one source rather than to the other, and that the true test was, having regard to the position and means of the testator, whether the sums of money bequeathed by his will were in excess of the amounts he might during his life time have gifted to members of his family; and applying this test he decided in favour of the validity of the bequests. In the result he made a preliminary decree removing the surviving plaintiff (two having died after the suit was brought) and the defendant from their office as executors and trustees under the will, and directing the usual enquiries and accounts. After the accounts had been filed Mr. Justice MOORE delivered a final judgment on 16th March 1905 in which he decreed to each of the legatees under the will the arrears of money due to them with interest at 6 per cent. per annum, and appointed a receiver of the whole of the testator's estate to carry out the trusts of the will; and in accordance with that judgment a decree was made.

An appeal from the decree of 11th October 1904 came before Sir ARNOLD WHITE, C.J, and Mr. Justice SUBRAHMANIA AYYAR who held that the Court had jurisdiction in the case for the reason that the cause of action had arisen at any rate in part within the local limits of the jurisdiction of the Court and for the further reasons that the defendant was "dwelling" within the meaning of clause 12 of the Letters Patent, and was actually present at the time of the institution of the suit within the limits of the ordinary original civil jurisdiction of the Court: and also were of opinion that the will was not inoperative by reason of the character of the property, finding that the testator had, as he was entitled to do, kept his own earnings separate from the property which had come to him at the time of a partition which had taken place between him and the defendant.

Against the decree of the 16th March 1905 the defendant filed an appeal which was in all essential matters dismissed by the Appellate Court (Sir ARNOLD WHITE, C.J., and Mr. Justice BENSON).

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The judgments of the Appellate Court, dated 11th January 1906, will be found at pages 244 to 282 of I.L.R., 29 Mad., where the facts are fully stated in the judgment of Mr. Justice SUBRAHMANIA AYYAR at page 257. The judgments of the Appellate Court (Sir ARNOLD WHITE, C.J., and Mr. Justice DAVIES), dated 11th September 1900, in the suit brought by the daughter of the testator against the executors which was dismissed because the defendant was not then within the jurisdiction of the Court, and leave of the Court under clause 12 of the Letters Patent had not been obtained are also reported in a footnote at pages 239 to 282 of the same volume.

On this appeal.

Cohen, K.C., DeGruyther, K.C., and *S. A. Kyffin* for the appellant contended that the High Court on its Original Side had no jurisdiction; the appellant was domiciled and resided in the Native State of Mysore and was therefore a foreigner and not subject to the jurisdiction of the Court; and though he was at the time of suit visiting Madras, it was only a temporary residence and did not render him subject to the jurisdiction under clause 12 of the Letters Patent by reason of his "dwelling" there. As to the appellant being now estopped from impeaching the validity of the will, if what he had done amounted to an admission, it was an admission on a question of law which did not bind him. *Juttendro Mohun Tagore* v. *Ganendro Mohun Tagore*(1). [Sir *R. Finlay*.—The respondents' contention is that the appellant could not dispute the will because he had taken possession under it as executor.] At that time he was not aware of the nature of the property, or that he himself had any claim to it. On the question whether the property was joint or self-acquired reference was made to Mayne's Hindu Law, 7th Edition, page 348, section 277; page 352, section 281; and page 363, section 289. *Luximon Row Sadasew* v. *Mullar Row Rajee*(2); *Dhurm Das Pandey* v. *Mussumat Shama Soondri Dibiah*(3); *Rampershad Tewarry* v. *Sheo Churn Doss*(4); *Mahomed Sidick* v. *Haji Ahmed*(5); *Lal Bahadur* v. *Kanhaiya Lal*(6); *Anandrao Ganpatrao* v. *Vasantrao*

(1) (1873) L.R.I.A., Sup, Vol. 47 at p. 71.
(2) (1831) 2 Knapp, P.C., 60.
(3) (1843) 3 M.I.A., 229 (240).
(4) (1866) 10 M.I.A., 490 (505).
(5) (1885) I.L.R., 10 Bom., 1 (15, 16).
(6) (1906) I.L.R., 29 All., 244 (255). L.R., 34 I.A., 65 (68).

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Madhavrao(1) decided by the Judicial Committee of the Privy Council on 7th February 1907; and Evidence Act, 1872, section 32, clause (3), as to statements made by persons against their own interests; it being submitted that on the evidence it was shown that there was a nucleus of ancestral property, and therefore there was a presumption that the property was joint, and the onus was consequently on the respondents to show that it was self-acquired. On the 7th issue it was contended that the decision of the first Court that the testator in making the bequests in clauses 7 to 12 of the will was not dealing with any property which he could not have alienated by gift *inter vivos*, was contrary to the

(1) (1907) Appeal from High Court, Bombay—*Present.*—Lord DAVEY, Lord ROBERTSON, Sir ANDREW SCOBE, and Sir ARTHUR WILSON. The judgment was delivered by LORD ROBERTSON.—The suit in these proceedings is for partition of family property, and the main question in dispute is whether the property is joint and ancestral. The suit was instituted on 2nd July 1901, in the High Court at Bombay, by the first respondent in this appeal, who will be referred to as the respondent. The appellants were defendants; and, shortly stated, their defence was (1) that the property in dispute was not joint ancestral estate; (2) that the suit was barred by limitation; (3) that the respondent was prevented from suing by a certain release, dated 28th January 1889. The Judge of first instance, Mr. Justice TYABJI, decided the case in favour of the appellants, on the ground of limitation. This question has occupied, in the argument before Their Lordships, a position of subordinate importance, and the respondent is entitled to point to the judgment of Mr. Justice Tyabji as in no way adverse to his main contention that the property was joint and ancestral. An appeal having been taken, the Appeal Court, on 5th September 1904, reversed the decree appealed against and declared the respondent entitled to one-half of the property as joint ancestral property. The present appeal is against this judgment.

The judgment is voluminous and detailed, and Their Lordships do not find it necessary, in affirming this judgment, to recapitulate the details, as a comparatively limited number of facts are decisive of the question. The two salient features of the case are that this family lived joint, in one house, and that there was a nucleus of joint property. The former of the facts is undisputed, and of the latter the Chief Justice says: "As to the character of the Worli property there has been no dispute before us." The effort of the appellants in the present appeal has been to disparage the importance of the Worli property in comparison with the existing estate. This argument, however, is deprived of much of its force by the fact that the comparison is with the enhanced value of the more recent acquisitions, and Their Lordships find sufficient evidence that the Worli property was of substantial value, and when it was sold some of the proceeds, were used in defraying the cost of rebuilding the new house in which the joint family lived.

This being so, a nucleus exists and the family is joint. The onus is therefore on the party setting up a case of separate estate. Now the case of the appellants, such as it is, fails to establish any independent or separate source of affluence and indeed, is really rested upon certain instruments by which the grantors purported to deal with the property in question as if it were separate estate. As against those documents, there has to be set a series of family books and various contracts and transactions inconsistent with anything but joint property. But, over and above such items of evidence, the tenor of family life proves the use of the property to have been the same after as before the execution of those instruments.

Their Lordships therefore find in the broad facts of the case an answer alike to the claim of separate property and also to the plea of limitation. There has been no exclusion of the respondent from use and enjoyment for the period of limitation. In these circumstances it is unnecessary to rehearse or examine what are merely paper assertions not brought home to the knowledge of the persons said to have been affected by them. It must also be borne in mind that, on the assumption, which is now made, that the estate was ancestral, the respondent took, at his birth in 1884, a right in the estate independent of his father; and by none of the transactions in question, including the release of 1889, has he parted with that right.

The principles governing the case have been rightly applied in the elaborate judgment of the Chief Justice, and Their Lordships will humbly advice His Majesty that the appeal ought to be dismissed. The appellants will pay the costs of the appeal.

(1) (1873) L.R.I. A., Sup., Vol. 47 at p. 71.

(2) (1848) 2 De., Gex. & Sivale, 122 (163). (3) (1861) 30 Beav., 461.

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Hindu law, and *Juttendro Mohun Tagore* v. *Ganendro Mohun Tagore*(1) was referred to.

Sir R. Finlay, K.C., and *Kenworthy Brown* for the respondents contended that there was no doubt the Court had jurisdiction to entertain the suit, because the cause of action arose, at any rate in part, within its jurisdiction; and because the appellant was actually residing in Madras when the suit was instituted; a further reason was that the appellant by applying for probate of the will, and giving the required undertaking to administer the property under it, thereby subjected himself to the jurisdiction of the Court which had granted him probate. In the circumstances of the case the appellant was precluded from denying the High Court's jurisdiction to entertain the suit. He was also estopped from disputing the validity of the will. No honest man could undertake to act on the terms of a will as a trustee or executor must do, and afterwards dispute his responsibility; that defence, it was submitted, was not open to the appellant. He took possession of all the properties under the will. Where a person knowingly and expressly acquires the possession of property as a trustee he could not be allowed to assert against the trusts at least as defendant in a suit seeking the performance of the trusts, any title paramount and adverse to the trusts which he may himself have. Reference was made to *Attorney-General* v. *Munro*(2); *Newsome* v. *Flowers*(3); Indian Trusts Act (II of 1882), section 14, and Evidence Act (I of 1872),

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section 115; and *Sarat Chunder Dey* v. *Gopal Chunder Laha*(1) which laid down the law of estoppel in such cases. Evidence was gone into to show that the conduct of the appellant in dealing with the property was such as to estop him from denying his liability on the validity of the bequests in the will. As to the nature of the property dealt with by the will it was contended that the question whether it was ancestral, and therefore joint, or was self-acquired was a question of fact, and that there were concurrent findings of the two Courts below that it was acquired and not joint property, and that the testator had full power to dispose of it by will as he might have done *inter vivos*. *Baboo Beer Pertab Sahee* v. *Rajender Perdab Sahee*(2); Mayne's Hindu law, 7th edition, pages 349, 350, section 278; pages 367, 368, section 291; and Strange's Hindu Law, volume II, page 214, were referred to, and the cases cited for the appellant on the question whether the properties were self-acquired or joint were distinguished. No nucleus of joint property was shown, and it was submitted that the decision of the High Court on appeal that the testator had kept his own earnings separate from what had come to him from an ancestral source was correct; and that the onus was therefore on the appellant to show that the property was joint, an onus he had not discharged.

Dr. Gruyther, K.C., in reply referred to the Probate and Administration Act (V of 1881), section 4, as to the position of an executor: as to the nature of the property, he cited, in addition to the cases and authorites previously referred to, *Hurpurshad* v. *Sheo Dyal*(3); and Mayne's Hindu Law, page 357, section 285; and page 367, section 291.

Appeal Dismissed.

Solicitors for the appellants: *Rawle Johnstone & Co.*

Solicitors for the respondents: *T. L. Wilson & Co.*

1911, *May 9th.*—The judgment of their Lordships was delivered by Lord Macnaghten.

This is an appeal from the judgment of the Madras High Court in a suit for the administration of the trusts of the will of Venkatavarada Iyengar, who died on the 24th of August 1892, domiciled in the State of Mysore. The judgment under appeal

(1) (1892) I.L.R., 20 Calc., 296; L.R., 19 I.A., 203.
(2) (1867) 12 M.I.A., 1 (38). (3) (1876) L.R., 3 I.A., 259 (277).

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affirmed in substance the decision of MOORE, J., sitting on the riginal side oof the Court.

The appellant, who was the only son of the deceased, was one of the executors and trustees named in his will and sole residuary legatee. He joined in obtaining probate. He took upon himself the management of the estate and possessed himself of all the assets. For some years he acted in execution of the trusts of the will. Called upon to account and charged with various breaches of trusts he now asserts that the will was wholly inoperative and that the entire estate was joint family property, and that it belongs to him in his individual capacity by right of survivorship.

To such a contention advanced under such circumstances it would be a sufficient answer to say that no person who has accepted the position of trustee and has acquired property in that capacity can be permitted to assert an adverse title on his own behalf until he has obtained a proper discharge from the trust with which he has clothed himself. But out of respect for the arguments of Counsel at the Bar and the elaborate judgments in the Courts in Madras, it will be proper to deal shortly with the facts of the case and the grounds of the decision under appeal.

The testator was born at Madura in 1834. He was the son of Srinivasa Iyengar, who was Treasurer of the Collector of Madura. In March 1854, after a quarrel with his father, he left the family house and went to Mysore. He maintained himself there by his own exertions. He held various appointments under the Mysore Government, and got together a considerable sum of money in his father's lifetime. His father died in 1864, and a partition was then effected between the testator and the other members of the family. On the partition the testator received as his share a sum of money which, after recouping him for his outlay on account of his father's funeral and on account of other family expenses, amounted to about Rs. 7,000.

The testator continued to improve his fortune after his father's death. His estate when he died was worth about four lakhs of rupees. He left a widow and an only daughter as well as his son surviving him.

The testator's will was dated the 3rd of August 1892. He named as executors his son and four other persons. One of those four persons did not prove the will or intermeddle with the estate. The other executors were N. T. Venkatavarada Iyengar, the first

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respondent, Biligiri Ayyangar, an attorney of the Madras High Court (now deceased), and Krishna Iyengar (also now deceased). After stating that he had given certain jewels to his son the testator proceeded to declare his will as follows :—

"I have from time to time written and kept list of these and of all my other principal ancestral and self-acquired properties. My son Rajasvi Srinivasa Moorthi (may he live long), and after him his heirs, shall get all these and all my other estate, subject to the conditions mentioned hereunder, and others have no right thereto."

Then followed certain bequests. Provision for the daughter was made in paragraphs 10, 11 and 12, which were to the effect that Rs. 40,000, being four-fifths of the sum for which the testator's life had been insured, should be settled on her and her children. The remainder of the insurance money was to go to the widow for life.

Shortly after the testator's death the appellant and the three other executors who proved the will obtained probate in the Court of the British Cantonment at Bangalore, and on the 20th of February 1893 they applied to the Madras High Court for probate, limited to the Presidency of Madras.

On the 5th of May 1893 probate was issued to the appellant and the other three executors, and the usual undertaking was given by them to administer the estate and exhibit an inventory.

On the 4th of May 1894 the appellant filed a partial inventory showing that Rs. 65,146 had been realised in the Presidency town. The sum of Rs. 50,000 was also received from life policies.

For some time the appellant made payments to the daughter and the widow as interest on the fund in his hands.

In August 1898 the appellant wrote to his co-executor Biligiri repudiating his position as trustee, and stating that the will was invalid on the ground that all his father's property was joint family property, and belonged to him as survivor.

In the month of September 1898 he filed an affidavit in the Madras High Court setting up the same case.

In 1899 the daughter brought a suit against the appellant and his co-executors, but as the leave of the Court had not been obtained in accordance with section 12 of the Letters Patent for the High Court, the suit was dismissed against the appellant who was not then within the jurisdiction of the Court. Accounts

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were directed as against the other executors, but no further steps were taken in that suit.

In August 1901 the appellant's co-executors brought the present suit against the appellant alleging various breaches of trust on the part of the appellant in which they seem to have participated to some extent themselves. They alleged that the assets realised in the Madras Presidency in the hands of the appellant were more than sufficient to enable them to carry out the trusts of the will, and they asked for the usual accounts, administration of the estate, and removal of the defendant from the office of trustee. The plaint was afterwards amended by striking out the names of the two plaintiffs who died pending the suit.

On the 11th of October 1904, MOORE, J., delivered judgment, ordering that the surviving plaintiff and the defendant should be removed from their office as executors and trustees under the will, and directing the usual accounts to be taken with liberty for all the beneficiaries to come in and prove their claims.

On the 16th of March 1905, MOORE, J., made a final decree appointing a receiver and directing certain payments in accordance with the result of the accounts which had been taken.

The defendant appealed to the High Court from both decrees. The High Court dismissed both appeals with costs, and ordered the appellant to pay into Court on or before a day named in the order Rs. 1,15,000, with interest, to answer the amounts found due from him, with directions to the receiver in case of default to raise the required amount out of the estate and to execute the decree as if it were a decree in his favour for that sum.

From this decree, which is dated the 1st of March 1906, and the other orders and decrees made in the suit, the defendant appealed to His Majesty in Council. The argument of the learned Counsel at the Bar was addressed to (1) the question of jurisdiction, and (2) the question as to the nature of the testator's estate.

The question of jurisdiction is too plain for argument. Both Courts held that the cause of action arose partly within the jurisdiction of the High Court, and although the Judge of First Instance thought himself bound by a decision which had really no application to the case to hold (contrary to his own opinion) that the defendant was not "dwelling" within the jurisdiction, the High Court not unnaturally thought that inasmuch as he had taken up his abode with his wife and family in a hired house in

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Madras, meaning to remain there several months, and was actually living there when the suit was instituted, he could not be heard to say that he was not "dwelling" within the jurisdiction of the High Court.

As regards the second question both Courts rejected the defendant's contention. In the High Court SUBRAHMANIA AYYAR, J., with whom the Chief Justice agreed, held that it could not be doubted that "the testator kept his own earnings separate from the property that came to him at the time of the partition," and also that there was no doubt "that the testator left at his death documents which would clearly show how much of the assets left by him were his own acquisition and therefore at his disposal." All the testator's papers came at his death into the hands of the defendant, and the inference which the learned Judges drew from the evidence in the case was that the material documents were withheld by the defendant because they would disprove his story. Both Courts took a view of the defendant's character not altogether favourable. He was a person of some education, with some knowledge of the rights of members of an undivided family, and an astonishing disregard of truth.

Their Lordships see no ground for dissenting from the conclusion at which the learned Judges of the High Court have arrived, and in the result they will humbly advise His Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for the appellant: *Chapman, Walker* and *Shephard.*

Solicitors for the first, seventh, eighth and ninth respondents: *Douglas Grant*, J.V.W.

APPELLATE CIVIL (FULL BENCH).

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

1910. March 1, 2, 11 August 9, 16.

IBURAMSA ROWTHAN AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

THIRUMALAI MUTHUVEERA THERUVENKATASAMI NAICK AND OTHERS (FIRST DEFENDANT, LEGAL REPRESENTATIVES OF SECOND DEFENDANT, THIRD DEFENDANT, AND LEGAL REPRESENTATIVE OF FIRST DEFENDANT), RESPONDENTS.*

Hindu Law—Partition—Alienee from Co-parcener may sue for partition of that Co-parcener's share only.

When certain items of family properties are conveyed by one of two Co-parceners of an Hindu family to a stranger for purposes not binding on the family, the alienee from the other Co-parcener of his share in the said properties may, without instituting a general suit for partition of the entire family property, maintain an action for the partition of his share in the said items.

SECOND APPEAL against the decree of V. Swaminatha Aiyar, Subordinate Judge of Madura (West), in Appeal Suit No. 19 of 1906, presented against the decree of B. Krishna Rao, District Munsif of Periakulam, in Original Suit No. 322 of 1905.

The facts of this case are fully set out by BENSON and KRISHNASWAMI AYYAR, JJ., in the order of reference to a Full Bench which is as follows:—

ORDER OF REFERENCE TO A FULL BENCH.—In this case the first and second defendants are members of a joint family owing several items of property in common. Some of the items had been sold to the third defendant by the first. The plaintiff, having purchased the second defendant's interest in the said items, sues for partition. The Courts below have dismissed the suit as one for a partial partition and therefore not maintainable. The plaintiff appeals. It is an accepted rule of the Hindu law that a suit for partition should embrace the whole family property (see Mayne on 'Hindu Law,' page 668 (7th edition)). No tenets of the Hindu law have been cited nor have we discovered any as regards the foregoing rule. The rule in 'Manu,' chapter IX, verse 47, "once is the

* Second Appeal No. 88 of 1907.

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partition of an inheritance made?' does not deal with suits for partition whether of the whole or of portions of the common property but only forbids the reopening of a partition once made. Kulluka Bhatta makes this clear in his commentary on the verse. That it only relates to the prohibition of reopening the partition is made further clear by the further directions contained in the same verse "once is a maid given in marriage and once does a man say I will give." Verse 218 of the same chapter of 'Manu,' which provides for the partition of property afterwards discovered, does not necessarily lead to the inference that a partition must be complete (see 'Smriti Chandrika,' chapter 14, paragraph 10). It cannot be denied that it is open to the members of a joint family by mutual consent to divide the properties piecemeal. The prohibition therefore against a partial partition, though administered as a part of the Hindu Law, is more a creature of judiciary law than of the Hindu law-givers. As observed by West and Buhler in their 'Digest of Hindu law,' page 700—"Though partial division is of very frequent occurrence in practice, the law books do not contain any special rules on the subject." It is on general principles and actual decisions, as observed by the same authors, that the rule against a partial partition is based. It will be seen from the cases collected by Mayne in note (*l*) at page 668 and by West and Buhler in note (*c*) at page 699 that the Courts have always refused to make a partial partition at the instance of one co-parcener against others; nor is the rule confined to co-parcenary property. Even where the parties are only co-sharers or tenants-in-common, partition of certain of the items only has been ordinarily refused (see *Parbati Churn Deb* v. *Ain-ud-deen*(1) and *Ramasami Chetti* v. *Alagirisami Chetti*(2)), though, if it could be effected without much inconvenience to other sharers, a partial partition has not been held to be absolutely barred. See *Radha Kanta Shaba* v. *Bipro Das Roy*(3), *Syed Habibur Rasul Abul Faiz* v. *Ashita Mohan Ghosh*(4), *Uma Sundari Debi* v. *Benode Lal Pakrashi*(5) and Appeals Nos. 183 and 184 of 1907. The question however is more complicated where a stranger has become the purchaser of the interest of one of the co-parceners. In this case

(1) (1881) I.L.R., 7 Calc., 577. (2) (1904) I.L.R., 27 Mad., 361.
(3) (1904) 1 C.L.J., 40. (4) (1908) 12 C.W.N., 640.
(5) (1907) I.L.R., 34 Calc., 1026.

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different views have been held according as the suit is by the stranger purchaser to obtain possession of the share of the vendor by partition or by the member of the family against the stranger to recover his share of the property alienated. In *Venkatarama* v. *Meera Labai*(1), *Venkayya* v. *Lakshmayya*(2) and *Palani Konan* v. *Masa Konan*(3) a suit for partial partition by the purchaser of a share of a co-parcener in one item of family property was held not maintainable. The principle of these cases has been stated to be that, as no member of a joint Hindu family can predicate for himself that he is entitled to a particular share until partition, so he cannot also claim any particular part or a share in any item of the family property as his own until a partition is effected and the purchaser of his interest can only be assigned any property as representing the share of his vendor after all the accounts between the members of the family are adjusted and the mutual equities ascertained. In *Appavier* v. *Rama Subba Aiyan*(4) Lord Westbury delivering the judgment of the judicial committee made the well-known observations about the character of a joint Hindu family—"According to the true notion of an undivided family in Hindu law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property that he, that particular member, has a certain definite share. No individual member of an undivided Hindu family could go to the place of the receipt of the rent and claim to take from the Collector or Receiver of the rents a certain definite share. . . . But when the members of an undivided family agree among themselves with regard to particular property that it shall thenceforth be the subject of ownership in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with." It is on this principle that the alienee of the interest of one member of the co-parcenary or even of the interest of a sharer in common property has been held not entitled to sue for the partition of the item alienated without a general partition of the entire common property. It has however been held that when a sharer in co-parcenary property sues an alienee from another co-parcener of his interest in a portion of the common family property, he is entitled to

(1) (1890) I.L.R., 13 Mad., 275. (2) (1893) I.L.R., 16 Mad., 98.
(3) (1897) I.L.R., 20 Mad., 243. (4) (1866) 11 M.I.A., 75.

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recover his share in the property alienated (see *Venkatachella Pillay* v. *Chinnaiya Mudaliyar*(1), *Chinna Sanyasi* v. *Suriya*(2) and *Subramanya Chettyar* v. *Padmanabha Chettyar*(3)). It may at first sight seem difficult to account for the difference. It may be asked why should there not be equities amongst the members of the family to be adjusted which might result in the alienee getting no portion of the property transferred to him. It may also be asked why should not the equity in favour of the purchaser require the assignment of the entire property and not merely of a share to the purchaser. There is authority in favour of the purchaser's equity being so worked out (see *Koer Hasmat Rai* v. *Sunder Das*(4) and *Aiyyagari Venkata Ramayya* v. *Aiyyagari Ramayya*(5)). But if the purchaser of the interest of a co-parcener in a part of the family property has not sued to enforce a partition and the assignment of the whole of the items alienated in consequence of the equities in his favour, the other co-parceners are not precluded from recognising the transaction as valid to the extent of the share of the alienor and seeking a division of their shares in the property transferred, reserving for a future occasion the enforcement of their right to a partition of the remaining common family property. The authority of the Madras cases above referred to has been too well established to be questioned at this time of the day. A difficulty however has been felt as regards cases where all the co-parceners have severally alienated their respective interests in some items of common family property. In *Subbarazu* v. *Venkataratnam*(6) it was pointed out that a suit between purchasers of the interests of the co-parceners is not governed by the principle of the decision in *Venkatarama* v. *Meera Labai*(7) against the purchaser of the interest of the sharer in some items of family properties suing for a partial partition. In that case however the plaintiff purchaser had acquired the title of all the co-parceners and sued to eject a mortgagee with possession of the moiety of one of the sharers and the suit was not one for a partition. In *Kadegan* v. *Periya Muṇusami*(8) it was held that the alienee from one member of the co-parcenary of his interest in some of the family properties could sue for partition of his

(1) (1870) 5 M.H.C.R., 166.
(2) (1882) I.L.R., 5 Mad., 196.
(3) (1896) I.L.R., 19 Mad., 267.
(4) (1885) I.L.R., 11 Calc. 396.
(5) (1902) I.L.R., 25 Mad., 690 at p. 718.
(6) (1892) I.L.R., 15 Mad., 234.
(7) (1890) I.L.R., 13 Mad., 275.
(8) (1903) (13) M.L.J., 477.

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vendor's share against a purchaser in Court sale of the interest of the other co-parcener. These cases rest on the principle that, as the co-parcener could sue the stranger for his share of the items conveyed by another co-parcener, he could transfer that right to another by disposing of his share in the property to that other. The case *Kristayya* v. *Narasimham*(1) is not reconcilable with this principle. That decision proceeds on the ground that the alienees from each co-parcener cannot get their rights ascertained until the equities between the alienors are adjusted. We must therefore refer, for the opinion of the Full Bench, the following question:—"Whether when certain items of family properties are conveyed by one of two co-parceners of an Hindu family to a stranger for purposes not binding on the family, the alienee from the other co-parcener of his share in the said properties may, without instituting a general suit for partition of the entire family property, maintain an action for the partition of his share in the said items."

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

T. R. Venkatrama Sastri and *R. Rungasamy Ayyangar* for appellant.

Bupwari Lal v. *Daya Sunker Misser*(2) and *Venkatrayudu* v. *Sri Batchu Venkatrayudu*(3) lay down the proposition that property alienated by one co-parcener without the assent of the others may be recovered for the purposes of partition, the transferee having a lien upon the share of the transferor for the return of the purchase money.

Suits with reference to the property of Hindu families can be analysed into four groups (1) between members of the family *inter se*; (2) by a member against a stranger; (3) by a stranger against a member; and (4) between strangers. This being so four propositions may be deduced, (1) One co-parcener (*A*) cannot sue another (*B*) for partition of a portion only of the property held in co-parcenership. (2) A transferee from one co-parcener (*A*) is in the same position. (3) In a suit for partition by another co-parcener (*B*) only his own share of property transferred (*by A*) can be recovered (*Venkatachella Pillai* v. *Chinnaiya Mudaliar*(4),

(1) (1900) I.L.R., 23 Mad., 608.
(2) (1909) 12 C.W.N., 815 at p. 816.
(3) Appeal No. 39 of 1906 (unreported).
(4) (1870) 5 M.H.C.R., 166.

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Chinna Sanyasi v. *Suriya*(1) and *Subramanya Chettyar* v. *Padmanabha Chettyar*(2). (4) It follows that the other co-parcener's (*B's*) alienee will have the same right as that co-parcener (*B*) himself.

Kristayya v. *Narasimham*(3) is not inconsistent with the fourth proposition as it was there held that the suit was one for partition of the whole of the family property liable to partition at the time, the other family property not so liable having been alienated for family necessity. *Shivmurteppa* v. *Virappa*(4), lays down that suits for partition must be general. *Subbarazu* v. *Venkataratnam*(5) was a suit between strangers to the family. *Kadegan* v. *Periya Munusami*(6), *Suraj Bunsi Koer* v. *Sheo Persad Singh*(7) and *Ashanullah* v. *Kali Kinkur Kur*(8) referred to.

The Advocate-General (Hon'ble Mr. P. S. Sivaswamy Ayyar) for respondent.

The proposition that a co-parcener can only recover his share of properties alienated by the other co-parcener is not now good law. *Aiyyagari Venkata Ramayya* v. *Aiyyagari Ramayya*(9) is now the correct view. As to the equities *Pandurang Anandrav* v. *Bhaskar Shadashiv*(10) states what they are and has been followed in all the cases. *Venkatachella Pillay* v. *Chinnaiya Mudaliyar*(11), and *Chinna Sanyasi* v. *Suriya*(1) commented on.

T. R. Venkatrama Sastri in reply. *Aiyyagiri Venkata Ramayya* v. *Aiyyagiri Ramayya*(9) did not overrule the series of cases. Sir Bashyam Ayyangar also decided the case of *Kadegan* v. *Periya Munisami*(6).

The Court expressed the following

OPINION.—The facts are sufficiently set out in the order of reference. It is unnecessary to recapitulate them here. We may begin with the proposition that a member of an undivided Hindu family cannot enforce a partial partition against the other members of the family. That is not disputed. The next proposition which is also beyond question is that a stranger purchasing the interest of one or more members of the family in certain items of family property cannot enforce a partition of those items only

(1) (1882) I.L.R., 5 Mad., 196. (2) (1896) I.L.R., 19 Mad., 267.
(3) (1900) I.L.R., 23 Mad., 608. (4) (1900) I.L.R., 24 Bom., 128.
(5) (1892) I.L.R., 15 Mad., 234. (6) (1903) 13 M.L.J., 477.
(7) (1880) I.L.R., 5 Calc., 148. (8) (1884) I.L.R., 10 Calc., 676.
(9) (1902) I.L.R., 25 Mad., 690 at pp. 715, 716, 718.
(10) (1874) 11 B.H.C.R., 72. (11) (1870) 5 M.H.C.R., 166.

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against the will of the other members without suing for a general partition of the entire family property. The principle of this rule is that there may be equities which those other members have against the vendor of the plaintiff which can only be worked out in a general suit for partition and in working out those equities the plaintiff's vendor and hence the plaintiff may be assigned a different item from the items he purported to buy or even a smaller share than those items represented. We come next to the suit by a member of the family against the purchaser of part of the family property for the recovery of his share in the part alienated without claiming a division of the entirety of the family property. Such a suit has been held to lie in a series of cases as pointed out in the referring order. We may add two further cases in support of the same view (*Venkatrayudu* v. *Sri Batchu Venkatrayudu*(1) and *Bunwari Lal* v. *Daya Sunker Misser*(2)). If this view be correct the learned Advocate-General does not impugn, what is almost a corollary from it, that the purchaser from a member of his share of property alienated by others, can sue the alienees of those others for the share of his vendor in that property unless the alienation bound the entire family interest. The reasoning in *Subbarazu* v. *Venkataratnam*(3) and *Kadegan* v. *Periya Munusami*(4) fully supports this inference. But the learned Advocate-General disputed the correctness of the rule that a member of an undivided family could sue for his share in the item alienated to a stranger—purchaser of that item without asking at the same time for a general partition of the entire family property. The authorities laying it down he challenged as unsound and as opposed to the view, expressed in *Udaram Sitaram* v. *Ranu Panduji and Venku Panduji*(5) and in *Aiyyagari Venkata Ramayya* v. *Aiyyagari Ramayya*(6) that the equities of the purchaser might entitle him to the whole property purchased by him and not merely to the share of his vendor, and that he could therefore insist on a general partition of the whole property of the family as the only means of working out those equities. Those cases however do not lay down that the member of the family suing for his share could be driven by the purchaser

(1) Appeal No. 39 of 1906 (unreported). (2) (1909) 13 C.W.N., 815.
(3) (1892) I.L.R., 15 Mad., 234. (4) (1903) 13 M.L.J., 477.
(5) 11 B.H.C.R., 76. (6) (1902) I.L.R., 25 Mad., 690 at pp. 715, 716.

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from another sharer to institute a suit for general partition. They are only authority for the position that in a suit for general partition the purchaser could claim to have the equities so adjusted that the entire item bought by him might be assigned to him as for his vendor's share. The decision in *Kristayya* v. *Narasimham*(1) does not question the correctness of the chain of authorities laying down the rule that it is competent to a member to sue the purchaser from another member for his share in the items sold. In that judgment there is only reference to one of the cases establishing the rule, namely, *Subramanya Chettyar* v. *Padmanabha Chettyar*(2) and that also not as bearing on the rule mentioned. There was no intention to depart from the principle on which *Subbarazu* v. *Venkataratnam*(3) had been decided for that case is evidently referred to with approval. It was apparently assumed that the equities between the members of the family, who were all parties would have to be gone into in that case, having regard to the pleadings. We cannot therefore treat that case as any authority in support of the learned Advocate-General. Indeed he made no attempt to rely on it. It may also be pointed out that in view of the final result of that case on the finding that the family had no property besides that in suit the observations as to the form of the suit became unnecessary. We should feel disinclined to depart from a long-established rule as to the proper method of working out the rights of members of an undivided family against strangers who have acquired the interests of other members even if we were not satisfied as to its soundness. But our attention has been drawn by the learned vakil for the appellant to the form of decree in two decisions of the Privy Council (*Suraj Bunsikoer* v. *Sheo Persad Singh*(4) and *Hardi Narain Sahu* v. *Ruder Perkash Misser*(5)). In those two cases the suits were instituted by the sons against a purchaser in execution of a decree against the father. It was held that the proper decree was to confirm the plaintiffs' possession of the property or to decree to them possession of it against the purchaser, "leaving it to the purchaser to work out the rights which he has acquired by means of a partition" (*Suraj Bunsikoer* v. *Sheo Persad Singh*(4)).

(1) (1900) I.L.R., 23 Mad., 608. (2) (1906) I.L.R., 19 Mad., 267.
(3) (1892) I.L.R., 15 Mad., 234. (4) (1880) I.L.R., 5 Calc., 148 at p. 174.
(5) (1884) I.L.R., 10 Calc., 626 at p. 637.

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Their Lordships added a declaration in each case that the purchaser had acquired the interest of the judgment-debtor and "was entitled to take proceedings to have it ascertained in partition." (*Hardi Narain Sahu* v. *Ruder Perkash Misser*(1) and *Suraj Bunsikoer* v. *Sheo Persad Singh*(2)). In *Deen Dyal's* case(3) which was a suit of a similar character, but where the father too was alive and a party to the suit, the same decree for possession was made with a like declaration in favour of the purchaser. These decisions are clear authority for the position that the existence of any equities in favour of the purchaser does not entitle him to resist the claim of the members not bound by the alienation to possession. In Madras where the share of the members not affected by the alienation has been allowed to be recovered there is no reason for refusing the more limited prayer for possession of that share. We must answer the question referred to us in the affirmative.

APPELLATE CIVIL.

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

CHELLAMMAL AND OTHERS (DEFENDANTS NOS. 1 TO 4), APPELLANTS,

v.

RANGANATHAM PILLAI AND OTHERS (PLAINTIFFS AND DEFENDANTS NOS. 5 AND 6), RESPONDENTS.*

1910. March 3, 4, 23.

Hindu Law—Illegitimate son, share of one partition with legitimate sons after death of father—Illegitimate son takes one half of the share of the legitimate son—Marriage, proof necessary to establish.

The fact that a woman was living under the control and protection of a man, who generally lived with her and acknowledged her children as his will raise a strong presumption that she is the wife of that man. This presumption will however be rebutted by proof of facts which show that no marriage could have taken place. Where relations and castemen who would have been present at the marriage if it had taken place are not called as witnesses, and persons who would have been invited have received no invitation the presumption will be that no marriage has taken place.

(1) (1884) I.L.R., 10 Calc., 626 at p. 637.
(2) (1880) I.L.R., 5 Calc., 148 at p. 174. (3) (1877) 4 I.A., 247.

* Original Side Appeal No. 50 of 1907.

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When after a man's death, a partition of his property is effected between his legitimate and illegitimate sons, the illegitimate son takes one-half of what the legitimate son actually takes and not one-half of what a legitimate son in his place will get.

Kasaree v. *Samardhan*, [(1873) 5 N.W.P.H.C., 94], followed.

APPEAL from the judgment and order, dated 17th day of October 1907, of BODDAM, J., in Civil Suit No. 148 of 1906.

Suit for partition.

The plaintiff's claim is thus stated in the plaint.

"V. Kanagasabai Pillai, lately Superintendent of Post Offices, Presidency Division, Madras, who died at Conjeeveram on or about the 21st day of February 1906 has left him surviving the plaintiffs and defendants as members of an undivided Hindu family of which he was the common ancestor. Chellammall, the first defendant, is the senior widow of the deceased ancestor, having been married to him several years ago at Jaffna. The second, third and fourth defendants are the sons of the deceased ancestor by the first defendant. Parvathi Ammall, the fifth defendant, is the junior widow of the deceased ancestor who married her in supersession of his first wife, the first defendant, on account of incompatibility of temper, at Calicut in the month of Chittrai of the Tamil year Nandana corresponding to April-May 1892, and ever after continued to reside with her.

The plaintiffs and the sixth defendant are the sons and daughter respectively of the deceased ancestor by the fifth defendant.

The parties hereto are the only persons interested in the joint property of the said family."

On these facts the plaintiffs claimed a division of the property of the deceased into nine shares—four for the four plaintiffs, three for defendants Nos. 2, 3, 4, and one share each to first and fifth defendants for maintenance. Defendants Nos. 2, 3, 4 denied that the fifth defendant was the wife of the deceased and stated that they alone were entitled to the family properties.

The learned Judge held that the fifth defendant was the wife of the deceased and gave a decree for plaintiffs.

Defendants Nos. 1 to 4 appealed.

T. Rangachariar and *K. Jaganatha Ayyar* for appellants

C. S. Venkatachariar for first to fourth respondents.

JUDGMENT.—The four plaintiffs sue to recover their share of the properties left by their deceased father Kanagasabai Pillai

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from the defendants Nos. 2, 3 and 4 who are also his sons. The defence is that the plaintiff's mother, the fifth defendant, was not the wife of their deceased father but a prostitute who was for some time his concubine.

The learned Judge who heard the case held that the fifth defendant was validly married to the deceased Kanagasabai Pillai and awarded to the plaintiffs the share claimed by them. The first question for decision is whether the finding is supported by the evidence in the case. Kanagasabai Pillai was the Superintendent of Post Offices at Calicut for about six or seven years between 1890 and 1897. He was then transferred to Mysore, afterwards to Nellore and finally to Madras and while he was the Superintendent of the Presidency Division died intestate at Conjeeveram in February 1906. The suit was filed in September 1906. The relations between the first defendant Chellammal his admitted wife and Kanagasabai were always strained and had been so for many years prior to his death so much so that the first defendant and her eldest son Somasundaram, the second defendant, lived separately from him. It is also proved that Parvathi, the fifth defendant, accompanied Kanagasabai when he left Calicut and was ever after living under his protection and control that he generally if not always lived with her, acknowledged the plaintiffs as his children, educated them, introduced them to his friends and to the teachers in their schools as his sons, told some of his friends that Parvathi was his wife and one witness swears that he told him that he had married a Vellala girl at Calicut. Kanagasabai was a Vellala belonging to Jaffna. These facts undoubtedly raise a strong presumption that Parvathi was his wife. There is also the evidence of some witnesses to the effect that they were invited to the marriage; Parvathi also swears to her marriage. The first witness for the defence is the village munsif of the Nagaram Amsom, Calicut. He says that Kanagasabai Pillai was his tenant when he first came to Calicut. He first lived in a house belonging to the witness in the Northern Allachi while Parvathi, the fifth defendant, with her mother Amma and maternal uncle Shuppan were living in another house also belonging to the witness in Southern Allachi. The village munsif says that they belonged to the Konkan dancing girl caste. Parvathi was Kanagasabai's concubine, not living with him in the same house but going to him in the evening and

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returning in the morning. She had two children born to her while living there. When Kanagasabai was transferred from Calicut he took her with him and on his death Shuppan told him that he was going to Madras to bring his niece Parvathi to Calicut though he did not bring her. The second witness Gulam Hussain, a neighbour whose brother was employed in the post office under Kanagasabai, and the third witness, a pensioned Mail Overseer, also state that the fifth defendant was his concubine. They also knew her and her relatives. To meet this evidence the plaintiffs have not examined any of Parvathi's relatives paternal or maternal. Parvathi says that both her parents died within three years of the marriage. But she admits she had relatives at Salem. None of them now gives evidence. The defendants' evidence that Parvathi belongs to the Konkan class and to the family referred to by them stands uncontradicted except by her own statement.

Again Kanagasabai was holding a high official position at Calicut. If there had been any marriage ceremony the leading native officials would have been invited to the marriage. Not only is no one examined to prove the marriage, but one of his friends, the editor of the leading vernacular paper who used to visit him often, says that Kanagasabai did not marry at Calicut to his knowledge and that he was keeping a concubine there. We do not attach any weight to the evidence of the three Nair witnesses who have been examined by the plaintiffs to say that they went to the marriage. They are not caste men of the parties; nor persons likely to be invited and their evidence is very unsatisfactory. Vythialingam Pillai, the nephew of the deceased and his successor in his office at Calicut, states that he did not see the fifth defendant with the deceased at Calicut and that he saw her for the first time only on the day of his death at Conjeeveram when Chellammal, the first defendant, and others wanted to keep her away from Kanagasabai. He says that at his intercession she was allowed into the room for a short time before his death. She had some conversation with him when he told her that everything would be done for her quite properly but that was neither the place nor time. He met her again some time after to receive the papers left by Kanagasabai when she asked him to pay her something for her maintenance as she was helpless, to which he replied he could not very well do that. The brother of this witness is married to first defendant Chellammal's

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daughter, and he is alleged by Parvathi, the fifth defendant, to have been on unfriendly terms with the deceased though this is denied by the witness himself. We do not think this is a sufficient ground to discredit the evidence of a witness of his position and respectability; moreover his evidence is consistent with and supported by the evidence of the Calicut witnesses. It is also remarkable that in Kanagasabai Pillai's application to be enrolled as a subscriber to the Pursevalkam Fund, he gives the number of the house in which his admitted wife the first defendant and her children were living as his own place of residence and she and her children are called therein his wife and children, without any reference to Parvathi. For these reasons we feel constrained to hold that the fifth defendant was not the wife of the deceased Kanagasabai. But the same evidence places it beyond any doubt and the facts found show that the plaintiffs are his illegitimate sons, entitled to recover the shares allowed to such Dasiputras by the Hindu Law. What that share is now remains to be determined. According to the appellant's contention where the father's property is divided between an illegitimate and a legitimate son of a deceased father, the former's share is one-half of what it would be if he were a legitimate son or in other words one-fourth of the property left by the father while, according to the respondents, he is entitled to get one-half of what the legitimate son takes or one-third of the patrimony. The question turns upon the construction of the following text of Yagnavalkya which is generally relied upon to support either contention: "A son begotten by a Sudra on a female slave may take a share by the father's choice. But if the father be dead, the brethren should make him partaker of the moiety of a share." In the Mitakshara this text is explained thus: "After the demise of the father, if there be sons of a wedded wife, let these brothers allow the son of the female slave to participate for half a share: that is, let them give him half [as much as is the amount of one brother's] allotment." The words within the brackets are added by Subodhini and Balambhatta. See Stokes' Hindu Law Books, p. 426. No decision of the Madras High Court on the point has been brought to our notice. The observations of BHASHYAM AYYANGAR, J., in *Ramalinga Muppan* v. *Pavadai Gounden*(1) relied upon by

(1) (1902) I.L.R., 25 Mad., 519 at pp. 521, 523.

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appellants and of Muthusami Ayyar, J., in *Parvathi* v. *Thirumalai*(1) and of Collins, C.J., and Subramania Ayyar, J., in *Karuppannan Chetti* v *Bulokam Chetti*(2) were not made with reference to this question which was not before them for decision. Mr. Mayne is of opinion that the illegitimate son would take only half of what he would take if he were legitimate, *i.e.*, half of a moiety. Mr. Sircar in his Hindu Law, also takes the same view, see p. 245. The opposite view is maintained by Mr. Sarvadicari. See Hindu Law of Inheritance, p. 943, and in West and Buhler's Hindu Law, p. 382. The two opinions of the two Sastries given in West and Buhler are in conflict with each other. One of them is in support of the former and the other supports the latter view. A similar difference of opinion exists as to the mode in which the fourth share of a daughter or of an adopted son in the case of the subsequent birth of a legitimate son is to be calculated. The texts are similar. In the case of the adopted son the High Courts of Madras and Bombay have held that the adopted son is to take one-fifth and the other son the four-fifths; though according to Nanda Pandita, the adopted son, is only entitled to a fourth of what he would have taken as a legitimate son or a fourth of one-half. See Mayne, section 168. In the case of the daughter on the other hand the author of the Mitakshara, no doubt, adopts the construction similar to that advanced in favour of the legitimate son in this case: and this forms the basis of Mr. Sircar's opinion as he thinks that the principle on which the share is allotted is the same. But he allows that it has now been decided by the Judical Committee, though in his opinion erroneously (see p. 232) that an illegitimate son is a coparcener in the ancestral estate with his legitimate brother and takes by survivorship(1). We will now turn to the commentaries. The Mitakshara, as quoted above, is not of course clear though the words within the brackets added by Subodhini and Balambhatta apparently support the contention on behalf of the illegitimate son. In commenting upon a text of Manu which refers to the claim of the illegitimate son to get a share by father's consent Medatiths, a celebrated commentator, refers to the text of Yagnavalkya as giving to the illegitimate son half of what his legitimate brother actually

(1) (1887) I.L.R., 10 Mad., 334 at pp. 343 and 344.
(2) (1900) I.L.R., 23 Mad., 16.

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obtains, *i.e.*, the latter gets two shares and the former one share. According to Daya Vibhagu of the Vyavahara Kanda of the Madahavaya commentary on the Parasarasmriti this text means that the legitimate sons must give the "half of a share such as they get." For the close connection between the Mitakshara and the commentary, see page (xii) of Burnell's Daya Vibhaya. The author of the Viramitrodaya gives the same meaning to this text. See Sircar's Viramitrodaya, p. 130. No commentary taking the opposite view has been cited before us. The only reported case *Kesaree and others* v. *Samardhan and another*(1) takes the same view. It is true as pointed out by Mr. Rangachariar that the illegitimate son in *Thangam Pillai* v. *Suppa Pillai*(2) claimed only the smaller share. But it is stated in the judgment of the High Court that both the lower Courts found that the plaintiff was entitled to a higher share than he claimed while in *Rajagopala Chetty* v. *Dorasami*(3), the claim of the illegitimate son to a third share was not denied and was decreed though it was contested on other grounds. We follow the decision of the High Court of North-West Provinces and the opinions of the commentators above referred to and hold that an illegitimate son gets half of the share allotted to his legitimate brothers. Each of the four plaintiffs is therefore entitled to one-tenth share and each of the three defendants to two-tenths share of the father's property. The decree of the learned Judge giving each plaintiff the same share as each defendant will be accordingly modified and the consequential declarations will be made. The respondents Nos. 1 to 4 will pay half the appellants' costs on the original side and in appeal.

(1) (1873) 5 N.W.P.H.C., 94. (2) (1889) I.L.R., 12 Mad., 401.
(3) App. No. 84 of 1885 (unreported).

APPELLATE CIVIL.

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

1910. January 17. February 18. March 1.

THIYAGARAJA PILLAI (PLAINTIFF), APPELLANT,

v.

RATNASABAPATHI PILLAI AND OTHERS (DEFENDANTS, Nos. 1, 2, 4, 5, 7, 8 TO 11, 13 AND 14), RESPONDENTS.*

Limitation—If one of several joint trustees barred, the others also barred—Agreement between joint owners or trustees, effect of.

Two joint trustees A and B entered into an agreement, which recited that the families of A and B were entitled to the management of the trust and further provided that A's right shall after his death be exercised by his heirs and B's right shall after his death be exercised by his heirs.

Held, that the effect of this agreement was to constitute the heirs of A and B joint trustees and not to create a right in severalty between the two branches.

Where an adult joint trustee takes no steps to protect the trust and his right to take steps becomes time barred, the rights of other joint trustees, even though minors become time barred.

APPEAL against the decree of T. M. Rangachariar, Additional Subordinate Judge of Tanjore, in Original Suit No. 16 of 1904.

Suit against the members of the Devastanam Committee, Negapatam circle, and the trustees appointed by them, for cancellation of the decree in Original Suit No. 4 of 1886 and other reliefs.

The facts are thus set forth in the judgment of the lower Court.

Suit in *forma pauperis*.

Plaint sets forth as follows :—

The Keevalur temple and its properties have been hereditarily managed by the plaintiff's family for a long time. The Government has taken possession of the same, but in 1842 restored management to plaintiff's great grandfather Venkatapathia Pillai. This person and after him, his sons, Vadamalai Pillai and Tiagaraja Pillai were managing the temple till 1878 when plaintiff's father Saminada, son of Tiagaraja, succeeded to the management. Original Suit No. 4 of 1881 on the file of the

* Appeal No. 190 of 1905.

Negapatam Sub-Court was brought by Vadamalai's son Chokkalinga through his mother and guardian against Saminada and his brother Ratnam to establish his exclusive right to manage the plaint endowments. The same resulted in a compromise, exhibit A, under which Chokkalinga and plaintiff's father were to have managed jointly during their lives. The rajinamah further provides that in the event of any one of these persons dying, the survivor and the descendants of the deceased should have the right of management in order of seniority. Plaintiff's father who was managing the temple died in 1883 and he was succeeded by Ratnam in the management. Chokkalinga never managed the temple in spite of the provisions of the rajinamas. During the management of Ratnam, Original Suit No. 4 of 1886 on the file of the Tanjore District Court was brought to remove Ratnam from the trusteeship. He was removed and the Court, finding that the Devastanam Committee was entitled to the management to the temple under Act XX of 1863, directed them to assume its management. The said decision is wrong as the plaintiff's family has the hereditary right of management. The said suit was not conducted properly by the said Ratnam. Plaintiff as the next heir is entitled to recover possession, he having attained majority in August-September 1900.

On these grounds he prays that the decree in Original Suit No. 4 of 1886 be cancelled; that his hereditary right be established; that the temple and its properties be directed to be put into his possession.

The defendants pleaded *inter alia* that the suit was time barred. The lower Court found that the Committee was in possession since the decree in 1886 and dismissed the suit as barred by limitation.

Plaintiff appealed.

The Advocate-General (Hon. Mr *P. S. Sivaswami Ayyar*) and *T. R. Venkatarama Sastri* for appellant.

P. R. Sundara Ayyar for second, fourth, fifth and ninth to eleventh respondents.

K. Srinivasa Ayyangar for ninth respondent.

T. V. Gopalaswami Mudaliar for first and third respondents.

SIR ARNOLD WHITE, C.J.—In this case I think the finding of the Subordinate Judge on the fifth issue that the plaintiff's claim is barred by limitation is right. It is admitted that

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Chockalingam who represents one branch of the family attained his majority more than three years before the institution of the suit. The other branch of the family is represented by the plaintiff. It is not admitted by the respondents that the suit was brought within three years of the attaining of his majority by the plaintiff. For the purpose of the question of limitation, I assume that he brought the suit within three years of his attaining his majority.

The Advocate-General on behalf of the appellant has contended that the effect of the compromise which was entered into between the two branches of the family in connection with Original Suit No. 4 of 1881, was to create a right in severalty in the two branches with reference to his trusteeship and the management of the properties. I do not think that is the effect of the compromise. Paragraph 6 states that the right of the trusteeship in question has remained in the families of the plaintiff and of the first defendant. Then it goes on to provide that the plaintiff's right shall after his death be exercised by his heirs and the first defendant's right shall be exercised by him and by the second defendant and after the death of both of them by their heirs. I think the effect of the compromise is to constitute the representatives of the two branches of the family for the time being joint trustees and to give them joint interests as joint owners in the property in question, and I cannot accede to the contention of the Advocate-General that the effect of providing against the right of survivorship as between Chockalingam and the first defendant is inconsistent with giving joint rights to the representatives of two branches of the family for the time being. When by virtue of the decree of the District Court in Original Suit No. 4 of 1886, the families were dispossessed as regards the trusteeship it was open to Chockalingam to take proceedings for the purpose of protecting the rights of the family. He failed to do this; and that being so, it seems to me it is not now open to the plaintiff to say: "it is true that my co-trustee did not think fit to take any action as regards establishing the family rights in connection with his trusteeship; but notwithstanding that, and notwithstanding the fact that the rights of my co-trustee as against third parties have become barred, it is open to me, now that I have attained my majority, to take proceedings for the purpose of establishing these rights." I think on the facts of this case the

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joint trustee having taken no steps to protect the trust and his right to take steps being now time barred it follows as a matter of law that the right of the joint trustee is also time-barred. With regard to the case of *Jagadindranath Roy* v. *Hemanta Kumari Debi*(1) which was relied on by the appellant, it seems to me that the case is clearly distinguishable from the present one, because in that case the question we have to decide never arose for consideration. In that case there was no question as to joint rights and there was no question as to the legal effect of a joint owner failing to take steps to enforce his rights with reference to the rights of the other joint owners. That being my view with regard to the question of limitation, I do not think it is necessary to discuss the other question raised in this case, viz., the question of *res-judicata*. I think the judgment of the Court below is right and this appeal should be dismissed with costs. The appellant must pay Government the Court fees he would have had to pay if he had not been allowed to appeal as a pauper.

MUNRO, J.—Assuming for the sake of argument, that the statements in the plaint and in the compromise Exhibit A are true, it is clear therefrom that the office belonged to the family as a whole, though for the sake of convenience certain arrangements were made as to the individuals in whom the actual management should vest. For more than twelve years before suit, the office and the properties which formed the subject of management were held adversely by the defendant, and during the whole of that time, there was an adult male member of the family who could have taken steps to protect the alleged right of the family. In these circumstances, I think the plaintiff's suit is clearly barred and would dismiss the appeal with costs

(1) (1905) I.L.R., 32 Calc., 129.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Krishnaswami Ayyar.

1910. March 23, 24. April 1.

VUPPULURI TATAYYA *alias* VEERANNA (PLAINTIFF), APPELLANT,

v.

GARIMILLA RAMAKRISHNAMMA AND OTHERS (DEFENDANTS Nos. 1, 3, 4 AND 18), RESPONDENTS.*

Hindu Law—Gift of land by daughter for deceased father's spiritual benefits—When valid.

A Hindu widow who succeeded to the property of her deceased father made a gift of a very small portion of that property at the time of performing her father's sraddha ceremony on the occasion of a peculiarly holy event among Hindus.

Held, that the gift was in accordance with Hindu ideas as regards the daughter's duty in connection with the performance of a father's sraddha on such an occasion and cannot be impeached by the reversioners.

It cannot be laid down as a rule that to justify the alienation the expenditure should be for a spiritual *necessity*. It is sufficient if the gift or expenditure have reference to the spiritual needs of the father or husband whose property is taken.

SECOND APPEAL against the decree of Subordinate Judge of Cocanada in Appeal Suit No. 80 of 1906, presented against the decree of T. Swami Ayyar, District Munsif of Peddapur, in Original Suit No. 17 of 1905.

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

P. Nagabhushanam for appellant.

P. Narayanamurti for second to fourth respondents.

JUDGMENT.—The second appeal is argued as regards the validity of the gift of item No. II. Lakshmamma who succeeded to the property of her father on his death in the sixties, made a gift of 49 cents of her father's property to the third defendant. The extent of land which came to her from her father was about 19 acres apart from houses and house-sites and moveable property. The gift was made on the occasion of the Pushkaram at Rajahmundry, a peculiarly holy event amongst Hindus which happens once in twelve years. She was the person to perform her father's

* Second Appeal No. 396 of 1908.

sraddha on his death, there being no brothers and her mother having died before him. She performed the sraddha on the occasion of the Pushkaram and made gift of the land as part of the sraddha ceremony. The plaintiff, a reversioner, impeaches the gift. Under the Hindu Law in force in this Presidency the daughter is a limited owner like the widow and her powers of alienation as regards property which she has inherited from her father are no greater than those of the widow and we are inclined to hold that they are not less. The test however is, apart from cases of temporal necessity, whether the alienations are for the spiritual purposes of the deceased father or husband. The daughter inheriting property from her father is not entitled to expend it for the spiritual needs of her husband, though it cannot be said that under no circumstances can the father's property be so used. However this may be, if the expenditure by the daughter is for the spiritual needs of the father's soul, it stands on the same footing as the expenditure by the widow for the spiritual needs of her husband. There may be a question as to whether the daughter is competent to minister to the spiritual needs of a father in all those ways in which the widow is competent to serve the spiritual needs of her husband. But if according to the ceremonial law it is incumbent upon the daughter to serve the spiritual necessities of her deceased father whose property she inherits, we are not justified in dealing with her alienation of her father's property for such necessities in a manner different from a widow's alienation under like circumstances. In this case the daughter succeeded to her father's property. She was also the person bound to perform his sraddha at his death. Her duty in respect of the funeral and annual ceremonies is laid down by writers on the ceremonial law. Rajkumar Sarvadhikari in his Tagore lectures names her at page 110 "as the person entitled to perform sraddha rites on failure of the widow." Mr. Ghose in his Hindu Law names her among the persons competent to perform the sraddha at page 63. Sarvadhikari relies on the authority of the "Dharma Sindhu" from which he quotes largely. In the Bombay Sanskrit Edition of the Nirnaya Sindhu at page 287 the author says "the daughter performs the sraddha to a divided father as she takes the property." In the Sraddha Kanda of Vaidainatha Dikshita published by Narayana Sastri in grantha characters, the daughter's duty to perform her father's sraddha is laid down

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in pages 23 and 26. He says the daughter performs the sraddha in the absence of the son, etc., and gives the order at the bottom of page 26 thus: "the son born, the grandson, his male descendants the putrikaputra, his descendant, the adopted son, his issue, the daughter's son, who inherits, the daughter's son, the widow, the husband, the son of a co-wife, the daughter, the brother, the brother's son, etc." The performance of the sraddha being enjoined the *nibandhana* writers are agreed that a visit to a *theertha* or holy place is a proper occasion for the performance of a sraddha. Reference is made by Sarvadhikari in the footnote at page 101 to the Theertha Sraddha on the authority of Dharma Sindhu. The Nirnaya Sindhu—Bombay Sanskrit edition speaks of it at page 379. The Madhaviya published as volume 48 of the Bombay Sanskrit Series lays down the duty of performing the sraddha on occasions of visit to holy places and on the occurrence of sacred conjunctions. See pages 301 to 307. So does the Vaithianatha Dikshitya dwell in great elaboration on the peculiarly sacred occasions when the performance of sraddha is enjoined. That the banks of the Gódávari, which is a sacred river, would according to Hindu ideas be a fitting place for the performance of sraddha cannot be questioned. That the occurrence of the Gódávari Pushkara would largely enhance the sacredness of the place is also an accepted item of orthodox belief. The gift of land is a suitable appendage to the sraddha ceremonial, and is laid down in ceremonial treatises as highly meritorious. The Madhaviya at page 436 and the Vaithianatha Dikshitya at page 359 (the editions are those already referred to) refer to the gift of land as part of the sraddha ceremonial. It is therefore clear that the gift in the present case of a very small extent of the father's property was in accordance with Hindu ideas as regards the daughter's duty in connection with the performance of a father's sraddha on the occasion of the Gódávari Pushkara. It has sometimes been said that the gift of property is justifiable if it is in performance of indispensable acts of duty or religious necessity. See *Rama* v. *Ranga*(1) and *Lakshminarayana* v. *Dasu*(2). In the first of these cases the sale by the widow of nearly all the property she inherited from her husband for the expenses of pilgrimages was held unjustifiable. In the second case of a gift to a pro-Brahmin

(1) (1885) I.L.R., 8 Mad., 552. (2) (1888) I.L.R., 11 Mad., 288.

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introduced into a family by widows for the performance of their husband's sraddha it was held that the gift was for indispensable necessity and of a small portion of the husband's property and therefore valid. But we do not think we can lay down the rule that to justify the alienation the expenditure should be for a spiritual *necessity*. We have already said that the gift or expenditure should have reference to the spiritual needs of the father or husband whose property is taken. Where it was only for the widow's spiritual benefit as in *Puran Dai* v. *Jai Narain*(1) or for the endowment of a temple built by the mother-in-law as in *Ram Kawal Singh* v. *Ram Kishore Das*(2) the gift was undoubtedly without justification. The case of *Raj Chunder Deb Biswas* v. *Sheeshoo Ram Deb*(3) is not quite intelligible and we are not clear that the headnote is supported by the somewhat laconic judgment. It is said that the sale of the property by the daughter for the mother's sraddha was invalid. The appeal itself appears to have been dismissed which would rather support the view that the alienation was held good. But none of these cases which were relied on by Mr. Nagabhushanam is authority for the position that the alienation must be for an indispensable spiritual duty to support the alienation. It can hardly be supposed that a Hindu widow paying a visit to Gaya or Sethu is not justified in incurring reasonable expenditure for the purpose or in making a gift of land on the occasion of the sraddha there performed for the spiritual benefit of her husband's soul. Mr. Justice Dwarkanath Mitter, a high authority on such a question, held in *Chowdhry Jummenjoy Mullick* v. *Rasmoyee Dossee*(4) that a sale for the expenses of her husband's mother's sraddha by a Hindu widow was justified even though the actual performer of the ceremonies was the husband's brother. We think we are warranted in holding that if the property sold or gifted bears a small proportion (which it is impossible to define more exactly) to the estate inherited and the occasion of the disposition or expenditure is reasonable and proper according to the common notions of the Hindus, it is justifiable and cannot be impeached by the reversioner. We are obliged to express ourselves somewhat guardedly because almost every gift according to Hindu notions

(1) (1882) I.L.R., 4 All., 482. (2) (1895) I.L.R., 22 Calc., 506.
(3) (1867) 7 W.R., 146. (4) (1868) 10 W.R., 309.

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is as such calculated to promote spiritual merit and the occasions for the performances of ceremonies calculated to bring spiritual reward are so innumerable that almost any expenditure not for a sinful object and any alienation by way of gift may be attempted to be justified as ministering to spiritual benefit. We do not think that Hindu lawyers contemplated such an exercise of the power of alienation by a limited owner. It is to be regretted that we have not found ourselves in a position to lay down a more definite rule for practical application. In *the Collector of Masulipatam* v. *Cavaly Vencata Narrainapah*(1) the Privy Council said "for religious or charitable purposes or those which are supposed to conduce to the spiritual welfare of her husband, she (the widow) has a larger power of disposition than that which she possesses for purely worldly purposes." Their Lordships did not attempt to further define the spiritual purpose. We have endeavoured to suggest the further limitation that the spiritual purpose should be such as is regarded by the Hindu community as reasonable and proper though not absolutely necessary. We think the alienation in the present case falls within the rule. We must dismiss the second appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Krishnaswami Ayyar.

1910. January 7.

ARAYIL KALI AMMA AND OTHERS (DEFENDANTS Nos. 1 TO 7), APPELLANTS,

v.

PELAPPAKKARA MANAKAL SANKARAN NAMBUDRIPAD AND OTHERS (PLAINTIFFS AND DEFENDANTS Nos. 9 AND 10), RESPONDENTS.*

Appeal, abatement of—Limitation Act IX of 1908, s. 3, art. 177—Period of limitation provided in art. 177 applicable to applications made after the day when the Act came into force—Effect of abatement of appeal against one of several joint trustees.

Applications to bring in the legal representatives of a deceased respondent made after the coming into force of Act IX of 1908 must, under section 3 and

(1) (1861) 8 M.I.A., 529 at p. 551. * Second Appeal No. 656 of 1906.

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article 177 of the Act, be made within six months of the death of such respondent. If not so made the appeal must abate against such respondent.

Where the deceased respondent, in respect of whom the appeal abates, is a joint trustee with other respondents, the appeal cannot proceed against such other respondents.

SECOND APPEAL against the decree of J. H. Munro, District Judge of South Malabar, in Appeal Suit No. 587 of 1905, presented against the decree of V. S. Krishna Ayyar, District Munsif of Ponnani, in Original Suit No. 192 of 1904.

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

M. Kunjunni Nair for appellants.

C. V. Anantakrishna Ayyar for first to third respondents.

JUDGMENT.—In this case the fourth respondent died on the 9th December 1907. No application has been made till now to bring his legal representative on the record. The question is whether the second appeal abates under section 108 read with Order XXII, rule 11 and rule 4 of the Code of Civil Procedure. The time provided by the Limitation Act of 1877 was not six months under article 175 (*c*) but three years under article 178 according to the ruling of the Full Bench of this Court in *Susya Pillai* v. *Aiyakannu Pillai*(1).

But this period has been cut down to six months under article 177 of the Limitation Act of 1908. If this article applies the second appeal must abate as regards the fourth respondent.

According to section 3 of Act IX of 1908, an application to bring in the legal representative now made must be dealt with under this Act. Section 30 of the Act makes a special provision in respect of suits for which a shorter period is provided by the new Act than by the old, giving a further period of two years after the Act when the plaintiff would be barred if the new period were applied. But there is no similar provision in the case of an application. Section 6 of the General Clauses Act X of 1897 has no application so as to preserve the older period of limitation which is not a rule of substantive law. The decision in *Chajmal Das* v. *Jagdamba Prasad*(2) seems to be exactly in point. The fact that in this case an application to bring in the representative would be barred on the very date of the coming

(1) (1906) I.L.R., 29 Mad., 529. (2) (1889) I.L.R., 11 All., 408.

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into force of the new law fixing the shorter period cannot affect the principal applicable as has been pointed out in the English cases referred to in *Khusal Bhai* v. *Kabhai*(1). There is no objection to the application of the new rule on the ground of hardship when the legislature has postponed the coming into operation of the new Act to the 1st January 1909 though it was passed on the 7th August 1908. The facts of the case in *Khusal Bhai* v. *Kabhai*(1) are not clear and the principle of that case is distinguishable having regard to the interval of time between the passing of the Act and its coming into force. We agree with the decision in *Reg* v. *Dorabji Balabhai*(2).

We must hold that the second appeal abates as against the fourth respondent.

It is objected by the respondents that the appeal cannot proceed as against the other respondents as well. The respondents were co-uralers of a davasom and have obtained a decree for an injunction and damages against the appellants.

Co-uralers are joint trustees of the temple and its properties. It is not open to the appellants to prosecute the appeal against some of the trustees leaving the decree of the District Court intact in favour of the others.

We must dismiss the second appeal with costs.

(1) (1882) I.L.R., 6 Bom., 26 at p. 30. (2) (1874) 11 B.H.C.R., 117.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Munro.

1909. December 6, 7, 8, 9, 10, 13, 14.

1910. February 15. September 9.

KANDUKURI MAHALAKSHMAMMA GARU, PROPRIETRIX OF URLAM AND OTHERS (PLAINTIFF AND HER LEGAL REPRESENTATIVES), APPELLANTS, IN APPEAL No. 66 OF 1905,

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL REPRESENTED BY THE COLLECTOR OF GANJAM, CHATRAPUR (DEFENDANT), RESPONDENT.*

KANDUKURI MAHALAKSHMAMMA GARU, PROPRIETRIX OF URLAM AND OTHERS (PLAINTIFF AND HER LEGAL REPRESENTATIVES), APPELLANTS, IN APPEAL SUIT No. 64 OF 1907, AND RESPONDENTS IN APPEAL No. 65 OF 1907,

v.

THE SECRETARY OF STATE FOR INDIA (DEFENDANT), RESPONDENT IN APPEAL No. 64 OF 1907 AND APPELLANT IN APPEAL No. 65 OF 1907.

KANDUKURI MAHALAKSHMAMMA GARU, PROPRIETRIX OF URLAM AND OTHERS (PLAINTIFF, AND HER LEGAL REPRESENTATIVES), APPELLANTS, IN APPEAL No. 123 OF 1907, AND RESPONDENT IN APPEAL No. 134 OF 1907,

v.

THE SECRETARY OF STATE FOR INDIA (DEFENDANT), RESPONDENT IN APPEAL No. 129 OF 1907 AND APPELLANT IN APPEAL SUIT No. 134 OF 1907.

KANNEPALLI SOORYANARAYANA AVADHANULU AND OTHERS (PLAINTIFFS), APPELLANTS IN APPEAL SUIT No. 35 OF 1905 AND RESPONDENTS IN APPEAL SUIT No. 40 OF 1905,

v.

THE SECRETARY OF STATE FOR INDIA (DEFENDANT), RESPONDENT IN APPEAL No. 35 OF 1905 AND APPELLANT IN APPEAL No. 40 OF 1905.

* Appeal Nos. 66 of 1905, 64, 65, 125, 134 of 1907 and 35, 36, 40, 41 of 1905, Second Appeal No. 237 of 1907.

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v.

THE SECRETARY OF STATE FOR INDIA (DEFENDANT), RESPONDENT IN APPEAL No. 36 OF 1905 AND APPELLANT IN APPEAL No. 41 OF 1905.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL REPRESENTED BY THE COLLECTOR OF GANJAM, CHATRAPUR (DEFENDANT), APPELLANT IN SECOND APPEAL No. 237 OF 1907,

v.

KANNEPALLI SOORYANARAYANA AVADHANULU AND OTHERS (PLAINTIFFS), RESPONDENTS IN SECOND APPEAL No. 237 OF 1907.

The Madras Irrigation Cess Act, Act VII of 1865, s. 2—Ownership of bed of channel—Owner of channel bed not on that account alone entitled to water free of cess—Engagement to supply water free of charge, how proved—Nature of engagement to be inferred from permanent settlement—Act III of 1905, s. 2—Stream what is—Voluntary payment—Money paid on a decree and under Act II of 1864 not voluntary.

Where in a grant by Government of land, no reservation is made of channel beds and nothing is proved to show that the Government must have intended to reserve them and it is shown that the grantee exercised full control over the channel, it must be presumed that the bed of the channel was included in the grant. The ownership of the bed will not however carry with it the right to use the water of the channel free of charge under Act VII of 1865.

If water from a Government channel or river is distributed through channels provided by a private person, such irrigation is not free of cess.

Section 2 of Act III of 1905 is declaratory; and effect must be given to the clear declaration, without confining its operation to the matter of encroachments on land.

The channel or river is the flowing body of water. Under section 2 of Act III of 1905 where it is not shown to belong to a private person, it belongs to Government although private persons may be proprietors of the bed. The riparian proprietors have easement rights, but they are not on that account owners of the channel; and they cannot use water which belongs to Government free of cess in the absence of an engagement with Government to that effect.

The abstention of Government from charging water cess for a number of years, and the fact that the Government and the zamindar apportioned the cost of the upkeep of the channel according to the extent of zamindari and ryotwari land under it, do not raise a presumption of any such engagement.

The only engagement which can be inferred from the Permanent Settlement is that the peshkush being fixed with reference to the area of land then under

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irrigation no further charge for the use of water should be made in respect of that area.

The burden of proving that any kind of crop is exempt from water cess lies on the zamindar.

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Where capacity to grow a second crop is taken into account in fixing the peshkush, no separate charge can be made for the second crop.

Money paid on a demand by Government and enforceable by attachment under Act II of 1864 is not a voluntary payment.

APPEAL against the decrees of W. B. Ayling, District Judge of Ganjám, in Original Suits Nos. 3 of 1904, 19 of 1905, 30 of 1906, 37 of 1903, 38 of 1903.

Second Appeal against the decree of W. B. Ayling, District Judge of Ganjám, in Appeal Suit No. 161 of 1906, presented against the decree of T. Gopalakrishna Pillai, District Munsif of Chicacole, in Original Suit No. 306 of 1905.

The facts of these cases are fully set out in the judgment.

P. R. Srinivasa Ayyangar for third appellant in Appeals Nos. 66 of 1905, 64 of 1907 and 129 of 1907.

T. R. Ramachandra Ayyar for second and third appellants in Appeals Nos. 66 of 1905, 64 of 1907 and 129 of 1907.

P. R. Sundara Ayyar and *A. Krishnaswami Ayyar* for respondent in the above cases.

P. R. Sundara Ayyar and *A. Krishnaswami Ayyar* for appellant in Appeals Nos. 65 and 134 of 1907.

P. R. Srinivasa Ayyangar for third respondent in the above cases.

T. R. Ramachandra Ayyar for second and third respondents in the above cases.

T. R. Ramachandra Ayyar, *V. Ramesam* and *H. Suryanarayana* for second appellant in Appeal Suit No. 35 of 1905.

The Hon. The Advocate-General for respondent in the above.

V. Ramesam for appellants in Appeal Suit No. 36 of 1905.

The Hon. The Advocate-General for respondent in the above.

The Hon. The Advocate-General for appellant in Appeal Suit No. 40 of 1905.

T. R. Ramachandra Ayyar, *V. Ramesam* and *H. Suryanarayana* for respondents in the above.

The Hon. The Advocate-General for appellant in Appeal No. 41 of 1905.

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V. Ramesam for respondents in the above.

The Hon. The Advocate-General for appellant in Second Appeal No. 237 of 1907.

T. V. Narayaniah for respondents in the above.

MILLER, J.—The questions for decision in all these appeals except appeal No. 41 of 1905, which is for costs only, relate to the right claimed by the Government to charge a watercess under Act VII of 1865 (Madras) on lands in the Urlam zamindari and Lukulam Agraharam in the Chicacole taluk of the Ganjám district, irrigated from four channels, the Jalmuru, Polaki, Lukulam and Mobagam channels, all of which take off from the left bank of the river Vamsadhara.

The cess objected to by the zamindar and agraharamdars has been levied in some cases on irrigated second crop grown on land classed as irrigable or 'wet' land, and in others on irrigated crops grown on land classed as 'dry' or unirrigated land. The zamindar and the agraharamdars claim the right to irrigate free of cess all the land 'dry' or 'wet' which the channels will command, and as many crops as can be raised thereon.

The Government will be entitled under the Act of 1865 to charge water-cess if the water with which the lands are irrigated is supplied from a river or channel belonging to, or a work constructed by the Government and if there is no engagement between the person using the water and the Government by which the irrigation is to be free of separate charge.

All the lands commanded by the four channels in question were included in the Haveli lands, which came into the hands of the East India Company in 1765. In 1803 they were divided into four lots and were all disposed of by permanent settlement with the bidder offering the highest 'premium' at an auction. Of the four lots three were soon afterwards in 1809 and 1810 sold up for arrears of revenue, and two of them, Jalmuru and Negarakatakam, were bought by the Government: the third, Urlam, was purchased by a predecessor of the present zamindar. The fourth lot Polaki did not come into the hands of the Government until 1850. The District Judge finds that the Jalmuru, Polaki and Lukulam channels are channels belonging to the Government and therefore that water-cess may be charged upon land irrigated under them, but that the Mobagam channel does not belong to the Government and the Vamsadhara river which supplies it does

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not belong to Government and consequently that no charge can be made for water supplied from that channel.

Both sides have appealed against his decrees in so far as they injuriously affect the rights they claim.

The zamindar claims to be the owner of all the channels so far as they lie within the limits of the Urlam estate, and though the answer to the question, who is the owner of the channel beds, may not materially affect the decision of these appeals, I have thought it best to deal with the question as it has been fully argued. The zamindar has at different times made inconsistent allegations concerning the origin of the channels, at one time alleging that they are natural branches of the Vamsadhara river and at another that they were dug by previous zamindars. It is clear that the latter allegation cannot be accurate for it is shown by exhibit LIV that all four channels were in existence before 1792, that is to say, before the Haveli lands were settled as zamindari land. Nor is there any evidence to support the former suggestion. What evidence there is,—there is not much—points the other way. In 1854 Captain Rundall writes of the channels as old native works excavated with a great fall in their beds and gradually enlarged by the action of the unregulated volume of water passing along them (Ganjám District Manual, page 253). Exhibits G (1826), C (1854) and E (1889) shew that some of the channels have always been regarded as artificial, and I think it must be taken in this state of the evidence that all are artificial channels. At the date of the auction in 1803 they watered Haveli lands and certain inams but when the Haveli lands were permanently settled the right to collect the dues payable by the inamdars was also alienated to the zamindars. Thus it may be said that the only lands watered by the channels after the permanent settlement were zamindari lands.

Now it is contended on behalf of the Government that when the Haveli lands were divided into lots and transferred to zamindars the channels were reserved in the hands of the Government, and on behalf of the zamindar that they were alienated with the lands.

There is nothing in the 'Sanad,' granted to the zamindar at the permanent settlement, which helps to elucidate the matter. No mention is therein made of channels or water-courses. In the instructions to Collectors issued in 1799 which form an appendix

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to the well-known "5th report from the Select Committee on the affairs of the East India Company" it is stated to have been the intention of the Company to leave the construction and care of the water-courses entirely to the zamindars unless it should be thought that the works were such as for special reasons to be stated by the Collector ought to be retained under the care of the Government (5th report, volume II, page 331, paragraph 59). We have not been shewn anything in the evidence to indicate that any channels or works in the Haveli lands were so reserved, nor does it seem probable that the Government would at that time have deemed it necessary to reserve a channel merely because it watered the lands of more than one zamindar. The zamindars could settle the distribution of the water according to custom or by arrangement. *Ambalavana Pandara Sannathi* v. *Secretary of State for India*(1), a case relied on by the Government, is distinguishable for there the channel in question irrigated lands other than inam lands, and it was held unlikely that in that case the grant of the inam carried with it the grant of the channel.

And so far as appears from the evidence the Government did not, until some of the property came back into its own hands, exercise any control over or in any way interfere with any of the channels. The Jalmuru and Negarakatakam estates, quickly returned to the ownership of the Government but Polaki remained a zamindari until 1850, and beyond the authorisation of the removal of the head of the Polaki channel to a point on the bank of the river within a Government village, there is nothing to shew that the Government interfered with this channel any more than with the others. After the repurchase of the Polaki estate we find the Government controlling and directing the improvement, maintenance and repair of all the channels, but after the repurchase of the Polaki estate the Government had a substantial interest in all, as considerable areas of ryotwari land were irrigated by all. On the whole the evidence seems to me to support the contention that the beds of the channels were not reserved by the Government at the permanent settlement but passed with the lands to the respective purchasers in so far as they lay within the limits of the land purchased by each, to the same extent and in the same way as tank beds, village sites and other poramboke lands. That however as I have already said does not

(1) (1905) I.L.R., 28 Mad., 539.

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decide the questions at issue in these suits. It does not follow because the zamindar provides the necessary channels to enable the irrigation of the zamindari lands, that although those channels carry water supplied from a river or channel belonging to the Government the irrigation is nevertheless exempt from water-cess.

It is argued, however, if I understood Mr. Ramachandrayyar aright, that the non-reservation of the channel beds is evidence that the grant was intended to convey the right to use all the water flowing in the channels without interference or charge that is to say is evidence of an engagement with the zamindar freeing all the land commanded by the channels from separate charge for irrigation. But I do not think we can from the non-reservation of the beds presume any thing more than that the Government fixed the revenue with reference to the extent of land under irrigation at the time: we have none of the permanent settlement accounts before us and no evidence that the peshcush of the zamindari was fixed with a view to any possible extension of irrigation. Statements such as those to which we have been referred in the fifth report, expressing a hope that a permanent settlement would have the effect of improving and extending the cultivation of the country are not evidence of an agreement in any particular case to permit free irrigation from Government sources of water supply.

The abstention of the Government from charging water-cess until 1901 is adduced as evidence of an agreement but does not help the zamindar. When the origin of title is not known as in the case of some inams granted before the permanent settlement the fact that irrigation has been permitted free of charge for a series of years may be evidence of a lost grant, but in the present case we know that before the settlement in 1803 the Government had the full rights of owner (apart from ryot's rights, if any) in all the land and water-courses, and we know what is contained in the sanad under which the zamindar holds. There is therefore no room for presuming another grant of irrigation rights.

It was suggested that an agreement between the different zamindars may be presumed, but that, if any, could bind the Government as repurchaser only so far as it relates to rights in the zamindar from whom the purchase was made: the right to make a separate charge for irrigation, if it then existed in the Government, was not sold to the zamindars.

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There is a quantity of evidence as to the construction and repair of works in the different channels, but I do not think it is of great significance in the present case. I will take it in favour of the zamindar that the works constructed and the repairs executed by the Government were to secure a supply of water for irrigation principally for the benefit of the ryotwari lands under the channels and the expenditure on such works and repairs can be roughly apportioned between the Government and the zamindar as proportional to the areas of ryotwari and zamindari land respectively commanded by the channels; but it does not seem to me that that helps the case of the zamindar. An arrangement of this kind for the upkeep of the channels by the parties interested might be equally just and fair whether the water which reaches the land is supplied free of charge or has to be paid for.

Then it is urged that we have the admission of officers of the Government that the irrigation is to be free of charge. It is not contended that these admissions bind the Government but only that they are evidence in support of the existence of the suggested engagement.

In 1886 the question of charging water-rate was raised and the Collector expressed an opinion that the Lukulam and Mobagam channels should irrigate free of charge on the ground that they were maintained and repaired by the zamindar and agraharamdars. In 1893 the zamindarni claimed the right to irrigate as much as she liked without separate charge and the Collector was of opinion that no charge should be made: he took the ground that documents shewed that the zamindarni had the right she claimed, and that in the absence of a regular survey of the zamindari it could not be ascertained whether or not the area then under irrigation exceeded the area shewn in the 'Gudikat' accounts as irrigable (exhibit FF).

The documents on which the Collector relied were, first an agreement between the Polaki and Urlam zamindars in 1842; we do not know the purport of this agreement but so far as I can see it could not affect the right of the Government to levy water-cess though it might affect the right to regulate the flow of water in the Polaki channel to the lands of the Urlam zamindari. Secondly some correspondence in 1861 in the course of which the Government Engineer directed that water was to be allowed to the zamindar 'for present and future crops to the end of

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the year' as usual. We do not know the grounds on which the Board of Revenue accepted the Collector's recommendation. They are not detailed in exhibit R1, but so far as the right to irrigate second crop was in question the Collector's view that the zamindar's right was proved must have been accepted: justification for the result as far as the extension of irrigation to dry lands was in question is found in the impossibility of ascertaining the area of the extension without a survey which apparently was considered not worth the expense involved.

There is in all this no evidence which indicates any engagement with the Government other than that which can be inferred from the permanent settlement, namely, that the peshcush being fixed with reference to the area of land then under irrigation no further charge for the use of water should be made in respect of that area (As to this see correspondence XXIV series.)

In the absence of any more extensive engagement then it has to be decided whether the Urlam zamindari is supplied with water from a river, stream or channel belonging to the Government.

I have little doubt that it is so supplied.

Mr. Sundarayyar relied on Act III of 1905 as declaratory of the law and I did not understand Mr. Ramachandrayyar to dissent from his contention on that point. His argument was that the Act left the law as it was before except in the matter of encroachments on land.

But the provisions of section 2 are clear enough and we cannot ignore a declaration contained in that section simply because the other provisions of the Act deal principally with the question of encroachments on public land. So far as this case is concerned the provisions of section 2 amount to a declaration, that, subject to easement and natural rights of other land-holders, all standing and flowing waters which are not the property of any one else are the property of the Government. Now clearly the waters of the Vamsadhara river do not belong to any one else; the owners of land on the banks of the river do not own the water: their natural right as defined by the Easements Act is saved by Act III of 1905, but it is not contended that the water is their "property." It follows that it is the property of the Government.

And if the body of water forming the river is the property of the Government, the river, it seems to me, belongs to the Government within the meaning of Act VII of 1865, even though the

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bed may be vested in the owners of land along the banks, so as to give them the right to accretions or "lankas" forming therein. The Vamsadhara river is undoubtedly a natural stream, and the definition of a natural stream given in the explanation to section 7 of the Easements Act indicates that in the eye of the law the stream is the flowing body of water—and a stream, was defined by Lord Watson in *M'Nab* v. *Robertson*(1) as "a body of water having as such body a continuous flow in one direction."

In this view it becomes unnecessary to discuss the question whether the bed of the Vamsadhara belongs to the Government as being the bed of a navigable river. It may be that for a portion of its course the land-owners on either bank have proprietary rights in the bank and bed; that in my opinion will not prevent the river from being a river belonging to the Government within the meaning of Act VII of 1865.

The District Judge seems to be of opinion that it is not the river but the artificial channels which are to be regarded as the source of supply within the meaning of the Act VII of 1865: I did not understand that Mr. Ramachandrayyar supported that view; he rested his case in regard to the river on the contention that the river bed did not belong to the Government.

It remains to be seen to what extent the levy of water-cess is lawful in the present cases, and here it is desirable to deal separately with the different appeals.

Appeal No. 66 *of* 1905.

Appeal No. 66 of 1905 is an appeal by the zamindar from the decree of the District Judge in Original Suit No. 3 of 1904 dismissing a suit to recover money paid as water-cess on zamindari jerayati land irrigated for second crop from the Polaki, Jalmuru and Lukulam channels.

The irrigation accounts (see for example exhibit XC) on which the charges are based show that the second crops in question are not what are ordinarily known as "wet" crops, *i.e.*, crops requiring constant irrigation: they are crops irrigated by one or two floodings of the ground, principally green gram and gingelly, and if it be found that crops of this kind were grown and irrigated at the time of the permanent settlement, we must imply an engagement to make no separate charge for irrigation in the future.

(1) (1897) A.C., 129.

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There is naturally not much evidence now in the absence of any accounts prior to the settlement, and the abstention of the Government from making any charge for so long a period after the enactment of Act VII of 1865 has placed the zamindar in a difficult position; but the burden is on the zamindar to prove the extent of his right (*Maria Susai Mudaliyar* v. *The Secretary of State for India in Council*(1)) and in my opinion the evidence is insufficient to discharge it. At the most the evidence shows that it is probable that some land in the zamindari was before 1803 cropped with second crops such as are now grown therein.

Exhibit B (1823) shows that spring crops were watered in Kottapolavalasa and probably in Kobagam in that year. In exhibit D (1855) the inamdars of Lukulam complain that much water is taken to grow spring crops in Polaki village which ought to come to their channels. In exhibit O (1861) the Engineer directs a subordinate to make provision for the irrigation of "present and future crops" to the end of the year. There is also evidence that at the inam settlement about the same year second crops of "green gram, etc." were very generally grown on the inam lands. The District Judge relies on a remark at page 232 of the District Manual as indicating that the raising of a second crop is exceptional but that remark, it seems to me, refers only to second crops of paddy and sugarcane, the staples referred to in the preceding paragraph. Some passages on page 238 are more relevant to the present case. Second crops of green gram, it is there stated, are sometimes raised on paddy land when there is water: and again wet lands are used for oil-seeds in April and May. I have already remarked that the second crops on which the charge is levied are principally green gram and gingelly (an oil-seed crop).

In exhibit LXIV (1810) the Collector informed the Board of Revenue that Urlam zamindari was then reckoned one of the best, if not the best of the estates in the Chicacole taluk, and from exhibit XXIV we find that it was the opinion of the officers of Government that the peshcush was fixed at a high rate.

We get no aid from the practice of the Urlam zamindar: the rents paid by the ryots were in 1884 fixed "at conventional rates not based on any ascertained principle" (exhibit XXIX) and we

(1) (1904) 14 M.L.J. at p. 354.

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have nothing before us to show whether these rates prevailed at the time of the permanent settlement or are calculated so as to give the zamindar a share of the profits of two crops.

I do not think there is any other evidence on this point to which we have been referred, and it is impossible to differ from the District Judge's conclusion that we have not enough to show that the charge of water-cess on second crop jerayati is not legal. Appeal No. 66 of 1905 must therefore be dismissed with costs.

Appeals Nos. 64 *and* 65 *of* 1907.

Appeals Nos. 64 and 65 of 1907 and the Memorandum of objections in Appeal No. 64 next fall to be considered. Appeal No. 64 of 1907 is presented by the zamindar from the decree of the District Judge in Original Suit No. 19 of 1905. In that suit three questions were raised as to the right of the Government to levy water-cess (1) as in Original Suit No. 3 of 1904 on second crop on jerayati land, (2) on first and second crops on inam lands and (3) on first and second crops on jerayati land alleged by the Government to have been unirrigated or "dry" at the time of the permanent settlement. The District Judge upheld the claim of the Government so far as it related to irrigation from the Jalmuru, Polaki and Lukulam channels, but holding that the Mobagam channel belonged to the zamindar declared that the Government is not entitled to levy water-cess on lands irrigated under that channel.

The zamindar appeals in Appeal Suit No. 64 of 1907, and the Government by a Memorandum of objections raises the question of its rights in respect of the Mobagam channel. Appeal No. 65 of 1907 is by the Government and is put on the same ground as the Memorandum of objections.

As regards extension of irrigation in jerayati land, *i.e.*, the conversion of "dry" land into "wet," I have already pointed out that the only engagement on which the zamindarni can rely is an engagement enabling her to irrigate free of separate charge the extent of land which was classed as "wet" at the time of the permanent settlement. In arriving at a conclusion as to this extent the District Judge has relied on accounts prepared in 1853 showing the area then irrigated. These accounts (called the gudikat accounts) though not based on an accurate survey and measurement of the lands (exhibit FF, paragraph 7) were found by the Inam Deputy Collector to have been carefully prepared (exhibit

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LXXI, 1st paragraph) and were in some cases accepted as the basis of the inam settlement. They form the most trustworthy evidence we have on which to base an estimate of the extent of irrigation at the date of their preparation, and as there is no evidence of any decrease of cultivation between 1803 and 1853 it is not likely that they err generally in favour of the Government. But a discrepancy was pointed out to us as an example of their inaccuracy: Exhibit LXIX, the gudikat account of the Urlam village, is inconsistent with exhibit CVII the water-rate account of the same village. The area of "wet" land taken from the gudikat account is 706 acres: the area actually irrigated is found to be 1,039 acres, and the difference between the two is charged with water-cess. But 1,039 acres is more than the whole cultivated area including inams as given in the gudikat account, and almost equal to the total area of the village including porambokes. Mr. Sundarayyar suggests that the difference may be accounted for by the cultivation of porambokes but there is no evidence in support of the suggestion. In the absence of any such evidence it is fair to infer that the difference is due to an underestimating of the area by the officer responsible for the preparation of the gudikat accounts In exhibit FF, the Collector suggested that the Government might allow 10 *per cent.* of the estimated area for possible inaccuracies in the estimate, but this does not appear to have been done. Possibly the Government officers were of opinion that any underestimate which might operate to the prejudice of the zamindar would be compensated by probable extensions of irrigation between 1803 and 1853, which were left out of account and this may in general be a fair assumption although there is in fact no evidence of any great extension of irrigation, and exhibit XXIV shows that under the Polaki channel the improvements made had rendered the supply sufficient for the lands already irrigable but had probably not resulted in any large extension of irrigation to the "dry" lands.

But in the case of Urlam village we have positive evidence that the area of wet land must have been more than 706 acres in 1853, while there is no evidence that it was not more than that extent in 1803. In these circumstances it seems to me that an attempt should be made to estimate the probable extent of the underestimate.

The area of "dry" land in the gudikat account (LXIX) is so small that the inaccuracy must be to a large extent in the estimate

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of the "wet" land: and I would arrive at a conclusion by the following method. Assume in favour of the Government that all the dry cultivable land in the village has been converted into wet: then 745½ acres (the total Sarkar cultivable area as per gudikat account) represents an actual area of 1,039 acres: and 706 acres as per gudikat account represents 984 acres on the ground, and this is the area of the "mamul wet."

We are not asked by either side to adopt this method of cultivation. For the zamindar it is urged that the discrepancy is enough to discredit the whole gudikat accounts, and for the Government that we should assume that the difference is due to cultivation of poramboke lands. I am not prepared to do either. The gudikat accounts may be accepted where there is no evidence to discredit them, and corrected by the method I propose when there is clearly an underestimate.

There is a similar underestimate in regard to the village of Kobagam where the total Sarkar area is 395 acres while the actual area charged is 410 acres, the mamul wet being 360 acres. The difference in this case is small. By the same method of calculation 360 acres as per gudikat account will be found to represent 370 on the ground. The extent on which the Government is entitled to charge water-cess will therefore be in Urlam 1,039 — 984 = 55 acres and in Kobagam 410 — 370 = 40 acres.

As to the inams we have the accounts prepared at the inam settlement and there is nothing to suggest that they are incorrect. We must accept them.

In the case of second crop on jerayati lands I have already shown that the zamindar has failed to make out a right to free irrigation.

Then as to second crop on inam lands we have to go by the inam settlement. The difficulty arises because there are no statements of areas grown with second crop at the date of the settlement, but there are statements made by the Inam Deputy Collector which indicate that in estimating the income from the land the cultivation of second crops was taken into consideration.

In exhibit LXXVI we have an explanation of the method adopted to ascertain the profits of the land. The village under consideration was compared, with reference to its fertility and irrigation facilities, with some village in the neighbouring Polaki estate which had shortly before come into the hands of the

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Government and an acreage rate of rent or land-tax was fixed, based on an average of the rates obtaining in the Polaki estate village taken for comparison.

In considering the fertility of the village the question whether the lands are cultivated with second crop is always taken into account, and except in the village of Venkatapuram we find from the statements that the cultivation of second crops was general. I do not understand the District Judge to say that the acreage rates were fixed without reference to this factor; his view seems to be that the second crops to which reference is made in the statements were not irrigated crops.

In that view I have no doubt he is wrong; he relies on a remark in exhibit LXXI to the effect that "wet grain and paddy" are not grown as second crops in Lukulam but the crops on which the Government is now charging water-cess are not "wet grain or paddy," but green gram, gingelly, chillies, etc. The statements show that this kind of crop was grown generally as second crop on wet lands and the District Judge's surmise that it was grown without irrigation is unlikely to be correct.

For in the first place if those crops were generally irrigated in 1901, it is not unreasonable to suppose that they did not grow without irrigation in 1861—and secondly in the statement for Venkatapuram village it is alleged that the lands are not cultivated a second time "*for want of water*": the obvious inference being that in the other villages where the lands are cultivated a second time that cultivation is with the aid of water—and thirdly I may remark that in dealing with Original Suit No. 30 of 1906 (Appeals Nos. 129 and 134 of 1907) the District Judge himself found that for such crops one flooding to prepare the land was 'essential.' I conclude from all the evidence on this point that the assessment of the inams was fixed with reference to the capacity of the land to grow an irrigated second crop, and consequently when second crops were grown includes a payment for such crop: and the Government cannot demand a second payment on the same account.

Appeal No. 65 of 1907 is by the Government claiming the right to charge water-cess on lands irrigated from the Mobagam channel. The District Judge has disallowed this claim holding that the Mobagam channel belongs to the zamindar. I have shewn that the water of all these channels is supplied or used from

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a river belonging to the Government and that the ownership of the bed of the channel is really beside the question. Appeal No. 65 of 1907 must be allowed.

A question is raised on behalf of the Government whether the zamindar is entitled to recover anything, whatever be the result of our decision on the other questions. It is urged that the payment of the water-cess must be regarded as a voluntary and therefore irrecoverable payment, because it was made without any actual attachment or distraint of the zamindar's property. The case *Muthayya Chetti* v. *Secretary of State for India*(1) is relied on. The plea is one which I suppose the advisers of the Government feel bound to raise, though probably a refund would as a matter of fact follow on a declaration by the Courts of the zamindar's right to free irrigation of land on which water-cess had been collected.

But I do not think the plea can be sustained. A demand by the Government having at its back the powers given by Act II of 1864 must unless in special circumstances, which are not shown here, amount to a threat of distraint if the money demanded is not paid, and if payment is made to prevent the execution of that threat. I am unable to see how the payment can be regarded as a voluntary payment. (See *Narayanasami Reddi* v. *Osuru Reddi*(2) and *Lutcamee Doss* v. *Secretary of State for India*(3).)

I would therefore modify the decree and refuse the declaration (*a*) prayed for in paragraph 30 of the plaint. grant a declaration that the plaintiff is entitled to irrigate free of water-cess second crops grown on the inam lands belonging to her except on those situated in the village of Venkatapuram to the extent of the wet area specified in the respective title-deeds, by means of water flowing, etc., as in prayers (*b*) of paragraph 30 of the plaint, and direct payment to the plaintiff of the amount collected for second crop on inams so far as the collection is unauthorised by this declaration—and also payment of the difference between the claim on jerayati first crop in Urlam village and the amount due taking the extent of mamul wet to be 984 instead of 706 acres the extent in Kobagam village being 370 instead of 360 acres. As to interest the District Judge allowed interest and we do not intend

(1) (1899) I.L.R., 22 Mad., 100. (2) (1902) I.L.R., 25 Mad., 548.
(3) (1909) I.L.R., 32 Mad., 456.

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to disallow it. Interest will be allowed on the sums decreed at the rates allowed by the District Judge up to the date of decree and at 6 per cent. on the aggregate after the date of decree till the date of payment.

Each party should pay his own costs in Appeals Nos. 64 and 65 of 1907. As the Memorandum of objections in Appeal No. 64 of 1907 is unnecessary, it must be dismissed but as its grounds are identical with those in Appeal No. 65 of 1907 its presentation cannot have increased the costs of the plaintiff and it will be dismissed without costs. Each party should bear his own costs in the lower Court.

Appeals Nos. 129 *and* 134 *of* 1907.

These are appeals from the Subordinate Judge's decree in Original Suit No. 30 of 1906.

The suit was for declaration similar to those prayed for in Original Suit No. 19 of 1905 and refund of water-cess collected for fasli 1314, and our decree should follow that in Appeals Nos. 64 and 65 of 1907. There is one question raised which was not in Original Suit No. 19 of 1905 and which requires separate consideration. It is dealt with in the 11th and following grounds of appeal in Appeal No. 134 of 1907 and in the 13th and following paragraphs of the judgment of the District Judge. I agree with the District Judge on the evidence that the water was used to irrigate second crops on lands ordinarily irrigated from the Mobagam channel, and that the water so used was surplus water of the Polaki channel and was carried to the Mobagam channel through various branch channels.

I also agree with the District Judge that clause (*b*) of section 1 of Act VII of 1865 does not apply to the case because the land was not irrigated by water flowing from or through adjoining land within the meaning of that section nor was it stored in a reservoir and thereafter used. But it seems to me that clause (*a*) is applicable: the water is used from a river belonging to the Government, just as much as is any other water used from the Polaki channel. The question what would be the rights of the parties supposing the waters of the Mobagam channel were mixed with those of the Polaki channel does not arise, whether the irrigation from the Mobagam channel is or is not irrigation with water supplied from a river belonging to the Government: because no water from the Mobagam channel head was used in this case and for the

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purposes of this question the Mobagam channel bed formed only a branch channel from the Polaki channels. I would allow the Appeal No. 134 of 1907 on this point, and in other respects modify the decree in the manner indicated in disposing of the Appeals Nos. 64 and 65 of 1907. Each party should bear his own costs in Appeal No. 129; and Appeal No. 134 is allowed with costs. Each party should bear his own costs in the lower Court.

Appeals Nos. 35 *and* 36 *of* 1905.

Appeals Nos. 35 and 36 of 1905 are appeals from the decree of the District Judge in Original Suits Nos. 37 and 38 of 1903 by the Lukulam agraharamdars in regard to water-cess on second crops grown on wet lands in their agraharam.

It seems to me clear from exhibit H (which is exhibit LXXI in Appeal No. 64 of 1907) that the rates fixed in order to arrive at the quit-rent stated in exhibit J were struck in consideration of the circumstances that the lands were generally grown with second crops. It cannot be doubted, I think, that in arriving at his rate of 6 rupees per acre the Inam Deputy Collector relied on the fact that even in unfavourable seasons the wet lands were twice cultivated. It follows that a payment for a second crop irrigated, at any rate for a second crop of the kind on which water-cess is now levied, was included in the amount on which the quit-rent was fixed, and a further charge on that account would be a violation of the engagement implied in the grant J.

Appeals Nos. 35 and 36 of 1905 must be allowed and the respective plaintiffs in Original Suits Nos. 37 and 38 of 1903 given decrees declaring that of the lands in their agraharam classed as wet lands the extent specified in their title-deeds is entitled to irrigation free of water-cess for second crops of gingelly, green-gram, ragi, etc, raised thereon after the ordinary wet crop with the water of the Vamsadhara river through the Lukulam and Mobagam geddas (in Appeal No. 35 of 1905) and through the Lukulam gedda (in Appeal No. 36 of 1905) and a direction to refund the amount claimed with interest at 6 per cent. from date of levy to date of payment.

In the lower Court and in the appeals the parties will pay their own costs as the agraharamdars fail in their claim for unlimited free irrigation.

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Appeal No. 40 *of* 1905.

In Appeal No. 40 of 1905 the Government succeeds so far as the declaration is concerned, but fails as regards the second crop charge claimed. Each party may therefore bear his own costs.

Appeal No. 41 *of* 1905.

Appeal No. 41 of 1905 is an appeal from the decree of the District Judge in Original Suit No. 38 of 1903 in so far as it refuses costs to the Government. As I hold that Original Suit No. 38 of 1903 ought not to have been dismissed and that each party thereto ought to pay his own costs, I think this appeal must be dismissed with costs.

S.A. No. 237 *of* 1907.

Second Appeal No. 237 of 1907 is an appeal by the Government from the decree of the District Judge in Appeal No 161 of 1906 on his file. He there held that the Government was not entitled to collect water-cess on the second crop raised on their inam lands by means of water drawn from the Mobagam channels.

The plaintiffs did not set up any engagement with the Government or give evidence of any such engagement. They rested their case on an alleged right to irrigate from the Mobagam channel free of water-cess. I am of opinion that they have not that right for reasons already given: and in the absence of any engagement, the Government is entitled to levy a separate charge on second crops.

The appeal must therefore be allowed and the suit dismissed with costs throughout.

MUNRO, J.—I agree.

APPELLATE CIVIL.

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

1910. July 20, 21, 22, 29.

SETHURAM SAHIB AND ANOTHER (FIRST AND SECOND DEFENDANTS), APPELLANTS,

v.

VASANTA RAO ANANDA RAO DHYBAR, MINOR BY HIS NEXT FRIEND KAMALA BOI THAI SAHIB DHYBAR (PLAINTIFF), RESPONDENT.*

Civil Procedure Code, Act XIV of 1882, s. 462—When leave of Court not obtained, compromise not binding on minor—Hardship to other party no ground for upholding compromise—Minor not bound to return any benefit under compromise before it is set aside—Joint contract, liability on.

A compromise entered into on behalf of a minor without obtaining leave of the Court under section 462 of the Code of 1882, is unenforceable against the minor. It cannot be treated as binding upon him on the ground that its being set aside would work hardship on the other party. It is also no ground for not setting it aside that it is impossible to place the parties in the position in which they were when the compromise was effected.

The withdrawal from the suit by the other party cannot be considered as service rendered to the minor, for which the minor ought to pay compensation before the compromise is set aside.

Amansingh v. *Narain Singh*, [(1898) I.L.R., 20 All., 98], not followed.

The fact that a joint contract is not enforceable against one of the parties does not absolve the other party from liability.

APPEAL against the decree of V. Subramaniam Pantulu, Subordinate Judge of Tanjore, in Original Suit No. 22 of 1904.

The facts of the case, which are involved, are thus set out in the judgment of the lower Court.

"First defendant is the brother of second defendant and second defendant is the widow of one Sambu Singh who was the adopted son of late Sakharam Sahib, the son-in-law of late Sivaji Maharaja, the last Mahratta ruling prince of Tanjore. Sakharam Sahib died in 1895 and Sambu Singh, his adopted son, had predeceased him. When Sakharam Sahib died, the Collector of Tanjore seems to have taken possession of some moveable property which was just

* Appeal No. 121 of 1906.

then in his possession and secure it with a view afterwards to hand it over to any who might establish his right to the same. The two defendants set up a will as if executed by Sakharam Sahib, bequeathing most of the property to first defendant and the rest to second defendant, and filed the will before the Registrar of Tanjore for registration during the last days of Sakharam Sahib's illness. The genuineness of the will was disputed and its registration was opposed by one Chotah Raja who professed to be the adopted son of Sakharam Sahib's adopted son Sambu Singh. The Registrar having gone to Sakharam Sahib's house for registration of the will, found that Sakharam Sahib was not in a fit state of health and consciousness either to have executed the will or to make any admission regarding it to him and he therefore refused to register the will. The two defendants therefore filed Original Suit No. 5 of 1895 against said Chotah Raja and his natural father to have the genuineness of the will declared and its registration ordered, and Chotah Raja in his turn filed Original Suit No. 36 of 1895 to have his status as the adopted son of Sakharam Sahib's adopted son declared and to recover possession of all the moveable and immoveable properties of Sakharam Sahib. While the said two suits were pending, the present plaintiff, claiming to be the daughter's son of one Dadaji, the deceased brother of Sakharam Sahib, filed Original Suit No. 2 of 1896 to have his right to the entire property of Sakharam Sahib declared as Sakharam Sahib's heir and to recover possession of the same from defendants and their Agent Veeraraghava Aiyangar, and impleaded them as defendants Nos. 1, 3 and 4 respectively and made Chotah Raja the second defendant. When the three suits came on for hearing, it was arranged between the parties that defendants Nos. 1 and 2 should execute a bond for sum of Rs. 90,000 to plaintiff, and that Chotah Raja in his turn should execute another for half that sum in favour of first defendant, that plaintiff should in consideration of the bond, to be executed by defendants in plaintiff's favour, withdraw his Original Suit No. 2 of 1896, and that with the exception of the property settled by late Sakharam Sahib on second defendant during his life-time, the remaining property of Sakharam Sahib should be divided by first defendant and Chotah Raja in equal moieties and enjoyed. First defendant's guardian *ad litem* in that suit who was his paternal grandmother and second defendant

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accordingly executed the suit bond for Rs. 90,000 in favour of plaintiff's mother and next friend in that suit, and plaintiff's next friend in that suit filed a petition in Court to withdraw Original Suit No 2 of 1896 (exhibit E). But when that petition was filed, the District Judge wanted to know whether the Gosha lady who acted as plaintiff's next friend was aware of the step taken and having examined the lady on commission and satisfied himself on the matter, allowed the suit to be withdrawn (exhibit E1) and issued orders to the Receiver to restore all the property in his possession to defendants with the exception of the jewels taken from the Collector's custody. The stipulation of the said bond was that defendants Nos. 1 and 2 should pay the principal sum of the suit bond within three months after defendants and Chotah Raja took possession of the scheduled properties from the possession of the Receiver appointed by the Court in Original Suit No. 2 of 1896, and that, in default, it should be repaid with interest at 6 per cent. per annum on the said sum from that date to the date of payment. It appears that Chotah Raja, also, in his turn, executed a bond for Rs. 45,000 in favour of the first defendant, so that Original Suit No. 2 of 1896 having been dismissed, Original Suit No 5 of 1895 was decreed in the present first defendant's favour, while in Original Suit No. 36 of 1895, first defendant and Chotah Raja filed a razinamah petition to divide the entire property of Sakharam Sahib in equal moieties and a decree was obtained accordingly."

"The present suit is brought for the recovery of the principal and interest due on the bond executed by defendants Nos. 1 and 2."

The main contention on behalf of defendants was that the bond sued on was invalid as no sanction of the Court for the compromise was obtained as required by section 462 of the Code of 1882.

The Subordinate Judge found that no sanction was obtained but nevertheless passed a decree against both defendants on the ground that the first defendant had benefited by the compromise and that it was impossible to restore the parties to the position they occupied before the compromise.

Defendants appealed.

P. R. Sundara Ayyar and *C. V. Anantakrishna Ayyar* for first and second appellants.

The Advocate-General Hon. Mr. *P. S. Sivaswamy Ayyar* and *T. V. Gopalasami Mudaliyar* for respondent.

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JUDGMENT.—The first point taken on behalf of the appellant was that the suit was premature. As regards this we agree with the Subordinate Judge that the words in exhibit A "as scheduled in the aforesaid suit" mean as specified in the schedules to the suit in question. In our opinion the suit was not premature.

The second point taken was that the compromise in Original Suit No. 2 of 1896 which is embodied in exhibit A was not binding on the first defendant, inasmuch as, when the compromise was entered into, the first defendant was a minor and the leave of the Court was not obtained for the compromise. This being so Mr. Sundara Ayyar contended that the decree given by the Subordinate Judge against the first defendant in a suit on the compromise agreement was wrong.

He also contended that, the compromise being invalid as against the first defendant, and in view of the terms of the compromise as to the mode of payment of the sum which the defendants agreed to pay, the decree against the second defendant also was wrong.

We take the case of the first defendant first.

The Subordinate Judge found that the leave of the Court was not obtained on behalf of the first defendant for the compromise sued on. Here we think that for the reasons stated in paragraph 11 of his judgment there can be no question that the Judge was right.

Notwithstanding his view that the sanction of the Court had not been obtained either in fact or in law on behalf of the minor for the compromise the learned Subordinate Judge saw his way to holding, following *Aman Singh* v. *Narain Singh*(1), that the first defendant could not repudiate the contract. It is probably not material for the purposes of the question we have to consider, but, as a matter of fact, the first defendant is now of age. The learned Subordinate Judge based his decision upon the ground that it was then impossible for the first defendant to place the plaintiff in the same position as that in which he was when the suit was compromised and that the first defendant had not offered in the written statement to restore the property which he then obtained possession of; that being so, the Subordinate Judge was of opinion that the first defendant could not rescind the compromise.

(1) (1898) I.L.R., 20 All., 68.

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The Subordinate Judge's view, as it seems to us, really comes to this, that where the application of section 462 of the Civil Procedure Code of 1882 would work a hardship so far as the party seeking to enforce the compromise against the minor is concerned, the Court may on equitable grounds give the go-by to the section. There is no authority for this view, unless it be the case (*Aman Singh* v. *Narain Singh*(1)), on which the learned Subordinate Judge relied. And if this case is to be regarded as an authority for this view, we must respectfully dissent from it.

Aman Singh v. *Narain Singh*(1) may possibly, however, be distinguished from the present case. There the minors sought to set aside a decree on a compromise. Here the minor relies on the invalidity of the compromise as a defence to a suit on the compromise. There the ground on which the minors sought to set aside the decree on the compromise was fraud. Here the minor resisted the claim on the compromise on the ground that the requirements of section 462 of the Code had not been complied with.

We may observe that in *Barhamdeo Prasad* v. *Banarsi Prasad*(2), AMIR ALI and PRATT, JJ., expressed a guarded dissent from the Allahabad decision to which we have referred, and it seems difficult to reconcile the decision with such cases as *Sharat Chunder Ghose* v. *Kartik Chunder Mitter*(3) and *Virupakshappa* v. *Shidappa and Basappa*(4).

The Advocate-General did not attempt to support the decree against the first defendant on the grounds taken by the Subordinate Judge. He contended that the contract being voidable and the restoration to the *status quo* before the contract being impracticable, the contract should only be set aside on the terms of the party against whom it was set aside being given compensation as on a *quantum meruit* for services rendered. It was suggested that the services rendered in the present case on which the *quantum meruit* could be based consisted in the abandonment of the suit, and that the party's own valuation of what these services were worth (viz., the sum which the first defendant agreed to pay in consideration of the plaintiff abandoning the suit) was the basis for the assessment of compensation. We cannot possibly

(1) (1898) I.L.R., 20 All., 98.
(2) (1906) 3 C.L.J., 119.
(3) (1883) I.L.R., 9 Calc., 810.
(4) (1902) I.L.R., 26 Bom., 109.

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accede to this contention. If it were sound the requirements of section 462 could be dispensed with in every case and the party suing on a compromise which the minor was entitled to avoid could always rely upon the "services rendered" which formed the consideration for the minor's voidable promise.

As regards the second defendant the contention was that under the compromise no personal liability was incurred by the second defendant but only a liability to payment out of the estate of the first defendant as and when he obtained possession of his share of the property of the late Sakharam Saib. As we read exhibit A it amounts to a personal covenant on the part of the second defendant to pay, the only condition being as to time of payment. It was not contended that the second defendant did not get some benefit under her agreement. We cannot go into the adequacy of the consideration so far as she was concerned.

It was also contended that the intention was that the second defendant should only be liable under the contract if the first defendant were also liable. There is nothing in the contract to suggest this. The case (*Sivasami Chetti* v. *Sevugan Chetti*(1)) on which Mr. Sundara Ayyar relied is clearly distinguishable as there the contract was not complete. There is no authority for what we understood to be Mr. Sundara Ayyar's proposition that if a joint contract by A and B is unenforceable against A it is also unenforceable against B.

Mr. Sundara Ayyar also argued with considerable ingenuity that the second defendant was not liable since exhibit A contained an "express agreement to the contrary" within the meaning of section 43 of the Indian Contract Act, which precluded the plaintiff from claiming the benefit of that section and compelling one of the joint promisors performing the whole of the promise. He relied on the wording of exhibit A and contended that the words "we the executants aforesaid hereby agree and bind ourselves conjointly to pay" (*sic*) did not constitute one joint promise to pay, but two separate promises to pay jointly. In our opinion exhibit A cannot be so construed and there is no "agreement to the contrary" for the purposes of section 43 of the Contract Act. Consequently the plaintiff in our opinion is entitled to a decree against the second defendant for the whole amount.

(1) (1902) I.L.R., 25 Mad., 389.

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As regards the first defendant the appeal must be allowed and the suit as against him be dismissed, but, in the circumstances we direct that it be dismissed without costs.

As regards the second defendant the appeal is dismissed with costs.

APPELLATE CIVIL.

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

1910. July 18, 19, 20.

LAL BATCHA SAHIB (DEFENDANT), APPELLANT,

v.

ARCOT NARAINASWAMI MUDALIYAR, MINOR BY GUARDIANS SIVAGURUNATHA MUDALIYAR AND MEENAMBA AMMAL (PLAINTIFF), RESPONDENT.*

Interest, right to claim, till payment or legal tender—Tender or agreement to waive tender must be of an ascertained sum—Valid tender must be unconditional.

At common law, where interest is payable by the terms of a contract it runs ordinarily up to the date of payment.

A valid tender must be an unconditional offer to pay a specific and ascertained sum.

An offer to pay such amount as may be found due on a settlement of accounts if the payee would execute an indemnity bond in accordance with law is not a valid tender.

There cannot be a tender or an agreement to waive tender of an unascertained sum.

Garuda Reddi v. *Gudi Janakayya Garu*, [(1862) 1 M.H.C.R., 124], distinguished.

Pandurang Krishnaji and another v. *Dadhabhoy Nowroji*, [(1902) I.L.R., 26 Bom., 643], distinguished.

APPEAL against the decree of A. T. Forbes, District Judge of Bellary, in Original Suit No. 2 of 1905.

This was a suit to recover Rs. 3,747 and odd; Rs. 2,602 being principal and Rs. 1,144–14–0 interest thereon at 12 per cent. per annum till date of suit.

The plaintiff was the adopted son of Pinavelu Mudaliyar to whom the debt was due.

The defendant contended that the sum due for principal was Rs. 2,360–1–0 and not Rs. 2,602–3–7, that the plaintiff had omitted

* Appeal No. 14 of 1906.

WHITE, C.J., AND AYLING, J.

LAL BATCHA SAHIB v. ARCOT NARAINASWAMI MUDALIYAR.

to give him credit for several sums paid to and on account of Pinavelu Mudaliyar and that he has deposited Rs. 2,359–6–6 (deducting As. 10–6 charges for registered letters) towards the suit amount. On the death of Pinavelu Mudaliyar, Meenamba Ammal, his widow and A. Dhanakoti Mudaliyar, his brother, severally claimed the debt. On 4th November 1901 the defendant expressed his readiness and willingness to pay the debt to the holder of a succession certificate but refused to pay further interest. He contended that he was not liable to pay interest as there were disputes between the guardians regarding the right to claim the debt.

The lower Court decreed for plaintiff with interest up to date of suit holding that the defendant had unreasonably withheld payment.

Defendant appealed.

P. R. Sundara Ayyar and *M. B. Doraiswami Ayyangar* for appellant.

The respondent was not represented.

THE CHIEF JUSTICE.—The main question raised in this appeal is as to the interest payable by the defendant to the representatives of the late Pinavelu on money due by the defendant to Pinavelu on the death of the latter.

Mr. Sundara Ayyar on behalf of the defendant contended that the effect of exhibit IV, a letter dated 4th November 1901, from the defendant to Pinavelu's brother was to stop interest running as against the defendant from the date of that letter. He contended, in the alternative that at any rate exhibit VII, a letter dated 7th January 1902 from the defendant to Pinavelu's widow relieved the defendant from any obligation to pay interest as from the date of that letter.

It is not necessary to consider whether the taking out of a succession certificate was necessary for the recovery of the debt. For the purposes of my judgment, I assume that the defendant was entitled to decline to pay until a succession certificate had been taken out, though as a matter of fact no succession certificate was ever taken out and a suit was ultimately brought and a decree obtained by the guardians of Pinavelu's adopted son.

As WALLIS, J., points out in his judgment in Original Suit No. 53 of 1907, at Common Law when interest is payable by the terms of the contract (this is admitted in the present case) it runs ordinarily up to the date of payment or legal tender.

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I cannot find either in exhibit IV or in exhibit VII an unconditional offer by the defendant to pay a specific and ascertained sum. In exhibit IV he expressly guards himself from admitting that any amount is due. In exhibit VII he says that according to his accounts Pinavelu was credited with a certain sum and that the statement of the amount due in the demand for payment is wrong. He goes on to say that if the widow would execute and register an indemnity bond (which he will accept if it is in accordance with law) he would pay the amount due on the comparison of the two accounts.

I do not think exhibit VII read as a whole amounts to an admission by the defendant of liability to pay the amount which appeared to be due on his own account and an unqualified offer to pay this amount. A valid tender which has been improperly refused stops the running of interest; but there was certainly no tender in this case. Mr. Sundara Ayyar contended that the letters referred to or one of them amounted to an agreement by the brother or the widow to waive tender. But assuming it was open to the brother or the widow to agree to waive tender there cannot be a tender or an agreement to waive tender of an unascertained sum. In *Garuda Reddi* v. *Gudi Janakayya Garu*(1) and *Pandurang Krishnaji and others* v. *Dadabhoy Noworoji and others*(2) it would seem that the amount of the defendant's liability was an ascertained and specific sum. I think these cases are distinguishable on this ground. I also think the case before WALLIS, J., to which I have referred is distinguishable on the same ground.

The judgment would seem to direct that interest should be payable on the principal and interest due on 4th November 1901. The plaintiffs are only entitled to simple interest on the amount due subsequent to the settlement of 27th November 1900. The decree must be modified accordingly. Otherwise the appeal is dismissed. The respondent is not represented.

AYLING, J.—I concur.

(1) (1862) 1 M.H.C.R., 124. (2) (1902) I.L.R., 26 Bom., 643.

APPELLATE CIVIL.

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

KARUTHAN CHETTY AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

KALIMUTHAN *alias* VELLAYAN AND OTHERS (DEFENDANTS), RESPONDENTS.*

1910. August 30, 31.

Prescription, proof of acquisition of title by—Acts necessary to prove prescriptive right as trustee of tank—Such right not acquired by acts of conservancy, maintaining and repairing, etc.

A prescriptive right as trustee of a tank, the common property of a village, cannot be acquired by performing acts of conservancy, clearing and maintaining the tank, building flights of steps, sluices, etc., enjoying the fruits of trees in the bund, selling withered trees and similar acts.

Muthayya v. *Sivaraman*, [(1883) I.L.R., 6 Mad., 229], followed.

Sivaraman Chetty v. *Muthayan Chetty*, [(1889) I.L.R., 12 Mad., 241 at p. 248], followed.

APPEAL against the decree of S. Ramaswami Ayyangar, Subordinate Judge of Madura (East), in Original Suit No. 16 of 1905.

The facts of this case were as follows:—

This suit was for a declaration of the plaintiffs and the forty-sixth and forty-seventh defendants' ownership to the plaint named Paria *alias* Karkuthan oorany, the Pillayar temple and the trees on its bunds and all the appurtenances attached thereto, as hereditary trustees; for possession of the same, for an injunction restraining the defendants from interfering therewith except for taking water from the oorany and worshipping at the temple; for the removal of the platform and wall in the bund at the defendants' cost and for Rs. 15 past profits together with subsequent profits. The plaint contained a prayer for general relief.

The defendants Nos. 1, 3, 4, 6 to 10, 13 to 16, 18, 19, 22 to 31, 33, 35 to 39 and 43 to 45 filed one written statement. They denied the plaintiffs' title and enjoyment as trustees or otherwise and the other allegations in the plaint and pleaded that the oorany was dug by a Karkuthan, an ancestor of their families, for the

* Appeal No. 109 of 1906.

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general public use and had been since then managed and superintended by their ancestors and by themselves, and that the sluice, steps, etc., were constructed by their ancestors and by themselves.

The material portion of the learned Subordinate Judge's judgment is as follows :—

"The issue framed is whether the plaintiffs and the defendants Nos. 46 and 47 are the exclusive hereditary trustees and managers of the plaint oorany and the Pillayar kovil and the bund adjoining thereto, and described in the plaint, either on the ground of their ancestors having been the original founders of the oorany and the Pillayar kovil charity or otherwise? Whether they are as such trustees and managers exclusively entitled to make repairs, improvements, etc., to the said oorany and kovil, etc.

"There is not any evidence to prove the title of the plaintiffs or the defendants to the plaint oorany as owners and proprietors. It has not been shown also that the site of the oorany ever belonged to any of the parties to the suit or their ancestors.

"There is, however, abundant evidence, oral and documentary, on the plaintiffs' side to establish beyond all reasonable doubt that the plaintiffs and the forty-sixth and forty-seventh defendants and their fathers and grandfathers have been maintaining and conserving the plaint tank at their cost and have built flight of steps, sluices for it, and a Pillayar kovil, on one of its bunds, have been cleaning it and its supply kal, repairing and strengthening its bund and have also been enjoying the fruits of the trees in the bund, selling withered and fallen trees thereon, and that they are maintaining the Pillayar kovil also. It is further well proved that the occupants of the houses on its bund constructed them with leave of the plaintiffs' ancestors.

"The question then is whether by such exclusive management and maintenance of the plaint oorany at their own expenses without any objection or interference by others since 1859 if not a still earlier period, the plaintiffs have become entitled to be the exclusive trustees of the plaint oorany or to prevent the defendants or the other inhabitants of the village from doing any work on any portion of it."

The Subordinate Judge held that the plaintiffs had not acquired a prescriptive right as trustees by such exclusive management and maintenance of the oorany and dismissed the suit.

Plaintiffs appealed.

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K. Srinivasa Ayyangar and *M. A. Krishnaswami Ayyar* for *P. R. Sundara Ayyar* for appellants.

T. Rungachariar for respondents Nos. 2 to 4, 6 to 15, 17 to 19, 21 to 25, 27 to 31, 33 to 40 and 42 to 45.

THE CHIEF JUSTICE.—In this case the plaintiffs are inhabitants of a village called Nemathampatty and the defendants are also inhabitants of the same village. The matter in dispute is a pond or tank which may be described as the village pond of the village in question. It is said that the pond, as a matter of fact, is itself outside the boundaries of Nemathampatty village. But I think I am accurate in describing the pond as the village pond of the village of which the plaintiffs and the defendants are the inhabitants or some of the inhabitants.

Now the case set up by the plaintiffs is that they had certain rights as hereditary trustees of this tank, the parties for whom the beneficiary rights are supposed to exist being the defendants and other villagers of the same village. It may be it is not strictly accurate to describe the defendants as the *cestuis que trustent* of the alleged trust, but there can be no doubt that the trust which the plaintiffs set up is supposed to exist for the benefit of the defendants as villagers.

The case for the plaintiffs as made in paragraph 5 of the plaint is (I give the material portion only) that their ancestors and afterwards the plaintiffs have from time immemorial been undisputedly enjoying the pond in question for over fifty years as trustees. That is the case made in the plaint and that is the case made before us. They ask for a declaration that the properties with certain exceptions hereditarily belong to the ancestors of the plaintiffs and that the properties should be delivered to them and that the defendants have no rights other than the rights of taking water like other people and they ask for a permanent injunction restraining the defendants from interfering with the properties. They also ask for an injunction directing the defendants to remove a certain platform and certain mud walls which the defendants have erected.

In their defence the defendants set up an exclusive title as trustees to the pond in question. That has been found against by the learned Subordinate Judge. The plaintiffs appeal and the question for determination is whether the learned Subordinate Judge was right in holding that the plaintiffs had

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failed to make out the case which they set up in their plaint. Now the acts upon which the plaintiffs rely as creating in them a title as trustees by immemorial possession or by prescription whichever may be the more correct description of their claim, are to be found in paragraph 11 of the judgment of the learned Subordinate Judge. He says "that the plaintiffs and the forty-sixth and forty-seventh defendants and their fathers and grandfathers have been maintaining and conserving the plaint tank at their cost and have built flight of steps, sluices for it, and a Pillayar kovil, on one of its bunds, have been cleaning it and its supply kal, repairing and strengthening its bunds and have also been enjoying the fruits of the trees in the bund, selling withered and fallen trees thereon, and that they are maintaining the Pillayar kovil also. It is further well proved that the occupants of the houses on its bund constructed them with leave of the plaintiffs' ancestors."

That is what the Judge finds with regards to the acts done by the plaintiffs in connection with this village tank.

Mr. Ranga Chariar suggests that that is putting the case too high in favour of the plaintiffs. However, I will deal with the case on the footing that the learned Subordinate Judge was right in holding that the plaintiffs had established that these acts had in fact been done by the plaintiffs. Then with regard to the rights of the defendants in the pond in question these are the findings of the learned Subordinate Judge. In paragraph 19 he says "I have no doubt that the plaint pond just like other ponds in the village is the ancient immemorial pond of the village, and is therefore village common property either vested in the State or in the Zamindar, the proprietor of the entire village." Again in paragraph 22 he says "In this case (that is, the case before him) also the right of every one to use the oorany is not denied. I have found that, from the very nature of the case, the plaint oorany as an ancient village pond is the village common property." Again in paragraph 24, "I therefore find on this issue that the plaintiff's exclusive title as owners or trustees of the plaint oorany, has not been made out and that the plaint oorany is village common tank to the use of every part of which all the villagers are entitled."

I do not think it necessary to discuss the question of the ownership of the tank. The right which the plaintiffs set up is

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analogous to the right set up in the case of *Muttaya* v. *Sivaraman*(1). The Subordinate Judge in dismissing the plaintiff's suit was of opinion that the case before him was governed by the decision of this Court in the case of *Muttaya* v. *Sivaraman*(1) which went on appeal to the Privy Council, the Privy Council confirming the decision of the High Court of Madras and holding that the plaintiffs had failed to make out the title which they set up.

I do not say that the title set up in *Muttaya* v. *Sivaraman*(1) is identical with that in the present case but it is certainly analogous. I do not say this case is precisely on all fours with *Muttaya* v. *Sivaraman*(1). There are grounds of distinction which have been pointed out in the course of argument. One ground was that there was an admission in *Muttaya* v. *Sivaraman*(1) that the tank was the common property of the villagers. I do not know there is much substance in that distinction, because we have a finding of the learned Subordinate Judge—a finding which is not seriously contested, and which we see no reason to differ from—that here the pond was the common property of the inhabitants of the village.

Another ground of distinction deserves more serious consideration. In *Muttaya* v. *Sivaraman*(1) there was a certain agreement and that agreement is set out *in extenso* in the report of the case in the Privy Council (*Sivaraman Chetti* v. *Muthaya Chetti*(2)). No doubt the rights of parties in that case were considered with reference to the special agreement or compromise in that case. But I think it is clear from reading the judgment of the Privy Council as a whole that it was not the view of their Lordships that the rights of the defendants were created by the agreement in that case. I think their view was that the agreement merely embodied rights which previously existed. We find on page 249 of the report, "the terms of the Kararnama are fatal to the claim of the plaintiffs that they are entitled to repair at their sole expense. Their Lordships do not find anything in the previous evidence to show that these terms are erroneous." That suggests that their Lordships are of opinion, as I have said, that the agreement merely embodied the existing rights.

No doubt these are grounds of distinction and it may be that the learned Subordinate Judge was not quite right in his view that

(1) (1883) I.L.R., 6 Mad., 229. (2) (1889) I.L.R., 12 Mad., 241 at p. 248.

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there was no distinction between the two cases. But however this may be I am certainly of opinion that the general principles upon which the judgments of this Court and of the Privy Council proceeded in the case of *Muttaya* v. *Sivaraman*(1) if applied to the case before us, make it clear that the learned Subordinate Judge is right in his view that the plaintiffs had failed to make out their title as trustees.

Now the acts which were relied upon in *Muttaya* v. *Sivaraman* (1) as creating in the plaintiffs a title by adverse possession or prescription with reference to the point in question in that case are set out at page 242 of the Privy Council Report in *Sivaraman Chetti* v. *Muthaya Chetti*(2) and they are curiously similar to the acts relied on by the plaintiffs in this case. It would appear also that the allegations in the plaint in the case before the Privy Council were not traversed and that the case proceeded on the assumption that the allegations as to the acts done by the plaintiffs were established. Their Lordships held, as I understand their judgment, that the acts were not sufficient to create the title which the plaintiffs there set up. I am not sure that the Privy Council case is not stronger than the present case, stronger in favour of the title on which the plaintiffs rely for the purpose of excluding the defendants from having any part in the conservancy of the tank. Beyond the statements in the plaint, to which I have referred, we have the admitted fact that in the Privy Council case the plaintiffs dug the tank in question. True it was said they dug it with the permission of the defendants but we have the admitted fact that they dug the tank either with or without permission. There is no such allegation in the present case.

Here there is no evidence that, in the first instance, the plaintiffs were the owners of the tank. I think it may fairly be assumed that in the first instance the plaintiffs together with the defendants had precisely the same rights in connection with the tank, that is, rights as villagers. I certainly am not disposed to make any presumption of a lost grant in favour of the plaintiffs.

With regard to the case of *Venkatrama Aiyar* v. *Secretary of State*(3) I do not think that that case is in point. There was no question of the rights of trustees as against parties

(1) (1883) I.L.R., 6 Mad., 229. (2) (1889) I.L.R., 12 Mad., 241 at p. 248.
(3) (1910) 20 M.L.J. 74.

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who were entitled to the benefit of the trust. The question was as between rival owners and the only right in question was the proprietary right. Here admittedly no beneficiary right is in question. The only right in question is the right of a trustee as trustee.

For the reasons I have given I hold that the plaintiff's suit was rightly dismissed and I would dismiss this appeal with costs.

The memorandum of objections also is dismissed with costs.

AYLING, J.—I concur.

APPELLATE CIVIL.

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

1910. July 25, 26, 27. August 16.

RAJAGOPALA REDDY, LATE A MINOR BY HIS FATHER AND GUARDIAN SADASIVA REDDY (FIRST DEFENDANT), APPELLANT,

v.

NATTU GOVINDA REDDI (DECEASED) AND OTHERS (PLAINTIFF AND DEFENDANTS NOS. 2 AND 3), RESPONDENTS.*

Burden of proof—Reversioner, declaratory suit by, to set aside alleged adoption—Onus on adopted son, whether reversioner entitled to immediate possession or only to declaration.

Where a reversioner, during the lifetime of the widow on whose death he will be entitled to possession, sues for a declaration that an adoption alleged to be made by her is invalid and his right as reversioner is not impeached, the burden will be on the party relying on the adoption to prove its validity as it would be in the case where the reversioner sues for immediate possession.

Asharfi Kunwar v. *Rup Chand* [(1908) I.L.R., 30 All., 197], dissented from.

APPEAL against the decree of F. H. Hamnett, District Judge of South Arcot, in Original Suit No. 9 of 1905.

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

R. Sadagopachariar, *T. Rangachariar* and *T. Narasimha Ayyangar* for appellant.

P. R. Sundara Ayyar and *V. Krishnaswami Ayyangar* for fourth to ninth respondents.

* Appeal No. 25 of 1906.

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RAJAGOPALA REDDY v. NATTU GOVINDA REDDI.

JUDGMENT.—This is a suit by a reversioner to the estate of one Ramasami Reddy deceased for a declaration that an alleged adoption by Ramasawmy's widow (the second defendant) of the first defendant is invalid. In his plaint the plaintiff alleges that Ramasawmy died leaving him surviving his mother, the third defendant (a widow), his widow (the second defendant), and no issue male or female. He further alleges that the third defendant is the nearest reversioner to the estate of the deceased Ramasamy, and that he (the plaintiff) is next in grade to her. These allegations are not denied in the written statements of the first and second defendants. The first defendant admits that the plaintiff is a dayadi of the deceased Ramasawmy. The third defendant does not defend the suit.

The first question for consideration is whether the District Judge was right in holding that the onus of establishing the adoption lay on the defence. It is common ground that the plaintiff is entitled to sue for a declaration and that he is not entitled to immediate possession.

The learned vakil for defendants Nos. 1 and 2 relied on *Asharfi Kunwar* v. *Rup Chand*(1) where it was held that, where the plaintiff asks for a declaration that an alleged adoption is invalid, but cannot claim immediate possession by reason of the intervention of a widow's estate, the burden is on him to make out a *primâ facie* case that the adoption is invalid. The learned Judges in that case were of opinion that this question was concluded by authority. In *Brojo Kishoree Dassee* v. *Sreenath Bose*(2) there are some general observations of Sir Barnes Peacock which support the view taken by the Allahabad High Court. The learned Judge observed "The plaintiff asks in this regular suit to have it declared that Radhanath's adoption is invalid. It appears to us that the *onus* rested upon him, as it does upon any one who asks for a decree declaring the illegitimacy of another person, to prove the illegitimacy. The person who asks a Court to declare that a thing is invalid is bound to prove that it is so. The Act which enables the Court to make a declaratory decree does not enable the Court to call upon a man to prove his title at the instance of one who asks to have a declaratory decree that he is not entitled." In this case *Brojo Kishoree Dassee* v. *Sreenath Bose*(2) not only was

(1) (1908) I.L.R., 30 All., 197. (2) (1868) 9 W.R., 463.

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there no admission of the plaintiff's reversionary interest, but the Court held that, if the adoption were set aside, other parties were the presumptive reversionary heirs. In *Har Dyal Nag* v. *Roy Krishto Bhoomick*(1) the Judges do not appear to have drawn the distinction referred to in *Asharfi Kunwar and others* v. *Rup Chand*(2). The suit was for possession of property on the ground that an alleged adoption was invalid and it was held that it was too late to contend that the burden of proof of the adoption did not lie on the defendant. In *Tarini Charan Chowdhry* v. *Saroda Sundari Dasi*(3) the learned Judges referring to *Brojo Kishoree Dassee* v. *Sreenath Bose*(4) observe that in that case the plaintiff asked for a declaration during the lifetime of the widow, that an adoption made by her was invalid, and the rule laid down by the Court was, that when a plaintiff sues for a declaration that an adoption is invalid, he is bound to prove the invalidity, because in such a case he does not ask for possession. But, so far as we can see, the learned Judges in *Brojo Kishoree Dassee* v. *Sreenath Bose*(4) do not distinguish—at any rate, in so many words—between a case where a plaintiff only asks for a declaration and where he asks for possession. And the learned Judges in *Tarini Charan Chowdhry* v. *Saroda Sundari Dasi*(3) merely point out that the case (*Brojo Kishoree Dassee* v. *Sreenath Bose*(4)) was distinguishable from the case before the Calcutta Court. In Amir Ali and Woodroffe's 'Law of Evidence,' 4th edition, page 549, the learned authors, without any discussion of the question, say that, if a plaintiff sues as reversionary heir during the lifetime of the widow for a declaration that an adoption is invalid, the onus is on him to prove the invalidity, and they cite *Brojo Kishoree Dassee* v. *Sreenath Bose*(4), and the case on which we have commented. (The reference in the foot-note to 8 W.R. is a printer's error.)

In *Kusum Kumari Roy* v. *Satya Ranjan Das*(5), SALE, J., dealt with the case on the assumption that there was no dispute between the parties as to the fact of adoption. The plaintiff set up the incapacity of the alleged adopted son and the learned Judge held it was for the plaintiff to establish this as a question of law, not a question of fact. We think this case is distinguishable from

(1) (1875) 24 W.R., 107.
(2) (1908) I.L.R., 30 All., 197.
(3) (1869) 3 B.L.R., 145.
(4) (1868) 9 W.R., 463.
(5) (1903) I.L.R., 30 Calc., 999.

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the case before us where there was an issue as to the *factum* of adoption and the plaintiff's case was that no authority to adopt had in fact been given.

We think the District Judge was right in his view that the principle of the decision of the Privy Council in *Sukh Dei* v. *Kedar Nath*(1) with regard to the onus of proof applied to the present case. The law allows a reversioner who does not and cannot claim immediate possession to sue for a declaration that a transaction which would bar his reversionary interest is invalid. It is well settled that, if he were entitled to claim, and did claim, immediate possession, the onus would be on the party who relies on the transaction to establish its validity. We cannot see on what principle the fact that a widow's estate intervenes between the reversioner and his right to immediate possession, and that this being so, the plaintiff can only ask for a declaration, should alter the burden of proof. The fact that the interest of a presumptive reversioner, who is not entitled to possession, is merely a *spes successionis* which may or may not be a right of possession when the inheritance falls in, as it seems to us, is no good ground for the distinction. We do not think there is anything in the judgment of the Privy Council in *Rajendro Nath Holaar* v. *Jogendro Nath Banerjee*(2), which is inconsistent with the view we have indicated.

We do not desire to decide anything which is not necessary for the purpose of this particular case. All we say is that where, as here, the parties who rely on the adoption admit the interest of the party who impeaches the adoption as presumptive reversionary heir the *onus* in our opinion is on the party who relies on the adoption to establish it, notwithstanding the fact that a widow's estate intervenes between the presumptive reversionary heir and his right to possession.

Turning to the facts of the present case, we see no reason to differ from the decision of the learned District Judge who has found against the alleged authority to adopt. The oral evidence in support of the authority, as well as the probabilities of the case, have been fully dealt with in the judgment. The evidence of the defendant's witnesses who support the authority is not entitled to much weight, and the District Judge is probably right

(1) (1901) I.L.R., 23 All., 405. (2) (1871) 14 M.I.A., 67.

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in his view that Ramasamy Reddi died unexpectedly before the arrival of his wife's relations from Reddiyur, and that the whole story of his giving her in their presence authority to adopt is a subsequent invention. The absence of any reference to such authority in the petition (exhibit B) which bears date of the 14th December 1891, is very significant and so is the extraordinary delay of over nine years in carrying the alleged authority into effect. The widow's minority had expired long before this. On the other hand, the plaintiff's delay in bringing the present suit is explained by the depletion of his resources owing to the previous litigation, and to the fact that, in any case, he cannot recover possession of the property during the second defendant's lifetime and had therefore nothing to lose by delay, provided it did not exceed the limitation period.

The appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Krishnaswami Ayyar.

NELAYATHAKSHI AMMAL (PLAINTIFF), APPELLANT,

v.

THE TALUK BOARD, MAYAVARAM, THROUGH ITS PRESIDENT (DEFENDANT), RESPONDENT.*

1910. March 30. April 21.

The Madras Local Boards Act V of 1884, *s.* 51—*Taluk Board taking over management of charity not bound to keep account accessible to all persons, when they take the place of trustees who are under an obligation to do so—Power of Taluk Board to transfer management—Madras Regulation VII of* 1817, *ss.* 2, 3, 5, 7, 8, 13—*Under s.* 51 *of Act V of* 1884, *the Taluk Board is vested with powers of supervision and management and not with the power of appointing trustees conferred on the Board of Revenue.*

Where a Taluk Board under section 51 of Madras Act V of 1884 takes the place of trustees appointed by a will, which directs the trustees to keep accounts accessible to all persons, such Board will not in the absence of a charge of mismanagement be under an obligation to keep such accounts. The management being transferred by a special law to a statutory body, we must look to that law and not to the will to determine the duties incidental to such management. The

* Second Appeal No. 1903 of 1908.

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Board is not bound to give inspection of accounts when no charge of mismanagement is made.

The Taluk Board which has taken over the management under section 51 of the Act cannot appoint an independent trustee so as to divest itself of the duty of management.

The power and duties of the Board of Revenue which devolve on the Taluk Board under section 51 of the Act do not include the power to appoint trustees vested in the Board under section 13 of Regulation VII of 1817.

SECOND APPEAL against the decree of F. D. P. Oldfield, District Judge of Tanjore, in Appeal No. 729 of 1907, presented against the decree of T. A. Narasimha Chariyar, District Munsif of Mayavaram, in Original Suit No. 33 of 1906.

The claim of the plaintiff is thus stated in the judgment of the Court of First Instance.

"The plaintiff prays that the defendant (the Taluk Board) may be directed to produce, within a reasonable time, all the accounts relating to the charity referred to in the plaint from the date it took its management into its hands, up to date of plaint (11th January 1906), after declaring that the plaintiff is entitled to inspect the same and obtain copies of portions required of them either in person or through authorised agent, and if the said accounts are not produced within the time allowed, the Court may be pleased to grant an injunction for the production of the same.

"The plaint states that the plaintiff's husband left a registered will setting apart certain properties for charity and appointed trustees for the due management and performance of the same; that the defendant has taken into its hands, the management of the said charity in July 1903, on the ground that the said trustees mismanaged the same; that it is stated in the said will that proper accounts in bound books should be maintained for the management of the charity, which will be kept open to all persons for inspection; that the plaintiff, who is entitled to inspect the same as trustee, applied for copies of certain portions of the said accounts; and that her petition for the same was rejected by the defendant (Taluk Board), on the ground that she has no *locus standi*: and hence, the suit."

Defendant pleaded *inter alia* that the plaintiff was not entitled to inspect the accounts and that the management having been transferred to the plaintiff's brother, she had no cause of action against the defendant.

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The District Munsif gave judgment as prayed by plaintiff. On appeal the District Court dismissed the suit.

Plaintiff appealed.

The Advocate-General (Hon. Mr. *P. S. Sivaswami Ayyar*) and *T. Natesa Ayyar* for appellant.

The Hon'ble Mr. *T. V. Seshagiri Ayyar* for respondent.

JUDGMENT.—The plaintiff claims to inspect the accounts of a charity and has made the Taluk Board of Máyavaram, defendants. By the will of the plaintiff's deceased husband, certain charities were created and trustees appointed. The plaintiff was one of them. In consequence of alleged mismanagement the Board of Revenue intervened. It must be assumed for the purposes of this case that the management and superintendence of the endowment were made over to the Taluk Board under section 51 of Madras Act V of 1884. The possession of the endowment property passed to the Taluk Board in due course. The plaintiff has ceased to be a trustee of the endowment and claims the right to inspect under a special clause in the will which runs as follows:—"I have appointed certain persons (named) as trustees. The said persons shall properly conduct the said charities according to their present scale and maintain correct accounts therefor in bound books accessible to all the persons." The power is given by the instrument to the trustees appointed for the nomination of their successors after their death. If the trustees make default in management and resign office the Government is given the power of appointing other trustees in their stead. There is no mention of the duty of maintaining correct accounts accessible to all in the case of the successors to be appointed by the trustees named or by the Government. It may however be assumed that it was the testator's intention that such a duty should be attached to the successors as well. But it is another question altogether whether the obligation to maintain accounts accessible to all attaches to the Taluk Board which takes the place of the trustees appointed by the testator under special statutory authority in the absence of a special direction in the statute itself. We do not suggest that the Taluk Board as managers of a charity are not bound to maintain accounts like all managers of charitable institutions. But, as conceded by the learned Advocate-General there would be no duty in such a case to allow inspection to any member of the public when there is no averment of mismanagement. The question merely is whether,

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in the absence of a charge of mismanagement, the direction contained in the will as to the maintenance of accounts accessible to the public will *ipso facto* impose the obligation upon the statutory body which enters upon management under statutory powers. We think we must answer this in the negative. The duty to keep and give inspection of accounts is part of the function of management. When it is transferred by a special law to a statutory body, we must look to that law and not to the instrument of trust for the duties of the manager. There being no provision in the Act requiring him to give the inspection sought for and no general right of inspection on a charge of mismanagement being now in question, we must negative the plaintiff's claim. This is sufficient to dispose of the second appeal. But the question has been argued at some length as to whether the action is maintainable against the Taluk Board, when it has transferred the management to another person, as in this case it is alleged to have done. This raises the further question whether the Taluk Board which has taken over the management under section 51 of the Local Boards Act, can appoint an independent trustee so as to divest itself of its duty of management. It has been held that, under Regulation VII of 1817, the Board of Revenue has merely the powers of superintendence and not the right of actual management. The case, *Venkatesa Nayudu* v. *Shrivan Shatagopa Shri Shatagopa Swami*(1) if it does not actually decide it suggests this view in more than one place as the proper view to take with regard to the powers of the Board of Revenue. In *Panduranga* v. *Nagappa*(2), MUTHUSWAMI AYYAR and PARKER, JJ., point out that the powers of the Board of Revenue were primarily powers of supervision and control and that the committee constituted under Act XX of 1863, which was given the same powers as the Board of Revenue had under Regulation VII of 1817, was not entitled to sue for possession. In *The Chairman, Municipal Council, Rajahmundry* v. *Susurla Venkateswarulu* alias *Venkata Krishna Brahma Sastrulu*(3), it has been held that powers and duties of management did not attach to the Board of Revenue under Regulation VII of 1817, and that they had no right to maintain a suit upon a bond executed in favour of a

(1) (1872) 7 M.H.C.R., p. 77. (2) (1889) I.L.R., 12 Mad., 366.
(3) (1908) I.L.R., 31 Mad., 111.

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charitable foundation. But where under section 51, an institution is transferred by the Board of Revenue to the control of a Taluk Board, both powers of superintendence and of management are made over. To adopt the words of MILLER and MUNRO, JJ., to the facts of this case, the contention that the Taluk Board has merely stepped into the shoes of the Board of Revenue and has no greater powers does not seem to be correct. What was made over to the Taluk Board under section 51 of the Local Boards' Act was not only the superintendence of the charity but also the actual management. Is it competent to the Taluk Board to divest itself of the management given to it by virtue of section 51 of the Local Boards' Act? Mr. Seshagiri Ayyar contends that it is competent to the Taluk Board to do so and he relies on the clause in section 51 of Act V of 1884 which runs as follows :—

"Thereupon all powers and duties which attach to the Board of Revenue in all respects thereof shall attach to such Local Board as if such Board had been specifically named in the said Regulation." It is said that the power to appoint trustees is among the powers of the Board of Revenue under the Regulation and that therefore the Taluk Board has a like power. It is again contended that the provision that all powers of the Board of Revenue shall attach as if the Local Board had been named in the Regulation effects the substitution of the Local Board for the Board of Revenue wherever the latter term is employed in the Regulation. The question does not appear to us to be free from difficulty but we are inclined to hold that the contention is not right. In the first place, unlike the Board of Revenue which has no management, the Taluk Board is given powers of management which must be deemed to be inconsistent, in the absence of specific authority, with a right to delegate the management. In the second place, the power of appointing trustees vesting in the Board of Revenue under section 13 of the Regulation and the pre-requisite of such appointment being the receipt of a report from local agents, designated or appointed under the Regulation it is difficult to argue that the Taluk Board has the same powers of appointment when no local agents can be said to be contemplated as working under the Taluk Board and making reports to it. Reading sections 7 and 8 of the Regulation together, it seems fairly clear that the local agents are public officers. We cannot suppose that section 51, which continues to the Taluk Board the

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powers and duties of the Board of Revenue has the effect of continuing to maintain local agents who are public officers under the authority of the Taluk Board. The powers and duties which are continued are probably those that are referred to in sections 2, 3 and 5 of the Regulation and not necessarily powers of superintendence over local agents. Section 51 does not continue any duties of local agents towards Taluk Boards. The substitution of the Taluk Board for the Board of Revenue is limited to the powers and duties which attach to the Board of Revenue. We are inclined to hold that the Taluk Board does not possess the power of appointing trustees which the Board of Revenue had in virtue of the provision contained in section 13 of the Regulation. It was suggested that section 3 of the Regulation might be so construed as including the powers to appoint trustees. We doubt whether it is admissible to include such an important power as that of appointing trustees under the general words of taking "such measures as may be necessary to ensure that all endowments are duly appropriated to the purposes for which they were destined." If section 3 included such powers of appointment it might no doubt be contended that the same power passed to the Taluk Board. But in the face of the specific provisions contained in section 13 of the Regulation we are disinclined to hold that the same power is to be swept into the somewhat general language of section 3 of the Regulation In this view it follows that the Taluk Board has not the power to appoint independent trustees for the management of institutions taken over by it under section 51 of the Local Boards' Act. Having regard, however, to the opinion already expressed as to the plaintiff's right to claim inspection, we must dismiss the second appeal but in the circumstances without costs.

APPELLATE CIVIL.

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

1910. October 20. November 1.

WILLIAM DARE, PETITIONER,

v.

BELLE DONNA IGDALIOT DARE (RESPONDENT).*
GEORGE WHEELER (CO-RESPONDENT).

Indian Divorce Act, IV of 1869, ss. 16 and 17—Decree of dissolution of marriage - Recission of, by High Court—Withdrawal of petition on coming up for confirmation—English Procedure.

A decree of dissolution of marriage passed by a District Court under section 14 of the Indian Divorce Act may be rescinded by the High Court at the request of the decree-holder when it comes up for confirmation under section 17.

The High Court has jurisdiction to rescind the decree of the District Court and allow the petition to be withdrawn. There is nothing in the Divorce Act which requires a distinction to be drawn between sections 16 and 17 with reference to the power of the Court to rescind a decree where the relations of husband and wife have been resumed before the decree has been confirmed.

The power "to make such order as to the Court seems fit" is not limited to cases where further enquiry has been ordered.

The analogy of English procedure whereby on a petitioner withdrawing his petition the Court may set aside the decree *nisi* may be invoked in construing the Indian Divorce Act.

CASE submitted under section 17 of Act IV of 1869 by L. G. MOORE, District Judge of South Malabar, in Original Petition No. 123 of 1909.

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

C. Kunniraman for petitioner.

P. Kundu Paniker and *G. Joseph* for respondent.

THE CHIEF JUSTICE (SIR ARNOLD WHITE).—In this case the petitioner (the husband) obtained in a District Court a decree against the respondent for dissolution of marriage under section 14 of the Indian Divorce Act and for damages and costs against the co-respondent. On the decree coming before this Court for confirmation under section 17 of the Act he asked that the petition might be withdrawn and the decree of the District Court

* Referred Case No. 3 of 1910.

WHITE, C.J., KRISHNASWAMY AYYAR AND AYLING, JJ.

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rescinded. Affidavits were put in by the petitioner and the respondent in which they stated that since the decree they had become reconciled and were living together as husband and wife. The question is, can we do anything more than refuse to confirm the decree or can we rescind it?

The question now raised before us came before the Allahabad High Court in *Culley* v. *Culley*(1). In that case on the decree coming before the High Court for confirmation the petitioner and the respondent put in a petition expressing their intention of living together as man and wife and asked that the decree should not be confirmed. (In the case before us the parties say they have actually resumed conjugal relations). The question whether the Court would have jurisdiction to dismiss the petition or to rescind the decree does not seem to have been considered by the learned Chief Justice and the order made was that the Court did not make absolute the decree of the District Judge. This was in accordance with the decision in *Lewis* v. *Lewis*(2) where the Judge Ordinary doubted whether he had power to dismiss a petition for dissolution after a decree *nisi*, except at the instance of the Queen's Proctor or a third person.

As regards the status of the parties, an order like the order in *Culley* v. *Culley*(1) would have the same effect as an order dismissing the petition or rescinding the decree, since they would remain husband and wife. But an order which leaves a decree for dissolution outstanding in the case of parties who do not desire that the marriage should be dissolved, does not seem a convenient or desirable way of disposing of the case if we have jurisdiction to make an order which would get rid of the decree.

In *Troward* v. *Troward*(3) BUTT, J., on an application by the petitioner, rescinded a decree *nisi* for dissolution when the parties had come together again. On the same facts a similar order was made by Sir Francis Jeune in *Flower* v. *Flower*(4).

In accordance with the more recent English practice I think it is clear that when the decree *nisi* is made by the High Court under section 16, this Court would have power to rescind the decree on the ground that the petitioner and the respondent had come together since the making of the decree *nisi*. The

(1) (1888) I.L.R., 10 All., 559.
(2) 30 L.J., P. & M., 199.
(3) 32 W.R., 864.
(4) (1893) P.D., 200.

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question is—is there a similar power when the decree is under section 17?

It is no doubt not strictly accurate to speak of a decree under section 17 as a decree *nisi*. Section 16 provides that the decree of the High Court "shall in the first instance be a decree *nisi*." Section 17 speaks of "a decree for dissolution of marriage." Under section 16 the decree is made absolute by the same tribunal which pronounced the decree *nisi*. Under section 17, the decree is confirmed by the tribunal which is the appellate tribunal for the purposes of the Divorce Act, though, by section 55 there is no appeal from a decree of a District Judge for dissolution of marriage. Section 16 empowers the High Court on the application of any person, to reverse a decree *nisi* on the ground that it has been obtained by collusion or that material facts have not been brought before the Court.

There is no express power given to the High Court by section 17 to reverse or rescind a decree. The power of removal given to the High Court is a power to remove before the decree has been pronounced. Under section 16 the right to intervene is during the six months after the making of the decree *nisi*. Under section 17 the right to intervene is during the progress of the suit in the Court of the District Judge. The reason for this distinction is not clear. Under section 16, if the petitioner fails within a reasonable time to move to have the decree *nisi* made absolute, the High Court may dismiss the suit. There is no similar provision in section 17, and the practice of this Court is to deal with cases for confirmation under section 17 without an application by the petitioner.

But I do not find anything in the Divorce Act which requires us to draw a distinction between the two sections with reference to the power of the Court to rescind the decree made in the first instance when the parties have resumed the relations of husband and wife since that decree was passed and before it has been confirmed or made absolute.

It is difficult on principle to see why the wide discretion to make "such other order as to the Court seems fit" given to the High Court when the Court had directed further enquiry to be made or additional evidence taken under section 17, should not be exerciseable in cases where the Court did not consider further enquiry or additional evidence necessary.

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As regards section 45 of the Divorce Act I should be inclined to hold that that section only applied to matters of procedure and, the question before us being one of jurisdiction, that the section cannot be relied on for the purposes of praying in aid the provisions of the Code of Civil Procedure.

In the present case I think we have power to make an order dismissing the petition and setting aside the decree and I think that is the order we ought to make.

KRISHNASWAMI AIYAR, J.—I concur with the learned Chief Justice in the conclusion arrived at by him. The District Court has pronounced a decree dissolving the marriage under section 14 of the Divorce Act. The case has come up before us under section 17 of the Act. The husband who was the petitioner has got reconciled to the wife and taken her back. He does not want to proceed with the petition for divorce. Notwithstanding the doubt expressed in *Lewis* v. *Lewis*(1) it would now be perfectly competent to him to withdraw the petition under the English law. See *Troward* v. *Troward*(2), *Flower* v. *Flower*(3), *Ousey* v. *Ousey*(4). On such withdrawal the Court would set aside the decree *nisi*. I take it to be clear that if the proceedings had been instituted on the Original Side of the High Court, the Court under the like circumstances would make the same order. Section 7 of the Act which requires High Courts and District Courts to act and give relief on principles as nearly as may be conformable to the principles and rules of the Divorce Court in England, would enable a withdrawal, after a decree *nisi* of the High Court, and the setting aside of such decree.

The only question is whether it makes any difference that the decree in this case has been passed by the District Court and the case has come to the High Court for confirmation. I think it does not. Section 45 of the Act says that subject to the provisions therein contained all proceedings under the Act shall be regulated by the Code of Civil Procedure and not merely by the rules of procedure in the Code. The competency of a plaintiff to withdraw his suit at any stage is affirmed by Order XXIII, rule 1 of the Code of Civil Procedure. An original suit may be withdrawn even when the case has been carried to the Appellate Court. It

(1) 30 L.J.P. & M., 199.
(2) 32 W.R., 864.
(3) (1893) P.D., 290.
(4) (1875) 1 P.D., 56 at p. 65.

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would seem to follow that the pendency of the matter in the High Court for confirmation is no ground for refusing to permit the withdrawal. When the withdrawal of a suit or petition is allowed by the Appellate Court, the Court has the power to set aside the original decree and is indeed bound to do so. Section 17 of the Act empowers the High Court to confirm the decree for dissolution of marriage or "to make such other order as to the Court seems fit after such further enquiry as it may have chosen to direct." I do not think that the power to make such other order as the Court thinks fit is limited to cases where further enquiry has been ordered notwithstanding the use of the word "thereupon." I think that that word only means "after the enquiry in case an enquiry has been ordered." The Court having the power to make such other order as it thinks fit and being bound to act as nearly as may be in conformity with the rules and principles of the Divorce Court the proper order that we should make is to set aside the decree of the District Court and permit the withdrawal of the petition for divorce.

AYLING, J.—I concur in the order proposed by the learned Chief Justice.

APPELLATE CRIMINAL.

Before Mr. Justice Miller and Mr. Justice Munro.

1910. September 6.

E. R. LOGAN (COMPLAINANT IN CRIMINAL CASE No. 3-J.P. OF 1910 ON THE FILE OF THE DISTRICT MAGISTRATE AND JUSTICE OF THE PEACE (CIVIL AND MILITARY STATION, BANGALORE), PETITIONER,

v.

S. W. ROMER (ACCUSED), RESPONDENT.*

Justices of the Peace, powers of, in trials of European British subjects.

The powers of Magistrates of the first class who are Justices of the Peace and European British subjects are the powers referred to in section 36 of the Code of Criminal Procedure of 1898 as 'hereinafter conferred upon them and specified in the third schedule' and styled 'ordinary powers.' They do not include powers with which by virtue of section 37 of the Code a Magistrate of the first class may be invested by the authorities mentioned therein.

* Criminal Revision Case No. 220 of 1910.

MILLER AND MUNRO, JJ.

LOGAN v. ROMER.

The power to entertain complaints is not one of the ordinary powers of a First-class Magistrate.

PETITION under sections 435 and 439 of the Code of Criminal Procedure and Notifications of the Governor-General in Council No. 178-J., dated the 23rd September 1874, and No. 2616-I., dated the 6th August 1890, praying the High Court to revise the order passed by Mr. Richards, one of His Majesty's Justices of the Peace within the State of Mysore, in Criminal Case No. 3-J.P. of 1910.

A complaint against a European British subject resident in Mysore was presented in the Court of the District Magistrate and Justice of the Peace, Civil and Military station, Bangalore. The accused was residing outside the Civil and Military station. The District Magistrate as such had jurisdiction only over the Civil and Military station. As Justice of the Peace, he had jurisdiction over European British subjects in the province of Mysore. The Court held that it had no jurisdiction to entertain the complaint under section 190 (*a*) of the Code of Criminal Procedure and discharged the accused.

The complainant moved the High Court under sections 435 and 439, Criminal Procedure Code.

B. W. S. Lawrence and *C. S. Govindaraju Mudaliar* for petitioner.

Justices of the Peace for the State of Mysore exercise concurrent jurisdiction within the State of Mysore under a Notification of the Governor-General in Council No. 2770-F.B., dated the 14th July 1904.

The Civil and Military station of Bangalore is a portion of the Mysore State. At the time of the rendition it was handed over to the British Government in accordance with section 17 of the Instrument of Transfer. The whole matter is thrashed out in the case of *Hayes*(1).

If Mr. Richards' interpretation is correct, it renders the notification meaningless and would lead to a *reductio ad absurdum*.

The Advocate-General (Hon. Mr. *P. S. Sivaswami Ayyar*) *contra*.

Mr. Richards' conclusion is right though his reasons are only partly correct. Under section 190, Criminal Procedure Code, Act V of 1898, a Magistrate must be specially empowered to entertain complaints and sections 36 and 37, respectively, state he may be

(1) (1889) I.L.R., 12 Mad., 39.

MILLER AND MUNRO, JJ.

LOGAN v. ROMER.

given the ordinary powers set out in schedule III and the additional powers in schedule IV. The notification does not give power to entertain complaints nor does section 443, Criminal Procedure Code, give such power. Section 443 is prohibitive only; there is no positive language giving substantive powers. If section 443 does not help the complainant there is no other section for him to fall back on.

The powers of a Justice of the Peace outside British India are not governed by the Criminal Procedure Code but by the Notification No. 2770 of 1904. The Magistrate is wrong as to limitation of powers for if a person is appointed a Justice of the Peace in Mysore he will have jurisdiction all over Mysore and the several Justices have concurrent jurisdiction—*vide* Powell's 'Tagore Lectures.'

The Local Government can remedy any hardship which may arise in this respect for section 12, Criminal Procedure Code, gives power to define areas.

B. W. S. Lawrence in reply.

The words "conferred by the Code" in the Notification No. 2770 must be taken to mean "conferred by the Local Government under the authority of the Code." Otherwise there is a restriction upon the wording of the Notification.

The accused not appearing in person or by counsel.

ORDER.—We think the conclusion arrived at in the order under reference is right. By virtue of Notification No. 2770-F.B. of the 14th July 1904, any person appointed Justice of the Peace in any country beyond the limits of British India, shall have in proceedings against European British subjects all the powers conferred by the Code of Criminal Procedure of 1898, upon Magistrates of the first class who are Justices of the Peace and European British subjects.

The only question, as we understand the present case, is what powers are conferred by the Code of Criminal Procedure upon such Magistrates. We think it is clear that they are the powers referred to in section 36 of the Criminal Procedure Code as "hereinafter respectively conferred upon them and specified in the third schedule," and styled "ordinary powers," and we think that the language of the notification cannot be read as including powers

Vide also p. 346 of this volume.

MILLER AND MUNRO, JJ.

LOGAN v. ROMER.

with which by virtue of section 37 of the Code, a Magistrate of the first class may be invested by one or other of the authorities mentioned in that section.

The power to entertain complaints is not one of the ordinary powers of a First-class Magistrate.

The petition is dismissed.

APPELLATE CRIMINAL.

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

1911. January 23.

THE PUBLIC PROSECUTOR, BANGALORE,

v.

PRIVATE J. MARCHANT.*

District Magistrate, Civil and Military Station, Bangalore—Power of to try European British subjects.

Proviso 4 to Notification 1688 I.A., Government of India, dated 4th October 1898, does not deprive the District Magistrate for the Civil and Military Station of Bangalore of jurisdiction to take cognizance of offences committed by European British subjects within the station.

APPLICATION, praying that, in the circumstances stated therein the High Court will be pleased to take on its file a case against a European British subject, Private Marchant, of the 14th Hussars as the District Magistrate and Justice of the Peace, Bangalore, has declined to take cognizance of the case under section 190 of the Criminal Procedure Code.

One Private Marchant of the 14th Hussars, a European British subject, was put up before Mr. F. T. Richards, the District Magistrate of the Civil and Military Station of Bangalore (who is also a Justice of the Peace within the State of Mysore), on a charge of theft.

Thereupon Mr. Richards passed the following order:—

In *Logan* v. *Romer*(1) it was held that the language of the Notification of Government of India No. 2770-F.B. of 14th

* Criminal Miscellaneous Petition No. 9 of 1911.

(1) (1911) I.L.R., 34 Mad., 343.

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

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July 1904 "cannot be read as including powers with which by virtue of section 37 of the Code a Magistrate of the First Class may be invested by one or other of the authorities mentioned in that section" and therefore that I am not empowered as Justice of the Peace and First-class Magistrate to take cognizance of any offence under section 190, Criminal Procedure Code, as against European British subjects.

In proviso 4 of the notification No. 2688 I.A., Government of India, F.D., under which the Criminal Procedure Code was introduced into the station, it is distinctly laid down that nothing herein contained shall be deemed to apply to European British subjects.

Under the circumstances it is clear that I cannot take cognizance of an offence against an European British subject as District Magistrate or Justice of the Peace: I hold therefore that I have no jurisdiction to try the case.

The Police report is returned to the Police for presentation before a Court having jurisdiction.

The Public Prosecutor in the Civil and Military Station, Bangalore, thereupon petitioned the High Court in the exercise of its Original Criminal Jurisdiction to take the case on its file and try the accused as no other Court had jurisdiction.

The petition was posted before a Bench of three Judges.

B. W. S. Lawrence, Public Prosecutor, Civil and Military Station, Bangalore, in support of the petition.

The Advocate-General (Hon. Mr. *P. S. Swaswami Ayyar*) *amicus curiæ*.

The accused was unrepresented.

The arguments addressed in *Logan* v. *Romer*(1) were again urged before the Bench.

ORDER.—Mr. Richards, the District Magistrate and Justice of the Peace, Civil and Military Station, Bangalore, has held that he has no jurisdiction to take congnizance of this case by reason of the words of proviso 4 to the notification of the 7th October 1898, No. 2688 I.A. The proviso runs "provided, fourthly, that nothing in the said Code as now applied shall be deemed to apply to proceedings against European British subjects or persons charged jointly with European British subjects." The proviso is no doubt ambiguous, but, reading it by the light of the language

(1) (1911) I.L.R., 34 Mad., 343.

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used in the notification of the 1st March 1883, No. 529 I., which notification is in terms reproduced as regards the Civil and Military Station by the notification of the 7th October 1898, we think we are warranted in placing a construction upon the proviso, which would not have the effect of defeating what seems to us to be the intention of the Governor-General in Council.

The notification of the 1st March 1883, applies to the Civil and Military Station of Bangalore the whole of the Code of Criminal Procedure, 1882, with the exception (among other things) of so much of the Code as applies to European British subjects.

We think the intention of the Governor-General in Council in issuing the notification of the 7th October 1898 was to reproduce the effect of the language used in the notification of the 1st March 1883 so far as regards this exception. The result is the general provisions of the Code of Criminal Procedure with the specified exceptions apply and Mr. Richards as District Magistrate has jurisdiction to take cognizance of and try the offence in accordance with the provisions of the Code.

As the record of the present case is before us, in the exercise of our powers of revision we set aside the order of the District Magistrate, dated the 17th January 1911 and direct him to take cognizance of the case.

APPELLATE CRIMINAL—FULL BENCH.

Before Mr. Justice Abdur Rahim, Mr. Justice Krishnaswamy Ayyar and Mr. Justice Ayling.

1910. September 27. October 4.

SOLAI NAIK AND ANOTHER (PRISONERS NOS. 6 AND 7), APPELLANTS,

v.

EMPEROR, RESPONDENT.*

Criminal Procedure Code (Act V of 1898), s. 103—Evidence of search apart from search list—Evidence Act I of 1872, s. 91—"Matter required by law to be reduced to the form of a document."

When a search has been conducted under section 103, Criminal Procedure Code, evidence can be given regarding the things seized in the course of the search and regarding the places in which they were found in addition to the evidence of the list which the law directs to be drawn up relating to the particulars of the property found.

The words in section 91, Indian Evidence Act I of 1872 "any matter required by law to be reduced to the form of a document" could not have been intended by the legislature to mean observations of physical facts which under the ordinary law has to be proved by the testimony in Court.

APPEAL against the sentence of C. G. Spencer, Sessions Judge of Tinnevelly Division, in Case No. 46 of the Calendar for 1910.

In this case the accused were convicted of dacoity. Evidence was adduced to show that a search was properly conducted and the jury was directed "to see whether the search was properly conducted" and their attention was drawn to certain evidence on this point. No objection to the evidence appears to have been taken at the trial by either side.

The appeal first came on for hearing before (MUNRO and SANKARAN-NAIR, JJ.) who made the following order of Reference to the Full Bench.

ORDER OF REFERENCE TO A FULL BENCH.—In this case a search was made by an officer in charge of a police station in a place not within the limits of his police station and evidence was given of this search. It is contended that under section 166, Criminal Procedure Code, the officer had no power to make the search himself, that the search list drawn up is therefore not

* Criminal Appeal No. 290 of 1910.

ABDUR RAHIM, KRISHNASWAMI AYYAR AND AYLING, JJ.

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evidence, and that no evidence can be given of the search. If when a search is conducted the search list drawn up as directed in section 103 (2), Criminal Procedure Code, is the only evidence that can be tendered as to the facts which such a document should contain according to the section, then the contention must apparently prevail by reason of the provisions of section 91 of the Evidence Act. But on this point there is a conflict of rulings. Thus in the case of *Abdul Khadir and others* v. *Queen-Empress*(1), it was held that a search list prepared under section 103, Criminal Procedure Code, is the proper and only evidence admissible of the facts which ought to be contained in the search list. On the other hand, in the case of *the Public Prosecutor* v. *Sarabu Chennayya*(2) it was held that a search list is not evidence of the facts stated therein for the purposes of section 91 of the Evidence Act and that oral evidence was admissible. Again in *Elamathan* v. *Emperor*(3), a Bench of this Court refused to follow the earlier of the above cases and followed the later case. As the matter is one of great importance and continually arising, we think it should be definitely decided. We therefore refer to a Full Bench the question whether when a search has been conducted under section 103, Criminal Procedure Code, any evidence can be given regarding the things seized in the course of the search and regarding the places in which they were respectively found other than the list which the law in the section directs to be drawn up containing these particulars.

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

M. D. Devadoss for appellants.

Under section 103, Criminal Procedure Code, the search list is a document which is required by law to be reduced to the form of a document and therefore no evidence can be given on either side in proof of the matter of the document except the search list itself.

[ABDUR RAHIM, J.—What is the result? The accused would not be able to show the document is incorrect or even false. What is to be reduced to writing?]

Only the list of the things seized and the places in which they were found are covered by section 103.

(1) (1905) Weir's Crl. R., Vol. II, 515. (2) (1910) I.L.R., 33 Mad., 413
(3) (1910) I.L.R., 33 Mad., 416.

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[KRISHNASWAMY AYYAR, J.—The search cannot be made in writing. The making of the search is a collateral act. Suppose the law required that for a payment a receipt in writing shall be given, cannot you prove the payment otherwise?]

The terms of the document can only be proved by the writing where the document makes the transaction. Under proviso 1 of section 92 of the Evidence Act, evidence may be let in to invalidate the search list.

[ABDUR RAHIM, J.—Section 92 does not contemplate cases where the crown and accused are the parties. It does not apply to a search list.]

[KRISHNASWAMY AYYAR, J.—Cannot you prove a marriage without the Register of Marriages?]

Counsel referred to *The Public Prosecutor* v. *Sarabu Chinnayya*(1).

[KRISHNASWAMY AYYAR, J.—There SHEPHARD, J., does not take note of section 35.]

Counsel further referred to *Abdul Khadir* v. *Queen-Empress*(2), *Queen-Empress* v. *Viran*(3), *Jai Narayan Rai* v. *Queen-Empress*(4), *Regina* v. *Bai Ratan*(5).

The Public Prosecutor (*C. F. Napier*) in reply.—Only a list is required by the section. This is the only matter that is required to be in writing. You cannot reduce action to a document but when the document is the essential part of an action it is different. Compare section 174. According to the argument for the appellants no evidence can be given of the state of the body apart from the inquest report. True you cannot prove the report without the report, but you can prove the things mentioned therein. The word "matter" means something which can be reduced to writing and an action cannot be so reduced.

M. D. Devadoss in reply.

The Court then delivered the following

OPINION.—We answer the question referred to us in the affirmative. Section 91 of the Evidence Act lays down "when the terms of a contract, or of a grant, or of any other disposition of property have been reduced to the form of a document, and in

(1) (1910) I.L.R., 33 Mad., 413. (2) (1905) Weir's Crl. R., Vol. II, 515.
(3) (1886) I.L.R., 9 Mad., 224 at p. 228.
(4) (1890) I.L.R., 17 Calc., 862 at pp. 870, 871.
(5) (1873) 10 B.H.C.R., 166 at p. 178.

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all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant, or other disposition of property, or of such matter, except the document itself or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained."

In our opinion the words "any matter required by law to be reduced to the form of a document" could not have been intended by the legislature to apply to mere observation of physical facts which under the ordinary law has to be proved by testimony in Court. All the instances in which this section has been applied are cases in which the matter required to be reduced to the form of a document consisted of spoken words or other expressions of the human will. We do not, however, express any positive opinion that the application of the words is to be confined to such cases, but we are quite clear that, as laid down in *Jivandas Keshavji* v. *Framji Nanabhai*(1), if the narrative of an extrinsic fact as in this case has been committed to writing it may be proved by parol evidence and this would be so even though such writing is required by law. We need hardly point out that if the provisions of section 91 were to apply to the case of a search list prepared under section 103, Criminal Procedure Code, the results would be startling and there would be grave risks of miscarriage of justice in many trials in criminal cases.

(1) (1870) 7 B.H.C.R., 45 at p. 63.

APPELLATE CIVIL.

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

SUBRAMANIA PILLAI AND ANOTHER (PLAINTIFFS NOS. 1 AND 4), APPELLANTS IN APPEAL NO. 146 of 1906 AND RESPONDENTS IN APPEAL SUIT NO. 153 OF 1906,

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL REPRESENTED BY THE COLLECTOR OF TINNEVELLY (DEFENDANTS), RESPONDENTS IN THE ABOVE AND APPELLANT IN APPEAL NO. 153 OF 1906.*

1910. August 24, 25, 26, 30. September 1. October 13, 14, 17, 18. November 18.

Possession, nature of, necessary to prove lost grant or title by adverse possession—The Madras Forest Act V of 1882; ss. 3, 16, 25—Notification under s. 25 of reservation made before the Act extinguishes all rights existing at time of reservation.

Whether enjoyment is set up as the basis of a title by prescription or as evidence on which a lost grant should be presumed, the same characteristics will be necessary.

Acts done on parts of a tract of land will only be evidence of possession of the whole where the said tract of land possesses a defined boundary.

Sivasubramanya v. *Secretary of State for India* [(1886) I.L.R., 9 Mad., 285 at pp. 304 and 305], referred to.

The intention of the Legislature in enacting section 25 of the Madras Forest Act is to place all forests reserved by executive order prior to the introduction of the Act on precisely the same footing as reserves subsequently constituted in accordance with the provisions of the Act.

The intention was that the notification under section 25 should operate in exactly the same manner as one under section 16 to which section 17 is a mere corollary. The further inquiry provided for in section 25 is purely discretionary with Government.

Where a reservation made prior to the Act is notified under section 25 of the Act, such notification extinguishes any right existing at the time of reservation whether the lands were within section 3 of the Act, at the disposal of Government or not at the time of reservation. Where the reservation is made under section 16, the section provides a mode of redress to the party; while section 25 gives none as the further inquiry provided therein is merely discretionary with the Government.

APPEAL against the decree of T. V. Anantan Nair, Subordinate Judge of Tinnevelly, in Original Suit No. 52 of 1902.

The facts are sufficiently stated in the judgment.

* Appeals Nos. 146 and 153 of 1906.

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P. R. Sundara Ayyar and *Srinivasa Ayyar* for appellants in Appeal No. 146 of 1906 and for first and the fourth respondents in Appeal No. 153 of 1906.

The Government Pleader for respondent in Appeal No. 146 of 1906 and for the appellant in Appeal No. 153 of 1906.

JUDGMENT.—The plaintiffs in the suit out of which these appeals arise are the trustees of the Kuthalanathaswami temple of Courtallam, the defendant being the Secretary of State for India. The plaintiffs sue to establish their title to about three acres of land lying immediately to the south of what are admittedly the temple premises, demarcated as S. No. 482 of Courtallam village. The land sued for is valueless for cultivation purposes but its importance lies in the fact that it contains the famous Courtallam waterfall and bathing pool, and sundry mantapams and sacred sites adjacent thereto. The plaintiffs claim the site in virtue of immemorial possession as part of the temple precincts and also by adverse possession for more than the statutory period. The defendant denies that there has been any exclusive or adverse possession of any portion of the disputed site on the part of the plaintiffs, and further pleads that by virtue of its inclusion in block No. III of the Tenkasi reserved forest in 1883 all pre-existing rights which may have existed have become extinguished.

The learned Subordinate Judge has found that only a portion of the disputed site falls within the reserved forest. The excluded portion contains the bathing pool, the lower portion of the hill-side immediately above it and the various mantapams; and in his decree, he recognises the temple's title to the following:—

A. The whole of the site below the pool including the Sandhyavandana mantapam and the site of the Kasilingaswami shrine destroyed by flood in 1891 (Nos. 5 and 4 on the plan, exhibit P).

B. The bridge (No. 10).

C. The Tirthavari mantapam and its verandahs on the eastern side (Nos. 6 and 7).

D. The site of the foot of the waterfall.

E. The pool itself (No. 2).

F. The rock above the falls on which the Sivalingams are cut.

He also recognises its right to carry on the customary puja at the falls and at the Tirthavari mantapam and the necessary right

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of way from the bridge to the foot of the falls and to the pool called Pongumakadal half way up the hill. The rest of the plaintiffs' claim is dismissed: and the decree further declares that the waterfall itself, the remainder of the hill-slopes, and the river bed belong to Government subject to the bathing rights of the European community and high-caste public conformably to the rights of the temple to carry on customary worship.

Against this decree both parties appeal.

It is convenient first to consider the question of the rights of the parties without reference to the reservation under the Forest Act, and then to determine the manner and extent to which they are affected by the Act. This is also the procedure followed by the learned Subordinate Judge.

In connection with the first question, some preliminary remarks are necessary. The learned vakil for the plaintiffs has argued with considerable force that his clients' claim should be considered not so much as an attempt to prove a title as against Government by 60 years' adverse possession, as to establish exclusive possession as owner for a sufficiently long period to give rise to the presumption of a "lost grant." As far as the decision of this case goes, however, this is a distinction without a difference. The Subordinate Judge has not rejected any portion of the plaintiffs' claim on the ground that the *period* of their proved enjoyment was deficient; nor do we see any reason to do so. The vital point is as to the *nature* of the enjoyment. Whether enjoyment is set up as the basis of a title by prescription, or as evidence on which a lost grant should be presumed, the same characteristics will be necessary. The plaintiffs relied upon the decisions of the House of Lords in *Lord Advocate* v. *Lord Blantyre* (1) and *Lord Advocate* v. *Young* (2), but we do not think the evidence in the present case brings it within the principle of these decisions.

In the second place, it must be observed that it is impossible to treat the area covered by the plaint claim as a single unit. The plaintiffs' claim must be separately considered with reference to each portion of the property sued for. As explained in *Sivasubramanya* v. *Secretary of State for India* (3) on pages 304 and

(1) (1879) 4 A.C., 770. (2) (1887) 12 A.C., 544.
(3) (1886) I.L.R., 9 Mad., 285 at pp. 304 and 305.

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305, acts done on parts of a tract of land will only be evidence of possession of the whole where the said tract of land possesses a defined boundary. That is not the case here, unless we accept the plaintiffs' theory of the position of the reserved forest boundary, in which case the plaint land might be regarded as enclosed between the revenue survey line on the north and the reserved forest boundary on the south. But for reasons which will appear later, we find the reserved forest boundary to be conterminous with the revenue survey line in the locality in question; and in consequence it is impossible to treat the plaint land as possessed of a defined boundary to the south or to deal with it as unit.

Before dealing with the evidence of enjoyment of the different items of the suit property, reference may be made to such old official records as are forthcoming. These are extremely meagre. The plaintiffs produce an extract from a Hinduvi inam chitta prepared in 1844 (exhibit C); while on the defendant's side we have an extract from the paimash olugu chitta (exhibit X), eight years earlier in date, and the revenue survey plan and settlement register (exhibits VIII and VIII-*a*) prepared in 1863 and 1874 respectively. The boundaries given in exhibits C and X are, as might be expected, very loosely expressed. Exhibit C describes the temple boundaries thus: "west of the Adivettiparai bridge, north of Aruvi Karai Malai, east of Sitharuvi Malai and south of Kuthala Nangai Amman temple." Both the northern and eastern boundaries, it will be noted, are points and not lines. Accepting the southern boundary (Aruvi Karai Malai) literally, it would give the temple the pool, bridge and mantapams (items Nos. 2, 10, 4, 5 and 6 as marked in exhibit P) with the intermediate spaces, but not the slopes of the hill, or the Pongumakadal or the land lying above the head of the waterfall. Exhibit X gives these boundaries: "north of the river, east of the western slope, south of the Padinettampadi tower gate, and west of the river." These would give the temple the Sandhyavandana mantapam (No. 5) and the ruined site (No. 4) with the surrounding rock, and absolutely nothing else.

These old records are not devoid of value, but it is impossible to place much reliance on them in determining boundaries to a matter of a few yards. The remarks of the Subordinate Judge in this connection in paragraph 12 of his judgment possess considerable force. No attempt appears to have been made at the

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time of the preparation of these accounts to check the boundaries stated by the village officials; and when a proper survey was effected in 1863 very considerable modifications were made. From exhibits VIII and VIII-*a* it appears that the bulk of the temple premises (27·67 acres) were surveyed as S. No. 482 (pagoda poramboke). A smaller plot (2·02 acres) was marked as S. No. 483 (flower garden poramboke) and a small tope (1·48 acre) as S. No. 481 (assessed Government dry land). In so doing the demarcation stones, while extending the eastern boundary of S. No. 482 considerably beyond the Adivettiparai bridge, were so fixed as to *exclude* the whole of the site now in dispute; and so far as appears no objection whatever was raised to this demarcation. This is a point of the utmost importance.

If the plaintiffs then set up title to the site in dispute, it is impossible to understand why no objection was raised to a demarcation which visibly excluded the site from the temple premises.

We shall now proceed to deal with the evidence of possession by the plaintiffs of the various items of the suit property.

(A) The Subordinate Judge finds that all the disputed sites lying to the west of the river bed (Nos. 4 and 5) belong to the temple, which has acquired a right of absolute ownership to them by immemorial user; and in this, we have no hesitation in concurring. In fact the Government Pleader has practically nothing to say against it. The evidence fully warrants the conclusion that the Sandhyavandana mantapam with the courtyard, in which it stands, was originally constructed by the temple authorities, and that from time immemorial it has been used by them as part of the temple premises for Brahmins to recite the Sandhyavandanam prayer after bathing. Item No. 4 was formerly occupied by the Kasilingaswami shrine which was an appurtenance of the main temple and under control of the trustees. It existed from time immemorial till it was washed away with the idol in the great flood of 1891. The materials of the shrine were subsequently used by the temple authorities for constructing a pavement on the open space adjoining the Sandhyavandana mantapam and for other purposes. This portion of the plaint property is clearly disunited by the river and the foot of the hill, and the Subordinate Judge's inclusion of the whole site west of the river bed in his award to the temple is justified.

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(C) The case of the Tirthavari mantapam (No. 6) is very similar to that of the Sandhyavandana mantapam (No. 5). The only difference is that there is the evidence of the Rev. Thomas Kimber to show that it was at one time used by European bathers as a dressing shed. This practice was discontinued more than 30 years ago, when separate bathing sheds were constructed, and in our opinion must be regarded as having been merely permissive. There is no reason to disturb the Subordinate Judge's finding regarding this mantapam.

(E) The next item for consideration is the pool itself (item No. 2). This is situated at the very foot of the falls, and has been hollowed out of the natural rocky bed of the river partly by the action of the water, and partly by blasting (*Vide* exhibit XVIII-*e*). Forming, as it does, a portion of the bed of the river, particularly strong evidence should be required to establish either a grant by the zamindar, or the acquisition of a title on the part of the temple authorities by adverse possession; and such evidence is, in our opinion, not forthcoming. Great reliance is placed by the plaintiffs on certain extracts from old temple accounts, produced to show that the temple authorities were in the habit of annually leasing out the right to collect "finds in the pool," that is, any articles of value which may have been dropped or thrown into it by the numerous bathers. The Subordinate Judge has accepted these accounts (exhibit A series) as genuine, in which he is no doubt correct; but it is extremely difficult to say what the entries refer to. They relate to five faslis, between 1809 and 1840, and merely record leases of the "pool" or the "aruvi (falls) pool" for various sums. There appears to be no evidence to explain what they mean, or whether the explanation offered to the Subordinate Judge is correct. So far as appears no such leases of "finds" have been held for the last 60 years. Apart from these accounts, there is absolutely nothing to support the temple's claim beyond the fact that the idol has been daily taken to the pool and solemnly bathed there; but it is impossible to treat this as evidence of possession, or of any form of title. Against it we have the admitted fact that as far back as can be traced Europeans and also respectable Muhammadans have been in the habit of bathing in the pool while low-caste Hindus have been excluded by magisterial orders of the District Magistrate (exhibits O and O-1) issued at the request of the temple authorities. The European

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residents of the district, as well as visitors, have not only bathed in the pool, but have annually formed a bathing committee and have collected and expended money on cleaning, deepening, and improving the pool and in erecting bathing sheds near it. Similar improvements, such as the erection of iron hand-rails, have been carried out by the temple; but it is as difficult to reconcile the long acquiescence of the temple trustees in the above act with the present theory of a lost grant of the pool, as it is to treat their possession as exclusive. It is in evidence that arrangements were made and adhered to in a friendly spirit for the convenience of all parties, the Europeans having the exclusive use of the pool for two hours every morning, fixed so as not to clash with temple worship, while on specially sacred days, they refrained from bathing at all. But such a sensible arrangement is no evidence of exclusive possession or recognition of title of either party. Special reference may be made to one incident in 1873 evidenced by exhibit XVIII-*c*. In that year, by the Collector's orders Rs. 100 were spent out of the "waterfall fund" which was raised by subscription among bathers, on enlarging the bed of the pool by blasting during the dry season. We think it may be safely held that the acquiescence of the temple trustees in such a proceeding shows that any enjoyment of the pool exercised by them at the time was not exercised with any consciousness of ownership, or intention of asserting ownership. The issue of the orders above referred to, exhibits O and O-1, in no way supports the plaintiffs' case. Such orders must have been issued in the interests of the public peace and tranquillity rather than for the protection of proprietary claims, which could have been otherwise enforced. In fact although the claims of different classes to bathe in the pool appear to have given rise to friction on several occasions, we can find no record of any assertion of ownership on the part of the temple trustees up to the time of institution of the present suit. We are of opinion that the plaintiffs' claim to ownership of the pool has not been established. A reference to exhibit O-2 will indicate the spirit in which the aid of Government officers was invoked in the matter; the petitions giving rise to that order having apparently emanated not from the temple trustees alone, but from them together with "other ryots."

(D) The same decision must be arrived at in the case of what the Subordinate Judge describes as the site of the foot of the waterfall.

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(F) The lower portion of the steep rocky side of the hill over which the water falls has been decorated at some unknown time with "Sivalingams" carved in relief, which are now deemed sacred, and are the object of worship by the votaries of the temple: but it is impossible to treat this by itself as evidence of ownership on the part of the temple.

(B) There remains only the bridge which crosses the river, and forms the most convenient access to the falls. The present bridge was constructed in 1892, replacing a former structure which was partially destroyed in the same flood which washed away the Kasilingaswami and its shrine. Exhibit G-1 shows that it was constructed by the Local Fund Engineer under orders of the Shermadevi Taluk Board, which allotted Rs. 340 for the purpose from its reserve fund. At the same time the temple authorities were asked "to contribute a share if possible"—a very natural course to adopt considering how keenly interested the temple was in the speedy repair of the bridge. This request gave rise to an interesting correspondence between the temple trustees and the Siva Temple Committee for the Tinnevelly district (*vide* exhibits G and G-2). On receipt of copy of the Taluk Board's resolution, the trustees addressed exhibit G to the Committee. In this they stated that, as the said bridge (meaning the former bridge) had always been under the control of the temple and chiefly useful to the temple, they had submitted an estimate for reconstructing it from temple funds (exhibit F-2), but had not obtained sanction. Meantime the Taluk Board had set the work in hand. They therefore recommend that the Taluk Board's request for a contribution should be complied with and one-third of the cost allotted. The letter proceeds thus :—

"Further, as the said bridge has always been in the private control *chiefly of the people and the temple*, there would be ground for the temple to have *a greater right than the one which it naturally has*, if a third portion were paid . . . . ."

The District Committee replied taking a much stronger line and enquired: "While this bridge and those places belong absolutely to the temple and while it is proper that that bridge should be constructed out of the temple funds, what was the reason for allowing it to be built from Local Funds?" To this, in exhibit G-2, the trustees replied, as might be expected, acquiescing in the view of the District Committee; and it was then resolved

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that "the full amount should be paid." This was on the 3rd July 1893. No further correspondence is exhibited, from which it may be fairly inferred either that no further steps were taken to pay the amount, or that the offer was rejected by the Taluk Board. It seems quite certain that no actual payment was made from temple funds; and as it is presumably in the power of the Temple Committee to produce the subsequent correspondence if there were any, it may be assumed that their failure to do so is due to the fact that it would not support their case. Altogether the correspondence and the course of events, while indicative of a *desire* on the part of both the trustees and the Committee to assert ownership to the bridge, in no way tends to support their claim; while the artless admissions of the trustees in exhibit G above quoted go strongly against it.

As to the repair and maintenance of the previous bridge or bridges, the evidence is conflicting. Probably both the Temple and the Waterfall Committee incurred expenditure on the bridge from time to time Exhibit B series shows that on several occasions between 1834 and 1840, when the temple was under the management of the revenue authorities, the bridge was repaired at the cost of temple funds; and it seems probable that in later times also the temple, being keenly interested, contributed to similar works. On the other hand exhibits XVIII and XVIII-*a* show clearly that repairs to the bridge were conducted from the waterfall fund under the Collector's orders in 1870 and 1873. Viewing the whole of the evidence we have no hesitation in finding that the plaintiffs' claim to the present bridge, which was admittedly constructed from Local funds, has not been established.

The plaintiffs' claim of ownership to the remaining portions to the plaint property was rejected by the Subordinate Judge and, in our opinion, quite rightly. It rests on nothing better than a certain amount of oral evidence to the effect that the temple servants and the pilgrims used to collect firewood on the slopes of the hills. This is very unsatisfactory; and exhibit XVII shows that in 1897 the temple trustees petitioned the Collector simply to allow them a right of way up the hill through this very land, without any suggestion of ownership.

From the above it will be seen that in our opinion, apart from all question of forest reservation, the plaintiffs have established

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their ownership only of the portion of the site west of the river bed (A), and the Tirthavari mantapam and its verandahs (C) and not to the remainder of the plaint property. The right of carrying on daily puja at the falls and Tirthavari mantapam and the right of way from the bridge to the falls and the Pongumakadal are established and were rightly allowed in the decree.

We have now to determine to what extent, if any, the above rights have been affected by the process of forest reservation.

According to defendant, the whole of the disputed site is included in the reserved forest, Tenkasi block No. III, which was originally ordered to be reserved (prior to the introduction of the Forest Act) by G.O., No. 257, Revenue, dated the 11th February 1881, and notified under section 25 of the Forest Act by G.O. No. 1611, Revenue (Forest No. 142), dated the 20th December 1883. These orders are exhibits IV and V; and it is argued that the effect of the latter was finally to extinguish all pre-existing rights in the reserved forest, which had not been admitted by Government prior to reservation. Admittedly no part of the present (suit) claim had been admitted, or even set up at the time of reservation.

The plaintiffs contend (*a*) that the plaint property falls outside the boundaries of the reserved forest; (*b*) that even if it be included therein, the notification under section 25 has no effect on pre-existing rights.

For the above reasons we are satisfied that the boundary of the reserved forest runs as stated by the defendant, and that the whole of the disputed site is included within it.

It remains to determine the effect of the reservation on the right which the plaintiffs possessed in the property in dispute at the time when the reservation was notified under section 25 of the Act.

The learned vakil for the plaintiffs argues that extinction of private rights in a reserved forest is only effected by the operation of section 17 of the Forest Act; which in its turn only takes effect when the procedure laid down in section 6 and following sections for inviting and enquiring into claims has been followed. We cannot accept this contention, section 25 of the Act is, no doubt, a very drastic provision of law: but its intention, in our opinion, is to place all forests reserved by executive order prior to the introduction of the Act on precisely the same footing as

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reserves subsequently constituted in accordance with the provisions of the same. The provision in paragraph 1 of the section that a forest which has been reserved before the Act shall be a reserved forest *under the Act* and the last paragraph of the section, in our opinion, show that the intention was that the notification under section 25 should operate in exactly the same manner as one under section 16, to which section 17 is a mere corollary. As pointed out by the Government Pleader, the continued existence in a reserved forest of rights which have not been admitted and registered after enquiry is incompatible with the intention and general scope of the Act.

No doubt provision is made in section 25 for further enquiry being held into private rights, where Government deems it desirable; but the wording of the proviso unmistakably indicates that this is purely discretionary with Government; and the undoubted fact that in this case Government did not order further enquiry must be taken to show that Government did not regard the previous enquiry as insufficient.

It might be suggested, though the point was not taken by the plaintiffs' vakil, that the order dated the 11th February 1881 (exhibit IV) does not amount to a final order of reservation. We have carefully considered this point, admitting, as additional exhibits for the purpose, the two Government Orders referred to at the commencement of the Forest Committee's report and have decided that the argument is not really maintainable. Paragraph 17 of G.O. No. 1612, dated the 2nd August 1879, certainly seems to imply that Government at the time of its issue contemplated that, in future cases, a final notification should issue *after* survey and demarcation. But the issue of such an additional order would seem to have been in the discretion of Government. There does not appear to have been any legal obligation on Government to issue a further notification, and the fact that no further notification, was issued does not, in our opinion, prevent the Government Order of the 11th February 1881, from operating as a reservation for the purposes of section 25 of the Act; exhibit II merely directs demarcation and survey in accordance with the earlier Government Order, without adding a word regarding the issue of any further notification. When issuing the order under section 25 (exhibit V) Government certainly treated G.O. No. 257, dated the 11th February 1881, as if it were a

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final order of reservation: and there seems to be no reason to hold that it was not so intended at the time of its issue.

One further point remains for consideration and it is a point of great importance and one which is not free from difficulty.

Under section 3 of the Act, the Governor in Council may constitute any land at the disposal of Government a reserved forest and by section 2 of the Act, land at the disposal of Government is defined as including "all unoccupied land whether assessed or unassessed."

The Government Pleader conceded, as we understood him, that, when the reservation was made, or, at any rate, when the suit was brought, the plaintiffs had exclusive possession of the site marked No. 5, the site marked No. 4, and the pavement between sites Nos. 5 and 8 in the plan P. The question therefore arises, were these sites unoccupied land within the meaning of the Act when the reservation was made, and if they were not, is it open to the plaintiffs in this suit to set up a title to the land in question. The Subordinate Judge deals with this question in paragraphs Nos. 56 to 58 of his judgment (although, in the view he took on the question of the extent of the land reserved, it was not necessary for him to consider it). The learned Judge was of opinion that the question was governed by the principle of law which was the ground of the decision in *Ramachandra* v. *The Secretary of State for India*(1). (See too *Subrahmanian Asari* v. *The Secretary of State for India*(2). We doubt if this is so. In *Ramachandra* v. *The Secretary of State for India*(1), the reservation was made under section 16 of the Act, and the Act itself provides the mode of redress given to a party who deems himself to be injured. The proviso to section 25 can scarcely be said to give to a party a mode of redress by way of further inquiry since it is left entirely to the discretion of Government to say whether there shall be a further inquiry or not. But, as we have pointed out, section 25 is a very drastic enactment. Its object would seem to have been to give legislative sanction to any forest reservation made by Government before the Act in all cases in which Government thought fit to exercise the powers given by section 25, and by so doing to prevent the question of the legality of any forest reservation which purported to have been made under the executive powers of

(1) (1889) I.L.R., 12 Mad., 105. (2) (1907) 17 M.L.J., 557.

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Government, or under any prior legislative enactment, from being raised. An enactment of this sort must of course be construed strictly (see, for example, the judgment of Lord Blackburn in *Metropolitan Asylum District* v. *Hill*(1)), but the words of the enactment in question seem clear. We do not think it necessary to discuss the case of *Balvant Ramachandra Nath* v. *The Secretary of State for India*(2). In that case the reservation had been made under the Act, and further, as the Judges point out on page 508 of the report, the decision was under the Indian Forest Act which was earlier in date to the Madras Act, and it is only reasonable to assume that all departures in the local Act from the language of the earlier enactment were advisedly made and indicate some material difference in the intention of the local legislature that made them.

It is not necessary for us to decide whether a notification under section 25 is in all cases conclusive on the question whether lands comprised in the reservation made before the Act came into force were lands at the disposal of Government at the time the original reservation was made. The Subordinate Judge finds in paragraph 57 of his judgment that, on the grounds given in paragraph 56, the Forest Committee though not trammelled by the provisions of the Act was bound to carry on its duty in accordance with the requirements of justice and fairness, and has done so. We see no reason to differ from this conclusion. This being so, we are of opinion that the fact, which we have held to be established, that the whole of the land in question was included in the reservation made by Government before the Act came into force is a good defence to the plaintiffs' claim.

We are therefore constrained to hold that the rights, if any, which the plaintiffs possessed in the plaint property at the time of the reservation in 1881 were extinguished by the notification, exhibit VI, published in January 1884. We do so with reluctance, as it seems probable that the omission of the temple trustees to come forward at the time of the enquiry by the Forest Committee in 1881 was due to ignorance of the extent to which their rights would be affected. If they had represented their claims to the mantapams and to the right of access to the falls for purposes of bathing and worship, it may well be that they

(1) (1881) 6 A.C., 193. (2) (1905) I.L.R., 29 Bom., 480.

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would have been admitted. Even in contesting the present suit, Government has declared its willingness to safeguard any customary right not only of the temple, but of the public as well; and we do not imagine that Government will consider it its duty to adopt a different attitude in the future from what it has maintained in the past. The plaintiffs seem to have embarked on the present suit without making any attempt, beyond the notice prescribed by law, to secure recognition of the rights they claimed by representations to Government or its responsible officers. Such, at least, is the statement of the Government Pleader which is not contradicted on the other side.

The plaintiffs' suit must therefore be dismissed with costs in both courts; the appeal preferred by Government (Appeal Suit No. 153 of 1906) being allowed with costs.

APPELLATE CIVIL.

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

1910. August 3, 4, 5, 11, 12, 15, 16. September 20. October 18.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL REPRESENTED BY THE COLLECTOR OF TINNEVELLY (DEFENDANT), APPELLANT,

v.

AMBALAVANA PANDARA SANNADHI OF THIRUVADUTHURAI MUTT (PLAINTIFF), RESPONDENT.*

The Madras Irrigation Cess Act VII of 1865 - Conditions necessary to entitle Government to levy water-cess—Government irrigation source, what is—Engagement, nature of, to be implied from title-deed—Extent of water right, how ascertained—Cultivation of larger area without increase of water not liable to cess—Injunction, granting of.

The essential conditions for the levy of water cess under Madras Act VII of 1865 are—(A) The irrigation must be effected by means of the water of 'a river, stream, tank or channel or work belonging to or constructed by Government. (B) If the water from such a source is received by indirect flow or used after storage in an intermediate reservoir, the irrigation must, in the opinion of

* Appeal No. 9 of 1906.

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the Collector (subject to the control of the Board of Revenue and Government) be beneficial to and sufficient for the requirement of the crops. (C) The charge must not be contrary to any engagement between the landholder and Government whereby the latter is entitled to irrigation free of charge.

Where water from two hills—one belonging to Government and the other to a private party—combine and flow in a channel between Government and private lands and through Government and private lands alternately and is afterwards drawn for irrigation through channels owned by private parties, such irrigation is effected by means of water drawn from a Government source within the meaning of section 2 of Act VII of 1865. *Uralam Proprietrix* v. *The Secretary of State for India*, [(1911) I.L.R. 34 Mad., 295], followed. Where Government waters mingle with those of another stream, the combined water must be treated as Government water and the fact that it is drawn for use through private channels is immaterial.

The question whether the irrigation is beneficial and sufficient must be decided by the Collector and his decision, when not impeached by the Board of Revenue or Government, cannot be questioned by the Civil Courts.

The only undertaking which may be implied from a grant of land by Government is an undertaking to supply water free of charge to the extent of the accustomed flow at the time of the grant. Where the quantity of the customary flow cannot be ascertained, the area irrigated will be presumed to be the measure of the quantity of water used at the time of the grant.

Where a larger area is irrigated subsequent to the grant, it will be open to the landholder to show that the increase is not due to the use of a larger quantity of water but to a more economical use of it, in which case no cess can be levied for the increased extent. *Maria Susai Mudaliar* v. *The Secretary of State for India*, [(1904) 14 M.L.J., 135], referred to.

An injunction ought not to be granted when there are no sufficient data for determining whether an infringement of it has taken place.

APPEAL against the decree of T. Sadasiva Aiyar, Subordinate Judge of Tinnevelly, in Original Suit No. 51 of 1902.

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

The Government Pleader for appellant.

P. R. Sundara Ayyar, *S. Muthiah Mudaliyar* and *T. S. Govinda Chariar* for respondent.

JUDGMENT.—This appeal is presented on behalf of the Secretary of State for India in Council against the decree of the Additional Subordinate Judge of Tinnevelly directing a refund of Rs. 835-13-7 faslijasti (water rate for a second crop cultivated on wet lands) alleged to have been illegally collected for fasli 1310 on the respondent's mitta of Kambaneri Pudukudi, and granting a permanent injunction against the future levy of such faslijasti on the lands situated under the plaint tanks, 15 in number.

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The tanks in question are fed by branch channels leading from the Pappankal, an artificial channel, which takes off from a river called the Karuppañadi. The whole suit turns on the right of Government to levy water-cess on irrigation so conducted and this has to be judged solely with reference to the provisions of Madras Act VII of 1865.

A reference to the Act will show that the essential conditions for the levy of water-cess are these :—

A. The irrigation must be effected by means of the water of "a river, stream, channel, tank or work belonging to or constructed by Government."

B. If the water from such a source is received by indirect flow or used after storage in an intermediate reservoir (as in the present case), the irrigation must, in the opinion of the Collector (subject to the control of the Board of Revenue and Government), be beneficial to and sufficient for the requirements of the crops.

C. The charge must not be contrary to any engagement between the landholder and Government whereby the latter is entitled to irrigation free of charge.

We shall deal with these conditions in order.

The first has been made the subject of acute contention before us although in the court of the Subordinate Judge it appears to have fallen into the back ground. The Subordinate Judge has concentrated his attention on condition C; and, if we correctly apprehend the meaning of his judgment as a whole, has decided in the plaintiff's favour, not on the ground that the water used was not that of a Government irrigation source (in itself a sufficient reason for giving the decree sued for) but because he found that the plaintiff was entitled to free irrigation by virtue of an implied engagement with Government (condition C). Confining one's attention in the first instance to condition A, we think it must be held to be established in favour of Government.

There is fortunately no dispute about the facts as bearing on this part of the case. The Karuppanadi (Black river) above referred to is formed by the junction of two hill streams of which one, the Kuliratti, rises in Government hills, and the other, the Aruvittalai in those of the Vyravan Kalam mitta. These streams bring down water in approximately equal proportions. From the point of their junction, the combined river, called the

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Karuppanadi runs between Government lands on one side and mitta lands on the other for two miles to the place where the Pappankal takes off by means of an anicut and head sluice. This Pappankal at its head, and for half a mile lower down, has Government lands on one side, and mitta lands on the other after which it flows alternately through mitta and Government lands, but chiefly through the former. Branch channels from the Pappankal feed the 15 plaint tanks under which lie practically all the lands for which the water-rate has been charged, a very small proportion being irrigated from the branch channel direct.

Now, apart from all discussion of the ownership of the Pappankal itself, it cannot be denied that the irrigation is effected by means of the water of the Karuppanadi and following the interpretation of section 2 of Madras Act III of 1905 adapted by MILLER and MUNRO, JJ. (*Uralam Proprietrix* v. *The Secretary of State for India*(1) this river must undoubtedly be treated as a Government irrigation source. Even irrespective of this view we should hold that condition A was satisfied by the fact that the water of the Government hill stream, the Kuliratti, was certainly used for the plaint irrigation. That this Kuliratti is a Government stream is beyond dispute and the mere fact that its waters before use were mingled with those of another stream (the Aruvithalai) or that they passed through a river bed or channel of joint, or doubtful, or even alien ownership is immaterial. This point is established in the most emphatic way by another recent decision. (*The Secretary of State for India* v. *Swami Narathee-swarar*(2). The reasoning of the learned Judges therein (BENSON and KRISHNASWAMI AIYAR, JJ.) is entirely applicable to the present case and conclusive of the point.

Passing to the second condition B, we may quote from the judgment in the case last cited :

"The question as to the beneficial character of the water taken from the Government source and of its sufficiency are not for the Civil Court, but for the Collector subject to the control of the Board of Revenue and of the Government. The Collector in this case having imposed the assessment and he not having been overruled by the higher revenue authorities, we think the plaintiff is clearly liable to pay the assessment."

(1) (1911) I.L.R., 34 Mad., 295. (2) (1911) I.L.R., 34 Mad., 21.

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The right of Government to charge water-rate being thus far established, it only remains to consider whether Government is precluded from so doing by any engagement with the plaintiff or his predecessor in title condition C.

The plaintiff's mitta forms part of the old Chokkanipatti Zamindari, which was permanently settled in 1802, brought to sale for arrears and purchased by Government in 1836 and again granted in 1859 by a fresh sannad (exhibit O). It is common ground that the terms of this fresh grant imply an undertaking on the part of Government to allow the use of Government water free of charge for the lands of the Zamindari to some extent, greater or less: and that apart from this implied undertaking there is no other engagement with Government which the plaintiff can plead. The difficulty is to fix the extent of the above-mentioned implied undertaking.

According to the defendant it must be strictly limited (as regards double crop cultivation with which we are now concerned), to the extent actually under double crop cultivation at the time of the re-grant in 1859.

The plaintiff's contention, on the other hand, taken at its widest and as set forth in the plaint, is that the grant allows (by implication) the free use of the water passing down the Pappankal to any extent and in any way the grantee may choose. The Subordinate Judge's findings, as set forth in paragraph 18 of his judgment, amount to a considerable limitation of this claim and in fact recognise the plaintiff's right only to the "accustomed flow" of water through his (the plaintiff's) sluices as it existed in 1859. The decree however goes much further than this, and gives an absolute injunction against the levy of faslijasti on the plaintiff's lands under the plaint tanks, quite irrespective of whether the "accustomed flow" was exceeded or not. We may say at once that this undoubtedly goes too far. No engagement to allow free of charge such unlimited irrigation can possibly be deduced from the grant and Mr. Sundara Aiyar, vakil for the respondent, in fact stated in the course of the hearing of this appeal that he would be content with the establishment of his right to so much water as his client's predecessor in title was accustomed to take from the Pappankal through the branch channels in 1859. That this is as far as the undertaking can be legitimately presumed will be apparent when the reason

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for inferring its existence is considered. It is based simply on the assumption that in fixing the peshcush with reference to the income derivable from the zamindari, Government must be presumed to have taken into account all irrigation facilities then enjoyed by the zamindari ryots.

Practically therefore the controversy narrows itself down to the question of whether the implied right to free irrigation deducible from the grant should be measured by the area irrigated or by the quantity of water used—or rather, whether the area irrigated should be viewed as a final and conclusive measure of the quantity of water used.

In the great majority of cases no other test of any practical value than that of the area irrigated can be suggested. It has been constantly adopted and acted upon as conclusive of the extent of a mittadar's, zamindar's or inamdar's rights to free irrigation, as, numerous decisions show. We need only refer to *Chidambara Rao* v. *The Secretary of State for India in Council*(1), *Lutchmee Doss* v. *The Secretary of State for India in Council*(2) and the Urlam case above mentioned. The respondent's vakil seeks to distinguish these cases on the ground that the first two relate to inam villages and the last to a zamindari formed from Haveli lands, while the suit mitta was carved out of an ancient zamindari. But it is difficult to see why the same principle should not be followed, the implied undertaking being based on precisely the same principle in the case of zamindaris and inams. The chief cases adduced on the plaintiff's side are *The Secretary of State for India in Council* v. *Perumal Pillai*(3), and *Maria Susai Mudaliar* v. *The Secretary of State for India in Council*(4). The former is easily distinguished on the ground that it was passed before the amendment of the Irrigation Cess Act by Madras Act V of 1900. *Maria Susai Mudaliar* v. *The Secretary of State for India in Council*(4) has been referred to by both sides in support of their contentions and is worthy of special attention, as arising out of a precisely similar dispute in another mitta formed from the Chokkampatti zamindari. It relates partly to lands under this same Pappankal and partly to lands under another channel from the Karuppanadi known as the

(1) (1903) I.L.R., 26 Mad., 66.
(2) (1909) I.L.R., 32 Mad., 457.
(3) (1901) I.L.R., 24 Mad., 279.
(4) (1904) 14 M.L.J., 350.

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Perunkal and it is notable that the charge of water-rate is allowed in the case of the former, and disallowed in the case of the latter. The two cases are dealt with separately in the judgment, and, as might be expected, each side in the present appeal relies on the reasoning found in the portion favourable to its contention.

We have very carefully considered the judgment and it appears to us that the vital fact differentiating the case of the two channels was that, in the case of the Perunkal, there appears to have been in force, both at the time of the grant and thenceforward to the date of suit, a definite arrangement whereby the zamindari and Government ryots took the channel water in turns of five days each; in the case of the Pappanakal, no such arrangement has ever been set up. Accepting this "Morai" (to use the convenient vernacular phrase) as proved, the learned Judges naturally held that the rights of the zamin ryots must be measured thereby without reference to the extent of land which they might cultivate in the exercise thereof. In the case of the Pappankal, where there was no such "Morai," they appear to have applied the usual test. They say "the evidence for the plaintiff does not prove what is the customary supply to which the plaintiff is entitled in respect of tanks Nos. 22 and 23, and it does not prove what was the exact extent of second crop cultivation in 1859." None of the cases quoted in the above judgment is of any use to respondent. *Morgan* v. *Kirby*(1) and *Kristna Ayyan* v. *Venkatachella Mudali*(2) were both suits between private parties and, although Government was a party in *Kristna Ayyan* v. *Venkatacheila Mudali*(2), the suit was brought to establish a right to an uninterrupted supply of water based on prescription. None of these cases nor the later case quoted *Ramachandra* v. *Narayanasami*(3), deal with the extent to which an implied engagement of the nature now in question extends, or to its effect in barring the right to levy water-rate.

We should be inclined to hold as follows.—A landholder is not *precluded* from showing that the excess of wet cultivation (first or second crop as the case may be) irrigated with the aid of Government water over that existing at the time of the grant,

(1) (1878) I.L.R., 2 Mad., 46. (2) (1872) 7 M.H.C.R., 60.
(3) (1893) I.L.R., 16 Mad., 333.

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is due to thrifty use of water or careful maintenance of his channels and tanks to prevent wastage, and not to the use of an increased quantity of water in which case water-cess on the increased area would not be leviable. But in all such cases rigid proof should be required, the natural presumption being that the quantity of water used varies in proportion of the extent under irrigation.

Turning to the facts of the present case we find that water-cess has been collected on 225·02 acres, the entire area cultivated with double crop in fasli 1310. No deduction has been made on account of double crop area as existing in 1859; but in the written statement the defendant admits that double crop cultivation to the extent of 15 kotas (about 20 acres) existed (all under plaint tank No. 3) in 1859 and states that he is prepared to refund a proportionate amount. In the course of the trial it became evident that the above figures did not represent the entire cultivation even under tank No. 3, which the Government pleader now admits must be taken to amount to at least 24 kotas (say 35 acres). What it was under the other 14 tanks he is not prepared to say.

A mass of oral evidence has been adduced on both sides, all of a more or less unsatisfactory character, as to whether the second crop cultivation is, or is not larger now than before the regrant in 1859. If the plaintiff's witnesses are to be believed, it then amounted to 635 kotas, or more than two-thirds of the wet ayacut.

This evidence is of a very interested character and is unsupported by anything in the nature of accounts. The aggregate figure is enormous whether compared with the present day cultivation or with the cultivation in 1836 which the Subordinate Judge finds to have been about 15 per cent. of the ayacut: and we have no doubt is an exaggeration. On the other hand, it is perfectly clear from the documentary evidence produced by the plaintiff (exhibits R., R., S. S., and W.) that between 1836 and 1859, and even at the paimash, second crop cultivation was carried on in the kar season under the other tanks besides No. 3 which Government has not allowed for. The documentary evidence is most incomplete, no cultivation accounts being produced for the period in question or the immediately succeeding years: but the most noticeable feature is the failure of Government

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even to specify the true extent of second crop cultivation at the time of grant for which irrigation should be allowed free. The figure given in the written statement is now admitted to be incorrect.

It is suggested by the Government pleader that the improvements effected to the head works of the Pappankal about 1877 must have resulted in an increase of second crop cultivation. There seems no reason whatever to suppose that this was so. The works in question included the *lowering* of the anicut and the construction of a head sluice. They appear to have been undertaken mainly with a view of preventing the numerous breaches in the channel which had usually occurred in the pishanam season. Their primary effect must have been a *reduction* of the quantity of water passing down the channel though no doubt the supply was better regulated and the wastage by breaches avoided. This, however, probably in no way tended to increase, but rather to decrease, the kar cultivation which takes place between May and October—a season when freshes are comparatively few and scanty and when no breaches were said to occur.

A more plausible cause of recent increase of second crop cultivation may be the fixing of long term money rents about 20 years prior to suit but it is only put forward by one or two witnesses and there is no reliable evidence as to the extent to which it operated.

On the whole, we see no reason to differ from the conclusion of the Subordinate Judge that the area of second crop cultivation charged for was not in excess of that existing in 1859. It follows that it was not liable to faslijasti and that the amount collected for fasli 1310 was rightly ordered to be refunded. The question whether any increase in area irrigated was effected without the use of an increased amount of water (*vide* paragraph 16 *supra*) does not therefore arise.

The next matter for decision is the question of the injunction. As already explained it cannot possibly stand in its present absolute and unlimited form which goes far beyond the rights to which the respondent is entitled or what his vakil now claims. The record unfortunately affords no data for granting an injunction in sufficiently precise terms. On the other hand there are obvious difficulties in the way of qualifying it. To be of any use

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an injunction must be sufficiently precise to render it easy to determine whether any infringement of it has occurred. In the present case there are no reliable data for fixing the area of second crop cultivation in 1859, and none at all for fixing the quantity of water then used for the irrigation of the plaint lands. The only course, unsatisfactory as it may seem, is therefore the omission of the injunction from the decree.

The apportionment of costs is somewhat difficult. On the whole it seems equitable that each side should bear its own costs in the Court below and that the respondent should recover his costs in this Court from the appellant. In other respects the decree of the Subordinate Judge will be confirmed.

The respondent has filed a Memorandum of Objections regarding the charges collected in faslis 1308 and 1309, recovery of which the Subordinate Judges held to be barred by limitation. The Subordinate Judge was right in holding that limitation runs from the actual date of payment.

The memorandum of objection must be dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

1911. January 18, February 9.

VENKATACHALA PILLAI (DIED) AND ANOTHER (SECOND DEFENDANT), APPELLANTS,

v.

THE TALUQ BOARD, SAIDAPET, REPRESENTED BY THE PRESIDENT, (PLAINTIFF), RESPONDENTS.*

Charitable Trust—The Madras Endowments and Escheats Regulation VII of 1817—The Madras Religious Endowments Act X of 1863—The Madras Local Boards Act V of 1884, s. 51—Religious Endowments Act—Powers of Board of Revenue and Taluq Board to appoint new trustee—Non-dismissal of old trustee.

Regulation VII of 1817 and Act XX of 1863 are applicable to endowments made after the Regulation as well as to prior endowments.

The Board of Revenue has no power to ignore the rights of a person lawfully in office as trustee and to appoint another person in his place without dismissing him. In this respect there is no difference between a hereditary and a non-hereditary trustee who is equally entitled to a freehold office.

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* Appeal No. 13 of 1908.

BENSON AND SUNDARA AYYAR, JJ.

VENKATA-CHALA PILLAI v. THE TALUQ BOARD, SAIDAPET.

The Board of Revenue is entitled under section 51 of Act V of 1884 to make over to a local body not only its power of superintendence but also the management of any endowment.

The Chairman, Municipal Council, Rajahmundry v. *Susurla Venkateswarlu*, [(1908) I.L.R., 31 Mad., 111], followed.

Nelayuthakshi Ammal v. *Taluk Board of Mayavaram*, [(1910) 20 M.L.J., 885], followed.

APPEAL against the decree of V. Venugopaul Chetty, District Judge of Chingleput, in Appeal Suit No. 3 of 1905.

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

T. R. Venkatarama Sastri for appellant.

Three points of law arise—

(1) Regulation VII of 1817 does not apply to endowments created after the date of the Regulation and the Board of Revenue has therefore no control over the plaint endowment.

(2) This is mainly a religious and not a charitable endowment and after the Religious Endowments Act the Board has no control over such endowments.

(3) The Taluq Board cannot recover the property. They can only take the place of the Revenue Board and exercise powers of superintendence. They must seek to remove the trustee and appoint a fresh trustee or more properly ask the Court to remove him and appoint a fresh trustee.

(SUNDARA AYYAR, J.—It has been held that power of superintendence includes the right of dismissal. It is not necessary to go to Court for dismissing a trustee and having a new one appointed.)

On the facts, the question is whether the property really belongs to the lady and not to the first defendant and whether the endowment is not really a device to defraud creditors.

On the first point: The heading of the Regulation, the preamble, the language of section 2 which uses the words "granted" and "hereby vested" and section 3 which uses the past tense "were" show that then existing endowments alone were within the Act.

(BENSON, J.—Is there any principle in making such a distinction and would not such a construction cut at the root of the policy of the Regulation?)

There is no distinction and the legislature could have provided for future endowments as well but it has not done so and it is not that there is no remedy in such cases. The worshippers or beneficiaries and the Advocate-General can move the Court

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in such cases. No authorities have settled the point so far. The case of *Sivayya* v. *Rami Reddi*(1) contains an *obiter dictum* by SUBRAHMANYA AYYAR, J. The case itself was disposed of on another point. Again even that *obiter dictum* is with reference to religious endowments and the wording of the Act may be considered wide enough to cover future endowments. The case of *Narasimha* v. *Ayyan Chetti*(2) contains an opinion of the District Judge, Mr. Davies, in favour of my contention and it was not disapproved by the High Court. There are some cases in which the Regulation has been applied to after-created endowments but without any argument on this point.

On the second point: Kumkumarchanai in the temple is strictly religious. Distribution of pan supari, etc., at a festival in the temple is also substantially a religious endowment.

(SUNDARA AYYAR, J.—The occasion is a festival but what is directed to be done is only a charity.)

The point was not further pressed.

On the third point: Under section 2 it is only superintendence that is vested in the Board. Section 3 only expands it but does not extend it beyond mere superintendence. Sections 9 to 14 show what is comprised in superintendence. The Board appoints local agents to keep an eye on the institutions, make reports, etc. In the case of some institutions the power of appointing trustees is vested in the Government. In others trusteeship is hereditary or the appointment is vested in others. In neither case can the Board take actual possession but can only superintend. And they can give no greater rights to the Taluk Board under the Local Boards Act.

(SUNDARA AYYAR, J.—Does not section 13 show that the Board can take possession in some cases?)

That section does not justify the taking of possession. But in any case that does not apply where there is a trustee and there is no vacancy. Sections 11 and 12 deal with a case where there is a vacancy. Here the first defendant was not dismissed and there was no vacancy when the Taluk Board was appointed. Even if a dismissal could be implied by the appointment of the Taluk Board without the adoption of the formal procedure required for a dismissal, I would contend that section 12 does not apply to the

(1) (1899) I.L.R., 22 Mad., 223. (2) (1889) I.L.R., 12 Mad., 157.

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case because first defendant became a hereditary trustee by the terms of the deed of endowment or the right of appointment would be vested in the founder's heirs.

(SUNDARA AYYAR, J.—I don't know if that is the law in regard to other than private endowments.)

There is authority for application to all endowments collected in Mayne's 'Hindu Law,' chapter on endowments.

(SUNDARA AYYAR, J., to the Government Pleader: Do you contend there is or can be an implied dismissal in this case or do you propose to contend that the Board have a right to take possession as part of their powers of superintendence?)

GOVERNMENT PLEADER.—I am going to rely on superintendence including the right to take actual possession.

(SUNDARA AYYAR, J., to T. R. Venkatrama Sastri.—You need not argue then about who has the right to fill up a vacancy.)

Argument was addressed on the facts.

C. F. Napier, the Government Pleader, for respondent.

On the first point: The use of the past tense may operate *in futuro*. In section 3 of the Regulation the word "were" refers to facts which were in existence on a future date. The Board has to exercise a duty in the future. On circumstance arising it has to take measures. There is an elaborate machinery to be used in the future. The preamble shows that the legislature has in view to provide for the class of charities mentioned in the past not those actually in existence only but that class of endowments. The word "such" means "of this kind" not "aforesaid."

The Regulation has to be construed so to carry out the policy and intention of the legislature. Here there is nothing to limit the Regulation to the past. The endowments in existence at the time of the enactment may all cease to exist when if the Regulation does not refer to future ones its very object would be defeated. It would have no endowments to deal with. This could never have been intended.

The use of the past tense has never been held to prevent application to the future. On the contrary the use of the past tense has been frequently held *not* to make the Act apply to past transactions. He referred to Maxwell on 'Interpretation of Statutes.'

He was stopped.

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On the third point: The powers given are powers of management. Superintendence as used in section 3 is a general phrase but the word is nowhere limited in the Regulation. The powers of the Board given by section 3 are not to remove and appoint but to take necessary measures to ensure it. Possession of the property is inseparable from this.

(SUNDARA AYYAR, J.—If the property is public property it would be so.)

The Board's powers for private are the same as for public property. The words "in like manner" in section 3 are used.

(SUNDARA AYYAR, J.—They may mean nothing more than "also.")

Act XX of 1863 was an Act to enable Government to divest itself of the management of endowments not the "superintendence" of them. He referred to the preamble of Act XX of 1863.

(SUNDARA AYYAR, J.—The power of superintendence might include power to appoint a manager though not to manage. Here the Board has not yet dismissed the present manager. Can the Board appoint without first dismissing?)

No doubt the trusteeship was not vacant but this does not take away the power of the Board to manage or delegate management. The Regulation in section 14 makes Government the party to be sued. Section 15 says the proceeds are not to be appropriated for the benefit of the Government which supposes Government to be collecting them.

(SUNDARA AYYAR, J.—Section 10 suggests that a trustee cannot be passed over without formality.)

That section is carried no further by any other section and is conclusive.

The handing over of the powers of management in this way must be taken to be a dismissal of the trustee.

It was held in *The Chairman, Municipal Council, Rajahmundry* v. *Susurla Venkateswarulu*(1) decided on the corresponding section 26 of the District Municipalities Act IV of 1884 that the powers of Government were wider than those of the Board and as the transfer to the Taluq Board was by Government all their powers passed.

(SUNDARA AYYAR, J.—You do not allege that in your plaint.)

(1) (1908) I.L.R., 31 Mad., 111.

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JUDGMENT.—In this case the Taluk Board of Saidapet sues for recovery of possession from the defendants of three items of property, alleging that they are trust properties, the first item being a Chattram, and items Nos. 2 and 3 being two houses endowed for the use of the Chattram. One Kanagammal by her will, dated the 5th February 1885, directed that twelve Brahmins should be fed on every *Dwadasi* day in the Chattram building, item No. 1, by means of the proceeds of the properties items Nos. 2 and 3. She also directed that a sum of one rupee should be spent on every Friday for performing *Archana* to the Goddess in a temple. The balance after deducting the expenses of feeding was to be devoted under the provisions of the will to defray the expenses of giving *Neermoru* or buttermilk, *Tambulam* or betel and nut, fans and sugar to people attending the festival of *Moluvaddee Servai* in Tiruvettiyur. She appointed three executors to her will but directed that Paupiah Chetti, who was the first defendant in the suit and with whom she was living either as wife or as a concubine, should conduct the charities, the other executors being given a right of interference in case Paupiah should be guilty of mismanagement. The second and third defendants in the suit are persons to whom Paupiah alienated by mortgage and sale the two houses, items Nos. 2 and 3, in August and June 1889. The plaint alleges that Paupiah, although he accepted the trust under the will and "discharged it faithfully for some years," afterwards grossly abused his trust and alienated the properties as mentioned above, and that he was prosecuted for criminal breach of trust and convicted of that offence. In August 1899 he executed a power of attorney in favour of the second defendant. Although in the power of attorney he treated item No. 1, choultry, as his own property, he directed the second defendant to conduct the charity therein. Complaints of misappropriation having been made by some members of the public in 1900 to the Collector of Chingleput, an inquiry was held and it resulted in the Board of Revenue resolving to take proceedings for the proper management of the trust. The plaint alleges (paragraph No. 12) that "the Board of Revenue, with the written "consent of the Governor in Council transferred to the Taluk "Board the management of item No. 1 together with its endow-"ments with power to file suits against the alienees of the trust "properties and recover possession of the same." Paupiah, the

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first defendant, died after the institution of the suit and the fourth and fifth defendants were brought on the record in the suit as his legal representatives. They did not however put in an appearance and the suit was tried *ex parte* as against them. The second and third defendants resisted the suit and raised various pleas. They contended that there was no real trust at all, and that the properties really belonged to Paupiah and not to Kanagammal, and that they were purchased in her name in order to screen them from Paupiah's creditors. They also contended that they were *bonâ fide* purchasers for valuable consideration from Paupiah without notice of the trust, and that the alienations could not therefore be disputed by the plaintiff. They denied that the Board of Revenue had any right to make over the management of the charity to the Taluk Board. And they contended further that the charities, if any, were of a private character and not public. It is unnecessary to refer to other pleas raised by them as we have not got to deal with them in this appeal.

The first issue framed in the case was: "Whether the plaintiff has any *locus standi* to maintain the suit?" The District Judge decided it in the affirmative. On the merits the District Judge held that Kanagammal was the owner of the properties and negatived the contention that the properties were purchased in her name to screen them from the creditors of Paupiah. Although the point was raised again before us at the hearing of the appeal we have no hesitation in agreeing with the lower Court in its finding that the properties belonged to Kanagammal and that the trust was a genuine and valid one. No serious attempt was made to refute the arguments urged by the lower Court in its elaborate judgment on this point. The finding of the Judge that neither the second nor the third defendant was a *bonâ fide* purchaser for valuable consideration was not controverted at the hearing and it is clearly correct.

The main question argued at the hearing was that raised by the first issue, whether the Revenue Board's order making over the management of the choultry to the plaintiff was legal and valid. Mr. Venkatrama Sastri contended that the trust must be regarded mainly as a religious one, and that the Board had therefore no jurisdiction over it. He urged that the distribution of *neermoru*, etc., to people attending the festival at Tiruvettiyur should be regarded as a religious charity. We are clearly of

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opinion that this contention is not correct. The distribution no doubt is to be amongst those who attend the festival in the temple, but it is not to be an offering to the deity and it is not any ceremony which is part of the temple festival itself. The learned vakil did not contend that the small provision for making *Archana* every Friday to the Goddess would make the trust a religious one. We therefore confirm the finding of the lower Court that the trust is not religious in its character.

The next ground of objection is that, as the endowment in this case was not one made before the coming into operation of Regulation VII of 1817, its provisions are not applicable and the Board of Revenue had no jurisdiction over the endowment. Reliance is placed mainly on the preamble to the Regulation and sections 2, 3 and 4. The preamble sets out the reasons for the enactment of the Regulation and states that considerable endowments *have been* granted both by the past and present Governments of the country and by individuals for the support of mosques, temples, etc., that there are grounds to believe that the produce of *such* endowments is in many instances being misappropriated, and that it is the duty of the Government to prevent such misappropriation. It is contended that the use of the expressions "have been" and "such endowments" shows that the Regulation was intended to be applicable only to endowments already existing. We do not think so. No reason has been suggested for restricting the Regulation to existing endowments. It is admitted that the mischief intended to be rectified would equally apply to future endowments. The preamble merely states the reasons which induced the legislature to enact the Regulation. No inference can be drawn therefrom that it intended to confine the enactment, without any apparent reason, to existing endowments. Moreover we are of opinion that the enacting portion of the statute is sufficiently clear to cover future endowments. Section 2 vests the general superintendence of all endowments in land or money *granted* for the support of *mosques, etc.*, in the Board of Revenue. We can see nothing in the use of the word "granted" to justify the interpretation of it as applicable only to what had already been granted before the passing of the Regulation. Section 3 directs the Board of Revenue to take measures "to ensure that all endowments made . . . . . "are duly appropriated to the purpose for which they *were*

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"destined by Government or the individuals by whom such endow-"ments *were* made." The use of the past tense "were" is much relied on by the appellant's vakil as well as the reference in the section to "public edifices which *have been* erected." We are of opinion that these words were used as applicable at the time when the Board of Revenue would be called upon to take action. Happier language might perhaps have been used to denote the intended meaning regarding which we entertain no doubt, but we have to construe an old statute, and it is clear to us that it would not be reasonable to place on it the restricted interpretation suggested for the appellant. Our opinion is in accordance with the view expressed by SUBRAHMANIA AYYAR, J., in *Sivayya* v. *Rami Reddi*(1) with reference to the construction of Act XX of 1863, although the point was not decided in that case. It is admitted that in several reported cases it was assumed that Regulation VII of 1817 and Act XX of 1863 are applicable to endowments made after the Regulation as well as prior endowments. We overrule this contention.

The next point urged was that, assuming that the trust is not a religious one and that the Regulation is applicable to prior endowments, the Board of Revenue had still no jurisdiction to make over the management to the Taluk Board on two other grounds. It was first urged that under Regulation VII of 1817 the Revenue Board possesses only a right of superintendence and that it has no right of management itself and could not therefore make over the right of management to the Taluk Board. It was further argued that the trusteeship would descend to the heirs of the deceased first defendant, and that, if it would not, the heirs of the founder Kanagammal would be entitled to appoint a fresh trustee. We do not think that these latter contentions are well founded, but we do not think it necessary to decide these questions as we have come to the conclusion that the appellant is entitled to succeed on another ground, viz., because the Board of Revenue had no power to transfer the management of the trust without first dismissing the trustee then in office.

It is admitted in the plaint (paragraph No. 4) that the "first "defendant accepted the trust and discharged it faithfully for

(1) (1899) I.L.R., 22 Mad., 223.

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"some years" and exhibit J, the power of attorney executed by him to the second defendant in 1899, enjoined him to conduct the charity in the chattram. It is true that the second and third defendants have contended in the suit that there was no real trust, but the first defendant having accepted the trust would remain in our opinion trustee until he was dismissed by a competent authority. The Board's order was passed under section 51 of the Madras Local Boards' Act V of 1884. That section empowers the Board of Revenue "with the written consent of the "Governor in Council and of the Local Board concerned to make "over to such Local Board *the management and superintendence* of "any such endowment and thereupon all powers and duties that "attach to the Board of Revenue in respect thereof shall attach "to such Local Board as if such Board had been specifically named "in the said Regulation," *i.e.*, under Regulation VII of 1817. The Board of Revenue under the provisions of Regulation VII of 1817 undoubtedly had power to appoint trustees for charitable endowments in certain cases. Section 13 of the Regulation invests the Board with power to make the appointment in the cases referred to in sections 11 and 12. Section 11 provides that the local agents appointed under the Regulation shall report to the Board all vacancies and casualties which may occur, and are required to furnish the Board with the information necessary to enable it to determine the rule of succession applicable to each case. Section 12 provides that in cases in which the nomination has usually rested with the Government or with a public officer or in which no private person may be competent and entitled to make sufficient provision for the succession to the trust and management, the local agents are to propose proper persons for the office of trustee, manager, or superintendent for the approval and confirmation of the Board, and the Board, according to section 13, is then entitled either to appoint the person or persons nominated for their approval or to "make such other "provision for the trust, management or superintendence as "may seem to them right and fit with reference to the nature and "conditions of the endowment, etc." It, however, seems to us clear that the Board has no power to ignore the rights of a person lawfully in office as trustee and to appoint another person in his place without dismissing him. In *Venkatesa Nayudu v. Shrivan*

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Shatagopa Shri Shatagopa Swami(1), it was no doubt recognised that "section 13 gives the Board of Revenue the largest power "of making any arrangement which the Board may consider best "adapted to securethe purposes which the Regulation had in view in "cases of vacancy." In *Ganapathi Ayyar* v. *Sri Vedavyasa Alasinga Bhattar*(2), SUBRAHMANIYA AYYAR and BENSON, JJ., held that the Board of Revenue had power to appoint a hereditary trustee where such appointment would not interfere with the rights of any existing trustee but had no power to subsequently appoint additional trustees so as to affect his rights of management without good and sufficient grounds for so doing. In *Sheik Davud Saiba* v. *Hussain Saiba*(3), referred to in the above case, it was laid down that a committee appointed under Act XX of 1863 whose powers of superintendence are similar to those of the Board of Revenue under Regulation VII of 1817, cannot appoint additional trustees where there is a hereditary trustee. These cases recognise the principle that the Board cannot ignore the rights of existing trustees, and in this respect we think there is no difference between a hereditary and a non-hereditary trustee who is equally entitled to a freehold office. It appears therefore to be clear that the power of the Board of Revenue to appoint trustees cannot be exercised to the prejudice of one who is in possession of the office under the instrument creating the trust. It is unnecessary to consider the argument urged by the learned vakil for the appellant that the Board had no power to manage the charities itself, for it is clear that, even if that were so, it is entitled under section 51 of Act V of 1884 to make over to a local body not only its power of superintendence but also the management of any endowment. This power of making over the management to a local board would only be an exercise of the Board's right of superintendence, and the section apparently empowers the Board to make over to a local board both the management, in virtue of its right of superintendence, and its own right of superintendence. This was expressly decided in *The Chairman, Municipal Council, Rajahmundry* v. *Susurla Venkateswarulu*(4) by MILLER and MUNRO, JJ., with reference to a similar provision in the District Municipalities Act IV of 1884,

(1) (1872) 7 M.H.C.R., 77.
(2) (1906) I.L.R., 29 Mad., 534.
(3) (1894) I.L.R., 17 Mad., 212.
(4) (1908) I.L.R., 31 Mad., 111.

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section 26, and by BENSON and KRISHNASAMI AYYAR, JJ., in *Nilayuthakshi Ammal* v. *Taluk Board of Mayavaram*(1), where the question arose with respect to section 51 of Act V of 1884. The order of the Board of Revenue in this case would clearly have been valid if the first defendant, Paupiah, had been dismissed by the Board. They had the power to dismiss him and there can be no doubt that Paupiah's misconduct would have fully justified his dismissal. But, as stated above, we are unable to hold that it had the right to pass orders transferring the management under section 51 of Act V of 1884 while the first defendant was still trustee and there was no vacancy with respect to the office. The first defendant, the trustee, having died since the institution of the suit and his representatives, the fourth and fifth defendants, having no right under the will to succeed to his right of management, it will no doubt now be open to the Board of Revenue to transfer the management to the Local Board under section 51 of the Act.

But for the reasons we have given above we are constrained to hold that the Taluk Board obtained no valid rights under exhibit C series which would entitle it to sue for the recovery of the properties, and we must reverse the judgment of the lower Court and dismiss the suit but without costs in the circumstances of the case.

(1) (1910) 20 M.L.J., 885.

APPELLATE CIVIL.

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

1908. February 19. March 3. 1909. March 30. 1910. March 2.

UMMANGA AND ANOTHER (DEFENDANTS NOS. 4 AND 5), APPELLANTS,

v.

RAMAKRISHNA PATTER'S SON APPADORAI PATTER AND OTHERS (PLAINTIFFS AND DEFENDANTS NOS. 1, 2, 7, 12, 13 AND 14), RESPONDENTS.*

Marumakatayam Law—Tarwad is the heir to the property of a deceased member, subject to the liability to discharge debts of deceased—Devolution of property, acquired by or for benefit of Tavazhi—Survivorship—Property acquired by individual member—Devolution of.

Coparcenary exists among the members of an undivided Malabar Tarwad. Where therefore one of the members dies, the Tarwad is the heir to the property of the deceased, subject to the liability to discharge the debts of the deceased member.

Ryrappan Nambiar v. *Kelukurup*, [(1882) I.L.R., 4 Mad., 150], referred to. Where property is acquired for the benefit of the Tavazhi, the incidents of such property will depend on the constitution of the Tavazhi. If the Tavazhi forms a distinct branch from the main Tarwad with separate properties and has its own karnavan, it will, in law, form a Tarwad and the incident of Tarwad property will attach to it. None of the members will have an alienable interest in such property and it cannot be attached in execution of a decree against any of the members.

Kenath Puthen Vittul Tavashi v. *Narayanan*, [(1905) I.L.R., 28 Mad., 182 at pp. 189, 190], referred to.

If, however, the members of the Tavazhi have not separated from the main branch by taking their share of Tarwad property or renouncing their interest therein, the mere acquisition of such property will not make them a separate Tarwad and the karnavan of the main Tarwad will retain all his rights and obligations towards them. The property will be the separate property of the Tavazhi and not Tarwad property and the incident of impartibility, which attaches to Tarwad property, will not attach to it. The interest of each member will be the same as in an ordinary Hindu family and will be liable to be attached and sold. If, however, any member dies without his interest being alienated in his life-time, his interest lapses to the other members and it cannot be sold. *Kunhachaumma* v. *Kuttimammi Hajee*, [(1893) I.L.R., 16 Mad., 201], referred to. If property is acquired solely for the benefit of two members of a Tavazhi, they must be treated as tenants in common. They cannot be treated as a separate

* Second Appeal No. 784 of 1905.

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branch and on the death of one, the share will pass to the heir of the deceased, which according to the preponderance of authority, will be the Tarwad.

The principle of joint tenancy is unknown to Hindu Law, except in the case of the members of an undivided Hindu family.

Joyeswar Narain Deo. v. *Ramchendra Dutt*, [(1896) I.L.R., 23 Calc., 670], referred to.

SECOND APPEAL against the decree of A. Venkataramana Pai, District Judge of North Malabar, in Appeal Suit No. 569 of 1904, presented against the decree of P. Raman, District Munsif of Taliparamba, in Original Suit No. 92 of 1904.

In execution of the decree in S.C.S. No. 792 of 1901, obtained by the plaintiff against the first defendant the former attached the plaint properties as the exclusive Jenm properties of the debtor. Defendants Nos. 2 to 4 successfully intervened. They claimed the properties as the Tavazhi properties of the debtor and themselves. The attachment was withdrawn. The suit is for a declaration that the properties are saleable for the decree-debt. Plaintiff's case is that first defendant and his mother deceased Parwathy purchased the properties for themselves and that Parwathy intended that the properties should belong to her and her son alone and that therefore the properties have after the death of Parwathy become the exclusive properties of the first defendant. Defendants Nos. 5 to 20 were brought in as the remaining members of the debtor's Tavazhi Tarwad.

Defendants Nos. 2, 7 and 12 to 14 plead that the properties were acquired by Parwathy alone, that the name of the first defendant who was a minor on the date of purchase was simply added in the deed, that after the death of Parwathy the properties have lapsed to the Tavazhi Tarwad, that first defendant has no exclusive or saleable interest in them and that they are not saleable for the decree in question which was passed against first defendant personally for a debt due by him in his own personal capacity.

The Court of First Instance found that the purchase money belonged exclusively to the mother of first defendant and that on her death, the property passed to her Tavazhi and dismissed the suit.

On appeal the Appellate Court passed judgment as follows:—

Plaintiff sued to establish his right to attach and sell the plaint property in execution of his decree against first defendant in S.C. No. 792 of 1901. Defendants Nos. 2, 4, 5, 7, 10 and 12 to 14 plead that the plaint property belonged to first defendant's mother

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Parwathy and that on her death it has lapsed to their tavazhi. The District Munsif dismissed the suit. Plaintiff appeals.

Exhibit I of 25th April 1883 is the deed under which the plaint property was acquired by Parwathy and her son the first defendant Nambi Nambiyar the late Karnavan and some junior members of the defendant's tarwad declare that the property had then recently been purchased by Nambi Nambiyar in Court auction *benami* for Parwathy, and that the same had been formally transferred to her and her son the first defendant. Of course, Parwathy was a consenting party to the transfer under exhibit I under which it vested in the two transferees jointly. Assuming that on Parwathy's death her interest passed to the tavazhi, the first defendant's interest which must be presumed to be one-half, is available for his debts.

The contending defendants' contention that the acquisition was intended for Parwathy's other children also is unsupported by the wording of the deed, exhibit I, under which the acquisition was made. Since Parwathy's death in 1884–85 the patta was made out in the name of first defendant who has also paid the assessment (C to H). The said defence story as to Parwathy's husband having made a gift of the purchase-money for the benefit of all her children cannot be held proved by the oral evidence of fifth defendant and his first witness who attested the deed I. It is not disputed that Parwathy's husband gave the amount, but the allegation that he intended it for his other children also is contradicted by the terms of exhibit I and not supported by any documentary evidence.

I find that one-half of the plaint property belongs to first defendant exclusively and in modification of the decree appealed against declare that the plaintiff is entitled to attach and sell in execution of his decree S.C. No. 792 of 1901.

Fourth and fifth defendants appealed to the High Court.

V. Ryru Nambiar for appellants.

G. S. Ramachandra Ayyar for *T. R. Ramachandra Ayyar* for first respondent.

JUDGMENT.—The plaintiff seeks to sell certain lands in execution of a decree he has obtained against the first defendant as the property of his judgment-debtor; the defendants contend that the first defendant has no interest therein liable to be attached and sold.

From exhibit I, it appears that the property was originally purchased in the name of Nambi, the late Karnavan of the first

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defendant's Tarwad as benamidar with the money paid to him by Parwathy, the mother of the first defendant. The Karnavan with the junior members assigned their interest to Parwathy and her son the first defendant (exhibit I). Parwathy is dead—and the question for decision is as to the interest of the first defendant in the property.

It is contended by the defendants that the property belongs to the Tavazhi of the deceased Parwathy, as having been purchased for them (exhibit I) and also on the ground that the members of the Tavazhi have been in adverse possession for more than 12 years before the institution of the suit. The plaintiff's case is that Parwathy and her sons were joint tenants and on Parvathy's death the first defendant became sole owner.

The Judge held that the first defendant's interest which must be presumed to be one half is liable to be attached and sold. Both the parties take objection to his finding.

The Judge has assumed that according to the defendants, Parwathy's husband made her a gift of Rs. 400 the purchase money. This appears to be incorrect. He also assumed that the defendants' contention was that the property was purchased also for the benefit of the other children of Parvathy, whereas the defendants' contention always has been that it has been purchased for Parwathy's Tavazhi, *i.e.*, Parwathy's children *and* their descendants in the female line. This would make a material difference. If it was purchased for all the children of Parwathy who were then alive, there is no reason why their names also should not have been mentioned in exhibit I, whereas if the assignment was executed in favour of the Tavazhi, then the execution in favour of the senior female and senior male is accounted for. There is no finding by the Judge whether the members of the Tavazhi have been in possession or only the first defendant and his mother. Further the Judge has not in coming to his conclusion kept in view the rules of law applicable to such cases.

We proceed to state them so far as they are necessary to the decision of this case.

In *Vydinada* v. *Nagammal*(1) a Hindu Testator devised some properties to his nephew and that nephew's wife. They were held to be joint-tenants and not tenants in common and it was also held

(1) (1888) I.L.R., 11 Mad., 258.

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that the nephew could not sever the joint-tenancy by an alienation by him alone to a creditor. Commenting on this case their Lordships of the Privy Council observe in *Jogeswar Narain Deo* v. *Ramchandra Dutt*(1): "There are two substantial reasons why it ought not to be followed as an authority. In the first place, it appears to their Lordships that the learned Judges of the High Court of Madras were not justified in importing into the construction of a Hindu will, an extremely technical rule of English conveyancing. *The principle of joint-tenancy appears to be unknown to Hindu Law, except in the case of co-parcenary between the members of an undivided family.* In the second place, the learned Judges misapprehended the law of England, because it is clear according to that law that a conveyance or an agreement to convey his or her personal interest by one of the joint-tenants operates as a severance."

Thus the questions for decision whether Chandu has an alienable interest and whether he took by survivorship his mother Parwathy's interest in the property have to be decided according to the Marmakkatayam law, not according to the principle of joint-tenancy as known to English law.

Co-parcenary exists among the members of an undivided Malabar Tarwad. If therefore the Tarwad to which Parwathy and the first defendant belonged had acquired the property under exhibit I, then, all the other members of the Tarwad, and not the first defendant exclusively, would have taken by survivorship the interest of the deceased Parwathy. But all the parties to this suit are agreed that the property was not purchased for the Tarwad.

The property according to the defendants' witnesses was purchased with the sum of Rs. 400 given to Parwathy by her father and the recitals in exhibit I apparently show that the amount was advanced by her alone. If the property for that or any other reason belonged exclusively to Parwathy, and the name of the first defendant was inserted in exhibit I to enable him to represent the estate before public officials; then, on her death, the property lapses according to the decisions (it is now too late to depart from those decisions) not to the Tavazhi, *i.e.*, her descendants but to the Tarwad who take it as her heir subject to the liability of discharging her debts (*Ryrappan Nambiar* v. *Kelu*

(1) (1896) I.L.R., 23 Calc., 670 at p. 679.

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Kurup(1). But as the debt for which the property is now attached is not alleged to have been contracted by her, and the first defendant would in that case have no alienable interest therein, it cannot be attached to discharge his debt and the plaintiff's suit will, in that event, have to be dismissed.

If as contended by the appellants before us, the property was purchased for the benefit of the Tavazhi, *i.e.*, Parwathy, her children and their descendants in the female line, then it would depend upon the constitution of the Tavazhi, whether the first defendant has any alienable interest or not. If the Tavazhi forms a distinct branch from the main Tarwad with separate properties, and its own Karnavan as the manager of its property and the guardian of the minor members, then in a Court of Law, it forms a Tarwad though popularly called a Tavazhi and the incidents of Tarwad property will apply to it and the plaintiff's suit must fail as the first defendant has no interest to be attached and sold (see *Korapen Nayar* v. *Chenen Nayar*(2) and *Kenath Puthen Vittil Tavazhi* v. *Narayanan*(3)). But if Parvathy and her descendants, or her Tavazhi have not separated themselves from the main Tarwad either by taking their share of the Tarwad property or by renouncing their interest therein, then the minor members of this Tavazhi or branch would still continue under the guardianship of the Karnavan of the main Tarwad Nambi, executant No. 1 in exhibit I or whoever has succeeded him whose liability to maintain them out of the Tarwad property would remain unaffected though the branch may have private property. They would continue to be the members of the main Tarwad of which the executants of exhibit I are members. The fact that Parwathy and her descendants forming a Tavazhi have acquired property by purchase or gift will not by itself deprive Nambi, the Karnavan of the Tarwad, of his rights or discharge him of his obligations towards them; and they will not for that reason alone constitute themselves into a Tarwad with its incidents of impartibility and uncontrolled management by Karnavan. It is Tarwad property alone that is impartible. This property which a Tavazhi or members thereof may acquire will be their separate property without the incident of impartibility. The members will be equally

(1) (1882) I.L.R., 4 Mad., 150. (2) (1871) 6 M.H.C., 411.
(3) (1905) I.L.R., 28 Mad., 182 at pp. 189, 190.

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entitled to it. The senior male or any other manager will not obviously have the right of uncontrolled management which a Karnavan has over Tarwad property. The interest of the first defendant as in the case of an ordinary Hindu family will therefore be liable to be sold.

But if any member dies without his interest in the Tavazhi property being alienated during his life time, then according to the Full Bench decision in *Kunhacha Umma* v. *Kutti Mammi Hajee*(1) his interest lapses to the other members of the Tavazhi and it cannot be sold. This decision as well as that in *Vydinada* v. *Nagammal*(2) above referred to, was based upon a rule of construction laid down in *Mahommed Shumsool* v. *Shewukram*(3).

As in both the Hindu as well as the Marumakkatayam law the joint-tenancy appears to be unknown except in the case of the undivided members of the family, whether this decision is consistent with the later decision of the Privy Council in *Jogeswar Narain Deo* v. *Ram Chandra Dutt*(4) it is unnecessary now to consider as the first defendant and not the deceased Parwathy is the plaintiff's debtor; and the question whether the interest of a member of a Tavazhi can be attached and sold before his death was not in that case raised or decided.

But if the property was acquired as the plaintiff contends solely for the benefit of the deceased Parwathy and the first defendant, then the interest of the first defendant therein is clearly liable to be sold. But as the deceased Parwathy and the first defendant alone never formed a branch or could form one to the exclusion of Parwathy's children, there can be no survivorship to the first defendant alone. They must be treated as tenants in common. The heir of Parvathy would take her interest. The preponderance of authority is in favour of the Tarwad (which includes the Tavazhi) being the heir, though there are also decisions that the Tavazhi is the heir. But in either view as the first defendant does not take it exclusively the plaintiff cannot proceed against Parwathy's interest unless the rule of joint-tenancy according to English Law is applicable, and the case in *Jogeswar Narayan Deo* v. *Ram Chandra Dutt*,(4) is an authority that it ought not to be so applied.

(1) (1893) I.L.R., 16 Mad., 201. (2) (1888) I.L.R., 11 Mad., 258.
(3) (1874) 2 I.A., 7. (4) (1896) I.L.R., 23 Calc., 670.

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We shall ask the Judge to submit a revised finding on the following issues with reference to the above obervations:—

(1) Whether the property belongs exclusively to the first defendant.

(2) Whether he has any interest liable to be attached and sold and if so, what is that interest?

Fresh evidence may be received. Findings should be submitted in six weeks, and seven days will be allowed for filing objections.

In compliance with the above order the District Judge submitted the following

FINDING.—This appeal has been remanded for a finding on the following issues:—

(1) Whether the property belongs exclusively to the first defendant?

(2) Whether he has any interest liable to be attached and sold and if so, what is that interest?

The District Judge found both issues in the negative.

This Second Appeal and the Memorandum of Objections coming on for hearing after the return of the above finding: upon perusing the affidavit filed by the first responndent to the effect that in consequence of the case not having been put down for judgment in the cause list of 3rd March 1908 given to his vakil, he had no information about the order calling for finding and that consequently the finding happened to be recorded and returned by the District Judge in his absence, the Court made the following

ORDER.—On payment by the first respondent to the appellants of the costs of the hearing in the District Court and of the application to this Court the case will go back to the District Court for fresh findings.

The findings should be submitted in six weeks from the re-opening of the District Court after recess, and seven days will be allowed for filing objections.

In compliance with this order, the District Judge submitted the following

FINDING.—Certain findings were called for by the High Court on 3rd March 1908 and submitted by this Court on 21st April 1908. On plaintiff—appellant's affidavit to the effect that in consequence of the case not having been put down for judgment in the cause list of 3rd March 1908 he had no information about the order calling for a finding and that consequently the finding

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happened to be recorded and returned by the District Judge in his absence, the case has been remanded for fresh findings after taking additional evidence. Plaintiff—appellant has again failed to instruct his vakil to adduce fresh evidence, and respondents do not wish to examine any further witnesses.

2. In my original finding I remarked (paragraph 2) that plaintiff's vakil has no instructions, but I did not mean by that that the case was not argued by plaintiff's vakil, but merely that plaintiff had not asked him to adduce fresh evidence. The case was fully argued and I submitted my finding. There is still no further evidence before me, nor any further observations by the High Court to guide me to a different decision, so I again find both the issues in the negative for the reasons given in my finding of 21st April 1908.

This Second Appeal and the Memorandum of Objections coming on for final hearing after the return of the second finding of the lower Appellate Court, the Court delivered the following:—

JUDGMENT.—On the finding which we accept the decree of the District Court is set aside, and the suit is dismissed with costs throughout.

The Memorandum of Objections is dismissed.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Krishnaswmi Ayyar.

1910. March 1, 18.

ANTONY CRUZ GONZOLVES (PLAINTIFF), APPELLANT,

v.

MAKIS BOOPALRAYAN (FIRST DEFENDANT), RESPONDENT.*

Succession Act X of 1865, ss. 190, 191, 239—Act VII of 1901—Grant of letters does not vest property of deceased in the administrator as from the date of death—Heirs of intestate Native Christian entitled to deal with their shares until grant of letters.

The effect of section 191 of the Indian Succession Act is not to vest the property of the deceased in the administrator as from the date of death. Subsequent to the passing of Act VII of 1901, which made sections 190 and 239 of

* Second Appeal No. 899 of 1908.

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the Succession Act inapplicable to Native Christians, the heirs of intestate Native Christians have the power to deal with their shares in the property of the deceased until the grant of administration and their transactions in respect of such shares will not be made invalid by the subsequent grant. The property of the deceased vests in the administrator only at the time of the grant, though for certain purposes the grant may relate back to the death of the deceased.

SECOND APPEAL against the decree of C. G. Spencer, District Judge of Tinnevelly, in Appeal No. 237 of 1907, presented against the decree of S. Mahadeva Sastriar, District Munsif of Tuticorin, in Original Suit No. 336 of 1906.

Joseph Satya Nadar for appellant.

G. Devasagayam for respondent.

JUDGMENT.—One Machado, a Native Christian, died in 1885 leaving a widow, the second defendant, two sons, the third and fourth defendants and two daughters. Defendants Nos. 3 and 4 hypothecated the suit property in 1891 to the first defendant. The first defendant instituted a suit upon the mortgage in 1901 and purchased the property. The second defendant, the widow, obtained letters of administration in January 1905, and sold the property to the plaintiff. The Courts below upheld the sale to the first defendant to the extent of the one-third share of defendants Nos. 3 and 4, and gave a decree to the plaintiff for two-thirds of the suit property. The plaintiff has preferred this second appeal. Sections 190 and 239 of the Succession Act have by Act VII of 1901 been made inapplicable to Native Christians. Section 179 provides that the executor or administrator of a deceased person is his legal representative for all purposes and all the property of the deceased person vests in him as such. An executor is defined as a person to whom the execution of the last will of a deceased person is by the testator's appointment confided. So property of the testator, vests in the executor on the death of the testator at once irrespective of probate. But an administrator is a person appointed by competent authority to administer the estate of a deceased person; so until he is appointed by Court the property of the deceased cannot vest in him. But section 191 enacts that once letters of Administration are granted, they entitle the administrator to all the rights of the intestate as effectually as if the administration had been granted at the moment after his death. The sons were entitled to a third share and when no administrator was appointed they were entitled to deal with it. The decree on the mortgage

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and the sale were subsequent to the repeal of section 190 as regards Native Christians and were therefore valid to the extent of the interest of the third and fourth defendants. Section 191 which makes the letters of administration relate back to the death of the intestate cannot, it seems to us, effect the right of the purchaser. In Williams on "Executors" volume I, page 468, there is the following statement of the law. "On the other hand an administrator derives his title wholly from the Court. He has none until the letters of administration are granted and the property of the deceased vests in him only from the time of the grant." Later on, Williams adds "the proposition, however, respecting the vesting of an administrator's interest must be taken with some qualification for, it seems clear that for particular purposes the letters of administration relate back to the time of the death of the intestate and not to the time of granting them." And he proceeds to give a number of instances where the letters of administration relate back to the time of the death of the intestate. This statement of the law is reproduced in section 191 of the Indian Act. We must therefore hold that the provision in the Succession Act as to the letters of administration relating back does not vest the property in the administrator before the grant of administration. The repeal of section 239 as regards Native Christians, strengthens the view that the heirs to the property of an intestate are not disentitled to deal with their shares until administration is granted, for the protection of the property by the Distrtct Court till the grant of administration has been taken away by the repeal. Act VII of 1901 has moreover authorized the issue of succession certificates for debts due to the estates of Native Christians. All this points to the intention of the legislature that until the grant of administration the property of an intestate vests in the heirs sufficiently to enable them to deal with their interests. We must hold therefore that the plaintiff is not entitled to claim their one-third share. We dismiss the second appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Sankaran-Nair and Mr. Justice Krishnswami Ayyar.

1910. April 8, 18. May 6.

KRISHNA AIYAR (PLAINTIFF), APPELLANT,

v.

BALAMMAL (DEFENDANT), RESPONDENT.*

Limitation Act XV of 1877, sch. II, art. 35—Where, after demand and refusal, differences are made up, time will not run until there is a fresh demand and refusal—Agreement between husband and wife, providing for future separation how far valid under Hindu and English law—The Madras Civil Courts Act III of 1873, s. 16.

Where after demand by the husband and refusal by the wife to return to cohabitation, the parties make up their differences, limitation will not run under article 35 of schedule II of the Limitation Act of 1877 until there is a fresh demand and refusal.

A, a Hindu Brahmin, after refusal by his wife *B* to return, brought a suit for restitution of conjugal rights in 1903. The suit terminated in a compromise between *A* and *B* in July 1904, by which it was agreed that *B* should return and live with *A* and that if at any time thereafter she should desire to live apart from *A*, she was to be paid Rs. 350 by *A*.

B never returned to live with *A*, who on 6th July 1907, brought a suit for restitution alleging a demand and refusal in February 1907.

Held, that the suit was not barred under article 35 of schedule II of the Limitation Act and that the demand and refusal prior to 1903 did not furnish the starting point for limitation:

Held, also that the agreement between *A* and *B* in July 1904, providing for a future separation was invalid. It was forbidden by the Hindu Law, which ought, under section 16 of Madras Act III of 1873, to be applied in determining the marital obligations between the parties.

Tekait Mon Mohini Jemadat v. *Basanta Kumar Sing*, [(1901) I.L.R., 28 Calc., 751], referred to.

Such agreement must also be considered as opposed to public policy and unenforceable.

Mhervally v. *Sakerkhanoobai*, [(1907) 7 Bom., L.R., 602], referred to.

Even under the English law, an agreement, providing for a future separation is invalid and would not operate as a bar to a suit for restitution of conjugal rights.

SECOND APPEAL against the decree of E. L. Thornton, District Judge of Trichinopoly, in Appeal No. 94 of 1908, presented

* Second Appeal No. 71 of 1909.

against the decree of K. S. Kothandarama Ayyar, District Munsif of Srirangam, in Original Suit No. 164 of 1907.

The facts are briefly these:—

The defendant is the plaintiff's wife. This is a suit for the restitution of conjugal rights and for a permanent injunction to restrain the defendant from enforcing the magisterial order, dated 3rd June 1903, that she has obtained against the plaintiff directing him to pay her Rs. 5, monthly maintenance.

The plaintiff's case is that the plaintiff and the defendant were married fifteen years ago; that till 3rd June 1903, they were living together as man and wife; and that then the defendant unjustly complained to the Deputy Magistrate and obtained a maintenance order for Rs. 5 a month. Then this plaintiff laid a suit (Original Suit No. 313 of 1903) in this Court for restitution of conjugal rights; but mediators effected a compromise that the defendant should go and live with the plaintiff, that, if *afterwards* they separate, the plaintiff pay defendant Rs. 350 in full satisfaction of her claim for maintenance, and that the magisterial order be not enforced; and an agreement (exhibit I) was accordingly executed on 25th July 1904, after which Original Suit No. 313 of 1903, was withdrawn as settled out of Court. But the defendant did not go and live with the plaintiff or return to his protection, but, instead, lodged a suit for the Rs. 350 of the agreement, which failed both here (Original Suit No. 439 of 1904—exhibit II) and (on 6th February 1907) in appeal (exhibit A). Towards the close of February 1907 the plaintiff asked the defendant to come and live with him; but the defendant has not done so. And the defendant in March 1907, took steps to realise in the Criminal Court, the maintenance due; she is precluded from doing so by her agreement. The plaintiff's cause of action arose in February 1907 and in April 1907.

Defendant pleaded *inter alia* that the suit was time barred.

The Court of First Instance decreed restitution. On appeal the District Court dismissed the suit holding it to be barred by limitation.

Plaintiff appealed.

K. Bhashyam Ayyangar for *T. Natesa Aiyar* for appellant.

T. R. Venkatarama Sastri for respondent.

JUDGMENT (KRISHNASWAMI AYYAR, J.).—The suit is by a husband for restitution of conjugal rights. The District Judge has

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dismissed it as barred by limitation. We are unable to agree with him. It is true article 35 of the Limitation Act of 1877 bars the suit for restitution if there has been a demand and refusal more than two years before. The decisions of this Court and of the Bombay and Calcutta High Courts are clear (*Saravanai Perumal Pillai* v. *Poovayi*(1), *Dhaujibhoy Bomanji* v. *Hirabai*(2), *Asirunnessa Khatun* v. *Buzloo Meah*(3).

But in this case a suit was brought after a demand and refusal for restitution of conjugal rights (Original Suit No. 313 of 1903). And that was compromised on the 25th July 1904. By the compromise (exhibit I) the parties agreed to live together "according to the custom of the world." The agreement further provides "If on any day subsequent to this and for any reason whatever you (the wife) should not like to live with me but want to go away from me, I agree to give you Rs. 350." It is impossible to contend after this agreement that the previous demand and refusal furnish the starting point for the running of time. The parties have made up their differences and agreed to live together as husband and wife. Unless there is a fresh demand and refusal time cannot run against the plaintiff's claim for restitution. It is nowhere alleged that subsequent to the agreement there has been a demand and refusal. It is true the wife did not return to conjugal life. But, we should be strict in applying article 35 according to the letter. It may be worthy of note having regard to the difference of opinion between the Allahabad High Court and the other Indian High Courts as to the applicability of the article to Hindus and Muhammadans that it does not find a place in the new Limitation Act. We would therefore overrule the Judge's view as regards limitation. We come next to the important question as to whether the agreement itself bars the present suit. According to the strict tenour of the language it has no application to the facts of this case assuring it to be valid. It requires the parties to come together and only provides for separation on a subsequent day after they have once come together. The wife never joined the husband after the agreement and it may therefore be sufficient to say that under the terms of the agreement there is no defence to the action. But we

(1) (1905) I.L.R., 28 Mad., 436. (2) (1901) I.L.R., 25 Bom., 644.
(3) (1907) I.L.R., 34 Calc., 79.

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desire to rest our decision on a broader ground. The parties are Hindus and Brahmans. The law to be applied in determining their marital obligations is the Hindu Law (see section 16 of Madras Act III of 1873). It may be doubted whether under that law any agreement between husband and wife to live apart from each other is valid. It may well be deemed to be forbidden by the Hindu Law. The authorities on the subject are set out and discussed in considerable detail by Mr. Justice GHOSE in *Tekait Mon Mohini Jemadai* v. *Basanta Kumar Singh*(1). It is unnecessary to consider whether there are any exceptions recognised by the Hindu Law. It is perfectly clear that the present case is not such an exception. Even apart from the Hindu Law the agreement, we think, must be regarded as opposed to public policy and therefore not enforceable. The decision of Mr. Justice BATCHELOR in *Mherally* v. *Sakerkhanoobai*(2) is a case exactly in point though the parties were Khojas. Even if the question fell to be decided under the English Law there can be no doubt that the agreement in this case to live apart is invalid. It is true that though the old ecclesiastical courts refused to admit a deed of separation as a bar to a suit for restitution of conjugal rights it was held by the House of Lords in *Wilson* v. *Wilson*(3) that an agreement for a present separation was enforceable. The decisions in *Marshall* v. *Marshall*(4), *Clark* v. *Clark*(5), *Besant* v. *Wood*(6) on which Mr. Venkatrama Sastri relied are not cases of agreement for a future separation like the present case. The English cases are fully discussed by Mr. Justice BATCHELOR in the Bombay case we have already referred to. It is unnecessary to add anything further. Even if we applied the English rule we should be quite prepared to hold that the agreement in this case being one for future separation would be invalid and constitute no answer to a suit for restitution of conjugal rights. We reverse the decree of the District Judge and restore that of the Munsif with costs in this and in the lower Appellate Court.

SANKARAN-NAIR, J.—I concur.

(1) (1901) I.L.R., 28 Calc., 751. (2) (1907) 7 Bom. L.R., 602.
(3) 9 E.R., 870. (4) (1879) 5 P.D., 19.
(5) (1885) 10 P.D., 188. (6) (1879) 12 Ch.D., 605.

APPELLATE CIVIL.

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

1910. January 5, 12.

DUVVADA HARIKRISTNA CHOWDARY (SECOND DEFENDANT), APPELLANT,

v.

SRIPADA VENKATA LAKSHMI NARAYANA PANTULU AND OTHERS (PLAINTIFF AND DEFENDANTS NOS 1 AND 3 TO 6), RESPONDENTS.*

Hindu Law—Suit by transferee of a portion of a joint tenancy for partition of such portion, maintainability of—Limitation Act XV of 1877, sch. II, art. 144—Adverse possession, burden of proving, in a suit for partition.

The transferee of a portion of a joint tenancy can maintain a suit for partition of such portion when such partition will not be attended with much inconvenience to the other sharers.

Ramasamy Chetti v. *Alagirisamy Chetti*, [(1904) I.L.R., 27 Mad., 361], not followed.

Where in such a suit by the transferee, it is alleged that the right of the transferor to claim a share has become barred by exclusion for more than twelve years from enjoyment, the article of the Limitation Act applicable is article 144 and the burden will be on the defendant to show that the sharer was, in denial of his title, excluded from enjoyment of his share.

APPEALS against the decree of Y. Janaki Ramayya Sastri, District Judge of Ganjám, in Original Suit No. 10 of 1906.

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

P. Nagabhushanam for appellant in Appeal No. 183 of 1907.

The Advocate-General (Hon. Mr. *P. S. Sivaswami Aiyar*) and *T. V. Narayaniah* for second and third respondents in the above.

K. Srinivasa Ayyangar and *K. Ramachandra Ayyar* for appellant in Appeal Suit No. 184 of 1907.

The Advocate-General (Hon. Mr. *P. S. Sivaswami Aiyar*) for respondents Nos. 1 to 3 in Appeal No. 184 of 1907.

JUDGMENT.—The father of the plaintiffs obtained a decree against the fifth defendant and in execution thereof brought to sale and purchased the fifth defendant's one-fifth share in the two

* Appeal Nos. 183 and 184 of 1907.

suit villages. The plaintiffs in the suit out of which these appeals arise sued for partition and for possession of the fifth defendant's one-fifth share in the said villages. Balakrishnamma, adoptive father of the second defendant, and defendants Nos. 1, 3 and 5 were members of an undivided family. In 1871 they effected a partition. The bulk of the family property was divided by metes and bounds, but the suit villages and some other immoveable property were kept undivided for convenience of enjoyment and were held by the divided members as tenants in common, though the actual management was vested in Balakrishnamma, who was to pay to each of the tenants in common his share of the income. In January 1893, Balakrishnamma died and the management was thereafter with the first defendant.

Two of the issues framed in the suit were whether the suit was barred by limitation and whether the suit was bad as being a suit for partial partition. The Court found both these issues in the negative, and gave a decree for partition. The arguments on behalf of the appellants have been confined to an attempt to show that the findings upon the above issues are wrong.

We shall first deal with Appeal No. 184 which is by the first defendant. This defendant in his written statement admitted that the fifth defendant used to receive payments towards his share of the income of the suit lands as long as Balakrishnamma was alive. He contended however that after Balakrishnamma's death in 1893 the fifth defendant had no enjoyment and that therefore the suit brought in 1906 was time barred. The article of schedule II of the Limitation Act applicable to a case like the present is article 144, and, to succeed, it was incumbent upon the first defendant to prove that the fifth defendant was in denial of his title excluded from the enjoyment of his share of the suit land, *Jogendranath Rai* v. *Baladeo Das*(1), *Sellam* v. *Chinnammal*(2), *Ittappan* v. *Manavikrama*(3). This was the view taken by the Court below, and it has not been seriously disputed before us. We think the Court below was right in holding that the first defendant failed to discharge the burden which rested upon him. The fifth defendant stated as a witness for the defence that after

(1) (1908) I.L.R., 35 Calc., 961. (2) (1901) I.L.R., 24 Mad., 441. (3) (1898) I.L.R., 21 Mad., 153.

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the partition of 1871 he never received any share of the produce either from Balakrishnamma or from any one else. In so stating he went further than the first defendant himself. There can be no doubt that his sympathies are now with the defendants rather than with the plaintiffs, and no reliance can be placed upon his evidence. Exhibits II and S are relied upon. These are written statements filed by the fifth defendant in Original Suit No. 1 of 1894 and Original Suit No. 10 of 1895, respectively. In these statements the fifth defendant alleged that the partition of 1871 was never acted upon, and that he and other members of the family were managing portions of the family lands. He never stated that he was excluded from enjoyment of the suit lands. His object in putting in these written statements was to claim a larger share than he was entitled to under the partition of 1871. This is all the evidence relied upon to prove adverse possession and it is manifestly insufficient.

The remaining question is whether the suit is bad as being a suit for partial partition. The fifth defendant was entitled as tenant in common to a one-fifth share not only in the suit villages but also in certain inam lands. The suit is for partition of his one-fifth share in the suit villages only that being all that the plaintiff's father bought. In support of the contention that the suit is bad we have been referred to a passage in *Ramasami Chetti* v. *Alagirisami Chetti*(1), and to an unreported decision of this Court—*The President, Taluq Board, Cocanada* v. *Maddirila Narasimha Rao*(2). In *Ramasami Chetti* v. *Alagirisami Chetti*(1), at page 366 it is said: "It is no doubt the law that the transferee from one or more co-sharers of a portion only of the co-tenancy cannot maintain a suit for partition of the portion transferred to him." For this statement of the law, *Parbati Churn Dab* v. *Ain-ud-deen*(3) is relied upon. As was however pointed out in *Radhakantashaha* v. *Bepro Das Roy*(4), it was not laid down in that case as a matter of law that a partition of a portion of a revenue-paying estate, when that portion is capable of partition without much inconvenience to other sharers, is absolutely barred by law and *Syed Habibur Rasul Abul Faiz* v. *Ashita Mohan Ghosh and others*(5), and *Uma Sundari Debi* v.

(1) (1904) I.L.R., 27 Mad., 361 at p. 366. (2) (1905) S.A. 175 of 1905 (unreported).
(3) (1881) I.L.R., 7 Calc., 577. (4) (1904) 1 C.L.J., 40.
(5) (1908) 12 C.W.N., 640.

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Benode Lal Pakrashi(1), are further authority that a suit like the present is not bad. *The President, Taluq Board, Cocanada* v. *Maddirela Narasimha Rao*(2), is clearly distinguishable. There the suit was to recover specific land left by the testator under his will to the plaintiff, and it was held that the plaintiff could not succeed because the immoveable property of the testator's family had not been divided and the testator himself could not have claimed any specific portion of the undivided property as his share. We therefore hold that the suit is not bad and dismiss Appeal No. 184 with costs.

Appeal No. 183 is by the second defendant. The only difference between this appeal and Appeal No. 184 is that there is no admission by the second defendant that the fifth defendant at any time enjoyed his share of the suit property. This however is immaterial seeing that the burden of proof is upon the second defendant.

We therefore dismiss this appeal also with costs.

APPELLATE CIVIL.

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

1910. September 23.

ARAKAL BASTIAN ANSAP AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

NARAYANA AIYAR AND OTHERS (DEFENDANTS), RESPONDENTS.*

Probate, application for—Party entitled to object to grant—Attaching creditor has interest sufficient to oppose grant.

Where an application is made for the grant of probate of the will of *A* a judgment-creditor of *A's* son who in execution has attached the son's interest in the property of his deceased father, has an interest sufficient to justify him in opposing the grant.

APPEAL against the decree of L. G. Moore, District Judge of South Malabar, in Original Suit No. 1 of 1908.

* Appeal No. 4 of 1909.

(1) (1907) I.L.R., 34 Calc., 1026. (2) (1905) S.A., 175 of 1905 (unreported).

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

Joseph Satya Nadar for Dr. *S. Swaminadhan* for appellants.

T. R. Ramachandra Ayyar for first and second respondents.

M. Kunjunni Nair for third and fourth respondents.

JUDGMENT.—The application for probate of the will was dismissed on the ground that the will had been revoked by marriage. The appellant does not contend that the will had not been revoked. He says the defendants had no *locus standi* to oppose the application for probate. They are judgment-creditors of the son of the deceased, two of whom had attached the son's interest in his deceased father's estate before the application for probate was made. The District Judge followed the authorities *In the matter of the petition of Nilmoney Singh Umanath Mookhopadhyar* v. *Nilmoney Singh*(1) and *Kishen Dai* v. *Satyendranath Dutt*(2). In the latter case the Privy Council's decision in *Nilmoni Singh Deo* v. *Umanath Mookerjee*(3) was considered. We are not prepared to say he was wrong.

The appeal is dismissed with costs—two sets.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Krishnaswami Ayyar.

1910. April 1, 19, July 20.

THATTAN KOTHER'S SON KUNHAN (ELEVENTH DEFENDANT), APPELLANT,

v.

MANGALATH MANAKAL NARAYANAN NAMBURIPAD'S SON MOORTHI AND OTHERS (PLAINTIFF AND DEFENDANTS Nos. 5 TO 10), RESPONDENTS.*

Charitable Trusts, trustees of—When act of majority will be binding—estoppel—Suit by some of several trustees, when sustainable—Misjoinder—Form of decree.

The rule that in the case of charitable trusts, the act of the majority will be binding on the minority only applies when such act is done after full opportunity

* Second Appeal No. 1693 of 1908.

(1) (1881) I.L.R., 6 Calc., 429. (2) (1901) I.L.R., 28 Calc., 441. (3) (1884) I.L.R., 10 Calc., 19.

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given for mutual discussion by all the members. When the act is done after mutual discussion when the minority had an opportunity to record their dissent it will be the act of the whole body; otherwise it will be the act of the majority alone and will not bind the minority.

Teramath v. *Lakshmi*, [(1883) I.L.R., 6 Mad., 270], referred to.

Wilkinson v. *Mallin*, [2 Tyrwhit, 544], referred to.

A company or body of persons will be estopped from questioning the validity of an act done by some only of such body or company only when such persons are held out as clothed with authority to do the act. Where such persons have not unlimited power to act for the body but only the right to act within certain limits, the stranger entering into the transaction has to find within such limits the power to transact.

Where the remedial right does not accrue until the majority have after consultation signified their will, an action by some or the majority of the trustees, without consulting the others, will not be maintainable.

When the right to the relief claimed has accrued to the joint trustees, the institution of a suit by some only without having consulted the remaining trustees, even where they have not perversely refused to join cannot be a ground for dismissing the suit. Although the interests of the co-trustees is joint and indivisible, it is fully represented when they are all on the Record on one side or the other.

Peria Karuppan v. *Valayutham Chetti*, [(1906) I.L.R., 29 Mad., 302], referred to.

One trustee can sue for redemption without consulting the other trustees or making them co-plaintiffs. Such misjoinder is not fatal to the suit.

Karattole Edamana v. *Unni Kannan*, [(1903) I.L.R., 26 Mad., 649], referred to.

The proper decree in such a case would be to order the trust property to be restored to all for the benefit of the *cestui qui trust*.

SECOND APPEAL against the decree of K. Imbichunni Nair, Subordinate Judge of South Malabar at Palghat in Appeal Suit No. 748 of 1907, presented against the decree of T. V. Narayananair, District Munsif of Ottapalam, in Original Suit No. 465 of 1906.

Suit to recover with arrears of rent two items of immoveable property alleged to be held under a kanom demise.

The facts are thus set out in the judgment of the lower Appellate Court.

The plaint mentioned properties which consist of a paddy land and a paramba belong in jenm to Killikurissi devaswom. The Uraima to the aforesaid devaswom is vested in seven Nambudri Illoms whose present Karnavans are the plaintiff and defendants Nos. 6 to 11. The devaswom above mentioned represented by all its seven Uralans demised the properties above mentioned to the first to fourth defendants' Karnavan Nanu Menon (deceased) on a Kanam of Rs. 28-9-2 in Mithunom 1052 (June 1877) and took in Karkitagom 1052 (August 1877) a kurichit from him (*vide*

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exhibit D). In 1062 (1887) Nanu Menon's and first to fourth defendants' Tárwad assigned its kanom to the fifth defendant's Karnavan Rama Perambra Nair. The usual twelve years' period under exhibit D expired in 1064 (1882). The fifth defendant says that in 1070 (1894-95) the usual renewal fee was paid to the Uralars and the necessary documents were drawn up, but there is no writing to prove this. On the twenty-fifth Tulam 1080 (10th November 1904) without the junction of the present plaintiff the defendants Nos. 6, 8, 9, 10 and seventh defendant's son Sankaran Nambudripad and eleventh defendant's nephew Parameswaram Nambudri jointly granted a renewal to the fifth defendant fixing the Kanom on item 1 and leasing item 2 on Verumpattom tenure and took kaichit and pattomchit from him. (*Vide* exhibits VII, VIII and XXVI.) The suit is to set aside the aforesaid renewal and to recover the plaint properties for the devaswom.

The Court of First Instance decreed redemption on payment of the kanom amount due to eleventh defendant. This decree was confirmed on appeal. Eleventh defendant appealed.

P. R. Sundara Ayyar, A. Nilakanta Ayyar and *K. Govinda Marar* for appellant.

T. R. Ramachendra Ayyar and *V. Ryru Numbiar* for first respondent.

JUDGMENT.—This is a suit for redemption. The plaintiff is one of the Urallers of the Killikurishi devaswom. The kanom sought to be redeemed is of the year 1884. It was granted to the family of defendants Nos. 1 to 3. Defendants Nos. 5 to 10 are impleaded as the remaining Urallers of the temple. The defendants set up a renewal in 1905 to which the plaintiff was no party. The eleventh defendant is the assignee of the rights of the Kanomdars. The Courts below have held the renewal to be invalid and given a decree to the plaintiff for the redemption. The eleventh defendant has preferred this second appeal.

A preliminary objection was taken that the eleventh defendant had no right to prefer the second appeal inasmuch as the plaintiff's co-urallers did not contest the decree of the lower Appellate Court. We see no force in this objection. The eleventh defendant as the assignee of the mortgage interest is entitled to question the right of one of the co-mortagors to redemption, whether or not the remaining co-mortgagors acquiesce in the claim of the plaintiff.

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It is argued in second appeal that the plaintiff was a consenting party to the renewal and that his name appears in exhibit XXIV as one of the persons present when the resolutions therein set out were adopted. It appears there "that it is resolved that the Uralam that manages the affairs of the respective years should grant renewals with the greatest possible number of Urallers, receiving the renewal fees, signing fees at the rate now settled from tenants whose term of lease has expired." The actual renewal now impeached is exhibit I. The plaintiff was no party to its execution; nor was he consulted about it. We do not understand exhibit XXIV to dispense with the necessity for all the Urallers being consulted before the execution of the renewal. "The greatest possible number of Urallers receiving the renewal fees" does not mean that it is left to the option of a majority to set at nought a minority and to carry on the business of the devaswom in the matter of renewals without any reference to that minority or without inviting its co-operation. We must therefore hold that the plaintiff not having been consulted in respect of the renewal in question is not precluded from impeaching it.

It is next contended that the majority of the trustees of the devaswom were parties to the renewals and that in the case of a charitable trust the consent of the majority is sufficient to validate the transaction. "In the due administration of all trusts of a private nature the vote or act of the majority of the trustees cannot in the absence of an express or implied power bind a dissenting minority." (See *Luke* v. *South Kensington Hotel Company*(1).) But it has long been held, owing probably to the validity of perpetuities in charities and the consequent perpetual succession of trustees which would produce a dead-lock in the administration if unanimity were insisted on that a majority of trustees has power to bind the minority (See 'Tudor's Charitable Trusts,' page 259). It does not appear to us to follow from the exception of the validity of the acts of the majority in public and charitable trusts that they may transact the affairs of the trust without any reference to the minority. On the other hand it seems to us that the very principle of recognising the validity of the acts of the majority involves the necessity of the majority being ascertained after mutual discussion among all the members

(1) (1879) 11 Ch.D., 121.

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A minority before mutual consultation may be converted into a majority after it. Unanimity on all occasions may be impossible. A majority after consultation and discussion is the nearest approach to it. Reliance was placed on *The Attorney-General* v. *Shearman*(1) in support of the view that a majority is sufficient even though the minority had no opportunity to express their views. In this case there were eleven trustees. There was an original lease by them to one last. There was a renewed lease to the original lessee and another by six out of the eleven trustees, the rest having refused to join. When the second lease was impeached it was held to be valid. This case is no authority for the position that a majority of the trustees can act in respect of a public or charitable trust without giving an opportunity to the minority to state their dissent. In *Teramath* v. *Lakshmi*(2) it was held that the decision of the majority was binding upon a dissentient minority where the majority of the Urallers of a devaswom agreed to renew a Kanom on terms beneficial to the devaswom after the question of the renewal had been fairly considered by all the Urallers. It was pointed out that in such a case each had the opportunity to let his views be known before a decision is passed. The High Court remitted an issue for trial whether the renewal was the result of consultation by all the Urallers though a majority had actually concurred in signing the deed. Section 16 of the Charitable Trusts Act, 1860 (23 & 24 Vict., Chap. 136) provided "a majority of two-thirds of the trustees of any charity assembled at a meeting of their body duly constituted and having power to determine, etc., shall also have a legal power on behalf of themselves and their co-trustees, etc., to do, enter into, and execute all such acts, deeds, contracts, and assurances as shall be requisite for carrying any such sale, exchange, partition, mortgage, lease or disposition into legal effect; and all such acts, deeds, contracts or assurances shall have the same legal effect as if the same were respectively done, entered into, or executed by all the acting trustees for the time being, etc." This section was repealed by section 17 of the Charitable Trusts Act, 1869 (32 & 33 Vict., Chap. 110), section 12 of this later Act replaced the earlier provision thus: "Where the trustees or persons acting in the administration of any charity have power to determine on any sale, exchange, partition,

(1) (1839) 48 E.R., 1119. (2) (1883) I.L.R., 6 Mad., 270.

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mortgage lease or other disposition of any property of the charity a majority of those trustees or persons who are present at a meeting of their body duly constituted and vote on the question shall have and be deemed to have always had full power to execute and do all such assurances, etc., for carrying any such sale, etc., into effect and all such assurances, etc., shall have the same effect as if they were respectively executed and done by all such trustees or persons, etc." (See 'Halsbury's Laws of England,' Vol. IV, section 416). This no doubt is a statutory provision. But the same rule obtained as regards mutual consultation and opportunity for the statement of each person's views before these statutes. In *Wilkinson* v. *Malin*(1) a schoolmaster was appointed by a majority of the trustees assembled for the purposes. He was dismissed by five out of the trustees without a meeting and there was no opportunity for the remaining trustees to participate in the business dealing with the dismissal. Lord Lyndhurst, C.B., who delivered the judgment of the Court of Exchequer observed as follows: "The next question that arises for consideration arises on the ninth and last issue being whether the master was duly and properly dismissed. Now the dismissal was in this form: there was no public meeting nor any declaration by a majority assembled at a public meeting that the schoolmaster should cease to act in that situation; but five out of the trustees not assembled in that formal manner gave notice that the schoolmaster should within a certain time retire from his office. In the first place, at the time when the notice was given there were ten trustees so that the persons who gave notice did not even constitute a majority of the whole body. In the next even if they did constitute a majority of the whole body, it is the whole body that is to dismiss and not a majority of it. So that if there is a meeting and a majority are for dismissal then the declaration of the majority is not merely the declaration of the majority but of the whole body: which whole body does in fact, dismiss. Therefore in a case of this description, where there was no meeting and where five individuals gave their opinion, or said that the dismissal should take place in a short time or that the party should cease to act as schoolmaster we are of opinion, that that is not a valid dismissal within the meaning of this trust." Without deciding that, in every case of a transaction entered into by

(1) (1832) 2 Tyrwhit, 544.

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the majority of the trustees of a public and charitable trust, there should have been a meeting of all to validate it, we may safely hold that all the trustees should have had an opportunity of stating their opinion. As the plaintiff in the present case was never consulted about the particular renewal, we must hold that it was invalid.

It was urged, that as regards the mortgage, he had nothing to do with the meeting or consultation amongst the trustees but that he was justified in accepting the renewal granted by the majority, as they must be deemed to have had authority to represent the whole body. The argument was rested on the principle of estoppel. *The Attorney-General* v. *Sheraman*(1) and 'Lindley on Companies,' page 218, were relied on. As regards the case cited we have already pointed out that it was not a case of a majority of the trustees having acted without reference to the minority. In holding that the acts of the majority in the circumstances of that case were binding, the Master of the Rolls further pointed out that the lessee had no notice from the dissenting minority that they objected to the lease and that there was no pretence of fraud or concealment on the part of the majority. These observations do not carry the matter as far as the appellant wants. They do not amount to saying that so far as the validity of the transaction as regards the party dealing with the majority of trustees is concerned, it is established by the bare majority of the trustees concurring in it. As regards the rule laid down in 'Lindley on Companies' that there is no necessity on the part of persons dealing with companies to see that *de facto* directors are properly appointed nor to see that the directors exercise the powers they possess in the precise manner prescribed in the regulations of the company, it is to be observed that the principle underlying it is different from what we have to apply to a case where a majority has no power to act for the whole body unless the whole body had consulted about it. If *primâ facie* the majority had power to act and it is a mere informality or a piece of irregularity in their not having consulted about the transaction, the position of the lessee or mortgagee would be different. This is not a case where the minority has permitted the majority to act for them subject to certain conditions assuming it would be competent to trustees to confer such a power upon their fellows. The rule of estoppel by holding out certain persons as clothed with authority has no application where the majority

(1) 48 E.R., 1119.

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has only a limited authority, within the limits of which a stranger dealing with it has to find the power to enter into the transaction.

Another contention of a formal nature was raised. It was said that the sixth defendant had surrendered his right in favour of his son Sankaran and likewise the tenth in favour of his nephew Parameswaran and that they were Urallers of the temple and should have been impleaded. This contention has been negatived by the Courts below. It is unnecessary to discuss it as the eleventh defendant who is the only appellant before us did not raise any such plea in his written statement.

The appellant has then an alternative argument that if the sixth and tenth defendants are the Urallers they have not been consulted by the plaintiff as regards the institution of the suit. It is urged with much force that if a majority of trustees cannot enter into any transaction without consulting the minority the institution of a suit by a single trustee without taking the opinion of the other trustees is bad and that the suit is on this ground liable to be dismissed. There has been considerable conflict of opinion on the question of joinder of co-trustees in this Court. It was held in *Parameswaran* v. *Shangaran*(1), *Puramathan Somayajipad* v. *Sankara Menon*(2), *Savitri Antarjanam* v. *Raman Nambudri*(3) that some of the trustees of a devaswam cannot institute a suit on its behalf making the other trustees defendants without having asked them to join as plaintiffs. An exception was made in cases where the other trustees perversely declined to co-operate and the suit was for the benefit of the institution The last of these cases was doubted in *Mariyil Raman Nair* v. *Narayanan Nambudripad*(4); but it was unnecessary to decide the question of necessity for previous request to join as co-plaintiffs as, in that case, the plaintiff impeached the removal which the co-trustee-defendant granted and it was impossible to get one to impeach his own deed. The question however was referred to a Full Bench in *Karattole Edamana* v. *Unni Kannan*(5). But as that was a suit for redemption by one trustee it was held that section 91 of the Transfer of Property Act enabled any person having an interest in the mortgage property to institute a suit for redemption and that one of several Urallers was a person having such interest and

(1) (1891) I.L.R., 14 Mad., 489.
(2) (1900) I.L.R., 23 Mad., 82.
(3) (1901) I.L.R., 24 Mad., 296.
(4) (1903) I.L.R., 26 Mad., 461.
(5) (1903) I.L.R., 26 Mad., 649.

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could therefore bring a suit for redemption. *Savitri Antarjanam* v. *Raman Nambudri*(1) was practically overruled. But the Court expressed no opinion about the correctness of the decisions in *Parameswaran* v. *Shangaran*(2), *Puramathan Somayajipad* v. *Sankara Menon*(3) which were suits in ejectment. The present case being one for redemption would apparently fall within the scope of the rule in the Full Bench Case. But it is pointed by Mr. Sundara Aiyar that joint trustees have not a several interest in the property of the devaswam or any personal interest in it and that section 91 does not contemplate the interest of one of several co-trustees or entitle him to institute a suit for redemption. It may be as pointed out by him that the question of the majority voting for redemption is different from that of the joinder of all as plaintiffs and that this view was not presented to the Court. It certainly does not appear to have been considered. But we cannot on that account whittle away the authority of that decision. However, apart from the authority of that case which is binding upon us, we are not satisfied that a suit by one uraller in which co-uralers are impleaded as defendants for redemption from mortgagees or for recovery of devaswam property from trespassers is liable to be necessarily dismissed for the reason that the co-urallers were not joined as co-plaintiffs or even consulted before the institution of the suit. It has been held in cases of joint owners or joint contractees that some of them may sue persons who infringe their rights, impleading co-owner's and co-contractees as party defendants and without consulting them before the institution of the suit. See *Peria Karuppan* v. *Valayutham Chetti*(4), *Pyari Mohun Bose* v. *Kedarnath Roy*(5), *Biri Singh* v. *Nawal Singh*(6). Does it make any difference that the joint owners are trustees? There is a distinction that their interest is one and indivisible while in the other cases there is a separable beneficial interest. In cases where no remedial right accrues to the trustees until a majority after mutual consultation have signified their will it cannot be competent to some of the trustees or even the majority to institute an action without such consultation. It may also be that if the decision in such a case of

(1) (1901) I.L.R., 24 Mad., 296.
(2) (1891) I.L.R., 14 Mad., 489.
(3) (1900) I.L.R., 23 Mad., 82.
(4) (1906) I.L.R., 29 Mad., 302.
(5) (1899) I.L.R., 26 Calc., 409.
(6) (1902) I.L.R., 24 All., 226.

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the majority is adverse the minority cannot institute an action as the remedial right has not come into existence. Take the case of a suit for the removal of an employee of a devaswam by some of the trustees making the remainder defendants. Here the employee was liable to be removed by the vote of the majority. If no such majority had concurred in dismissing the employee from office a suit by some of them would be ineffectual and would be liable to be dismissed on the ground that the trustees who desired the removal had not acted. It may also be where the removal of such employee is in the interests of the devaswam essential and the conduct of the majority of the trustees in upholding the misbehaving servant is open to exception the minority is not without its remedy. But where the right to the relief claimed has accrued to the joint trustees, the institution of a suit by some only without having consulted the remaining trustees even where they have not perversely refused to join cannot, it appears to us, be a sufficient ground for dismissing the suit. Although the interests of the co-trustees is joint and indivisible it is fully represented when they are all on the record on the one side or the other. Whatever question of costs may arise misjoinder is not fatal to the suit. In *Kokilasari Dasi* v. *Mohunt Rudranand Goswami*(1) while laying down the rule that all trustees should ordinarily be co-plaintiffs and that they must exercise the powers of their office in their joint capacity the Court pointed out that it was unable to follow the Full Bench ruling in *Pyari Mohun Bose* v. *Kedarnath Roy*(2) in the particular circumstances of the case by transferring the co-trustees to the ranks of the plaintiff as the original plaintiff set up sole right in himself. In *Luke* v. *South Kensington Hotel Company*(3) where there were three trustees of a private trust and the renewed mortgage in favour of two of them was impeached by the third in a suit to foreclose the original mortgage, the Master of the Rolls after disposing of the misjoinder as not made out in the circumstances of the case proceeded to deal with an objection similar to that now raised in the following words :—" Then it is said that some of the mortgagees might not wish to foreclose and others might. We will deal with that case when it arises as to whether one without the consent or

(1) (1906) 5 C.L.J., 527.
(2) (1899) I.L.R., 26 Calc., 409.
(3) (1879) 11 Ch.D., 121.

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against the wish of the others can foreclose. That is not the case here. The other two defendants do not oppose the foreclosure. They were not willing to be plaintiffs but they do not refuse to foreclose. If two out of three trustees decline to foreclose or to agree to any other remedy it might be a reason for removing them from being trustees, but that is not the case here and we have not therefore to consider that case which may be dealt with when it arises." The Master of the Rolls did not think that the unwillingness of the trustee-defendants to foreclose would be ground for a dismissing the plaintiff's suit for foreclosure. Lord Justice JAMES added "In the old Chancery practice there was this difficulty that the misjoinder of plaintiffs was fatal and that if you had any one person among the plaintiffs who had done any thing which might have amounted in equity to a release of his rights the whole suit failed and there was no remedy for it and therefore as a general rule you selected if you could one person as plaintiff whom you knew to be free from any charge or imputation on his conduct and made all the others defendants. There never was any objection to that in practice. Now that is rendered unnecessary by the fact that the Courts may deal with misjoinder of plaintiffs according to the justice and equity of the case." In the present case the right to redeem has long accrued. The plaintiff as one of the joint trustees is right in enforcing the claim of the devaswam to redeem. If defendants Nos. 5 to 10 are unwilling to join in the redemption there may arise a question as to how they are to be dealt with. We see no objection to one trustee suing for redemption without consulting the others or making them co-plaintiffs. But Mr. Sundara Aiyar urged that the decree should have been one for redemption in favour of the plaintiff and defendants Nos. 5 to 10. They were not represented before us. The proper course in such cases as pointed out by the Master of the Rolls in the case already referred to is to order the trust property to be restored to all for the benefit of the *Cestuis que trustent*. But the trustee defendants have not asked for it. The decrees of the Courts below are in plaintiff's favour on behalf of the devaswam. There is no need to vary them. The second appeal is dismissed with costs.

The time for redemption is extended to two months from this date.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Krishnaswami Ayyar.

1910. July 27. August 12.

NADAMUNI NARAYANA IYENGAR (DEFENDANT), APPELLANT,

v.

MINOR VEERABHADRA PILLAI *alias* RANGARATNAM PILLAI REPRESENTED BY HIS MOTHER AND NEXT FRIEND SOWBHAKIATH AMMAL (DEFENDANT), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, s. 244—Suit by party or representative against auction purchaser to raise question within section not maintainable—Auction purchaser as such not representative of decree-holder or of the judgment-debtor.

A suit by a party to a suit as his representative against an auction purchaser raising questions which, as between the parties, must be decided in execution under section 244 of the Code, is not sustainable. The prohibition is not based on the ground that the auction purchaser is the representative of the decree-holder. The auction purchaser is not such representative.

Manickka Odayan v. *Rajagopala Pillai*, [(1907) I.L.R., 30 Mad., 507], not approved.

Per WALLIS, J.—The prohibition is based on the general intention of the Legislature as gathered from the section.

Per KRISHNASWAMI AYYAR, J.—A party to the execution proceedings can impeach a sale only by an application to set it aside; and where the sale not being so impeached, is confirmed, the possession of the auction purchaser cannot be disturbed by suit.

The true ground for the prohibition is not that section 244 bars the suit as the auction purchaser is the representative of the decree-holder, but that section 244 being a bar to setting aside the sale except by a proceeding between the parties, the suit against the purchaser is not maintainable until it is so set aside.

A stranger purchaser at an auction sale in execution of a money decree is not the representative of the decree-holder or of the judgment-debtor.

SECOND APPEAL against the decree of E. L. Thornton, District Judge of Trichinopoly, in Appeal Suit No. 172 of 1908, presented against the decree of K. S. Kothandarama Aiyar, District Munsif of Srirangam, in Original Suit No. 83 of 1904.

The facts are sufficiently stated in the judgment of KRISHNASWAMI AYYAR, J.

T. Narasimha Ayyangar for appellant.

T. Rangachariar and *K. Parthasarathy Ayyangar* for respondent.

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* Second Appeal No. 390 of 1909.

WALLIS AND KRISHNASWAMI AYYAR, JJ.

NADAMUNI NARAYANA IYENGAR v. VEERABHADRA PILLAI.

WALLIS, J.—This is a suit to recover a temple office which is alleged to be hereditary in the plaintiff's family and which was purchased at a Court auction by the defendant in execution of a decree against a previous holder of the office. The plaintiff obtained a decree in the lower Appellate Court on the ground that the office was one of personal service and that the attachment and sale were bad as opposed to section 266 (*t*) of the Code of Civil Procedure. It is now contended that such a suit is barred by the operation of section 244 of the Civil Procedure Code and should have been dismissed. It is well settled that as between the judgment-debtor and the decree-holder this is an objection which can only be taken in execution and it is also well settled that the provisions of section 244 prohibit a suit by a party or his representatives against an auction purchaser to raise a question which as between the judgment-debtor and the decree-holder must have been determined under that section: *Basti Ram* v. *Fattu*(1), *Daulat Singh* v. *Jugul Kishore*(2) and *Mayan Pathuti* v. *Pakuran*(3). These decisions are not based on the ground that the auction purchaser is the representative of the decree-holder within the meaning of the section, but upon the general intention of the legislature as manifested in the section. The view that the auction purchaser may be treated as the representative of the decree-holder in cases arising between him and the judgment-debtor was no doubt taken in *Manickka Odayan* v *Rajagopala Pillai*(4), relying on *Sandhu Taraganar* v. *Hussain Sahib*(5) in preference to the authorities cited for the other view. But as pointed out in *Krishna Satapasti* v. *Sarasvatula Sambasiva Row*(6) *Sandhu Taraganar* v. *Hussain Sahib*(5) does not support so general a proposition, as in that case the decree-holder was the auction purchaser and the parties in question were his representatives by virtue of their purchase from him. The decision in *Manickka Odayan* v. *Rajagopala Pillai*(4) should, I think, have been supported on the ground that the application raised a question between the representatives of the judgment-debtor and the decree-holder himself; and that the auction purchaser had been properly added not as a representative of the decree-holder, but as a party

(1) (1886) I.L.R., 8 All., 146.
(2) (1900) I.L.R., 22 All., 108.
(3) (1899) I.L.R., 22 Mad., 347.
(4) (1907) I.L.R., 30 Mad., 507.
(5) (1905) I.L.R., 28 Mad., 87.
(6) (1908) I.L.R., 31 Mad., 177.

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interested. *Prosunno Kumar Sanyal* v. *Kali Das Sanyal*(1) and *Hira Lal Ghose* v. *Chundra Kanta Ghose*(2). In the present case we must reverse the decree of the lower Appellate Court and restore that of the District Munsif with costs here and in the lower Appellate Court.

KRISHNASWAMI AYYAR, J.—A decree was passed against the plaintiff's father in Original Suit No. 90 of 1894 on the file of the Srirangam Munsif for maintenance making the emoluments of the Mirasi office of accountant in the Srirangam temple liable. The decree was executed against the plaintiff after the death of his father and it must be taken that due notice was issued to the plaintiff of the proceedings in execution. The office of accountant was itself attached and, assuming that the attachment was irregular, no exception having been taken to the attachment, the attached property was sold on the 16th July 1897, and the sale confirmed. The defendant, who purchased the office in execution, obtained possession of it in November 1903. The plaintiff institutes the present suit for the surrender by the defendant of the Mirasi office on the ground that the sale was null and void. The plaintiff having obtained a decree in the District Court, the defendant has preferred this Second Appeal. It seems to me that the suit is not maintainable. The plaintiff was a party to the execution proceedings and the only mode in which he can impeach the sale is by an application to the executing Court to set aside the sale. It is argued for the plaintiff that the sale is a nullity because the decree did not direct the sale of the office and the office was inalienable. There was a personal decree against the plaintiff's father and, even assuming that the office was not charged with the liability, it could be proceeded against in execution of the money decree. Supposing that the office was inalienable, on which I do not express an opinion, it was competent to the executing Court to deal with the question whether the office was saleable. No exception having been taken in execution to the sale, we must take it that the sale was rightly held. The defendant cannot be ousted from possession until the sale is duly set aside. No attempt having been made by the plaintiff to impeach the sale in execution and the sale having been confirmed, it is not competent to the plaintiff to disturb the

(1) (1892) I.L.R., 19 Calc., 683.
(2) (1899) I.L.R., 26 Calc., 539.

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possession of the auction purchaser by suit. See *Mayan Pathuti* v. *Pakuran*(1) and *Kishory Mohun Roy* v *Mahomed Mujaffar Hossein*(2). The auction purchaser derives his rights from the sale which the party to the execution proceeding should not be permitted to impeach except by application to the executing Court. The true principle has been sometimes overlooked and the bar to the suit of the judgment-debtor against the stranger purchaser or *vice versâ* rested on section 244 of the Code of Civil Procedure, the suit being supposed to raise a question between the parties to the suit or their representatives. See *Dhani Ram* v. *Chaturbhuj*(3) and *Daulat Singh* v. *Jugal Kishore*(4). But this latter view appears to me to be erroneous. This mistake arises from a confusion between two ideas, One is that section 244 being a bar to setting aside the sale except in a proceeding between the parties the suit against the purchaser is not maintainable until it is so set aside. The other is that section 244 bars the suit as the purchaser is the representative of the decree-holder. It seems to me the former view is correct Section 335 would be inconsistent with the latter. We cannot treat this suit as an application under section 244 to set aside the sale as the decree-holder who would be affected by it is not a party. It is perhaps unnecessary to discuss the question whether section 244 is a bar to the present suit though I have no hesitation in expressing my concurrence in the decision in *Krishna Satapasti* v. *Sarasvatula Sambasiva Row*(5). It seems to me that the view upheld in *Manickka Odayan* v. *Rajagopala Pillai*(6) that the auction purchaser is the representative of the decree-holder in execution of a money decree is not tenable. *Sandhu Taraganar* v. *Hussain Sahib*(7) which was the case of a purchaser from the decree-holder who purchased in execution of his own decree is different from the case of a stranger purchaser. It is difficult to see how a stranger purchasing in execution of a money decree can ever be treated as the representative of the decree-holder. He purchased the rights of the judgment debtor in the property attached and not those of the decree-holder between whom and himself there is no privity of estate. It may sometimes be that the purchase

(1) (1899) I.L.R., 22 Mad., 347.
(2) (1896) I.L.R., 18 Calc., 188.
(3) (1900) I.L.R., 22 All., 86.
(4) (1900) I.L.R., 22 All., 108.
(5) (1908) I.L.R., 31 Mad., 177.
(6) (1907) I.L.R., 30 Mad., 507.
(7) (1905) I.L.R., 28 Mad., 87.

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carries more than the interest of the judgment-debtor as for example when the judgment-debtor has done something with the property in fraud of the decree-holder. The stranger purchaser cannot be the representative of both the parties. The true rule is that where the decree is a mortgage decree the purchaser in execution will be the representative of the judgment-debtor: where property is attached and sold under a money decree a stranger purchasing the property obtains the right of the judgment-debtor in the property but is not the representative even of the judgment-debtor; still less can he be the representative of the decree-holder. The authorities cited by the learned Judges in *Manickka Odayan* v. *Rajagopala Pillai*(1) are against the view which they have enunciated. See *Bashir-ud-din* v. *Jhori Singh* (2), *Mammod* v. *Locke*(3). *Chinnammal* v. *Athinatha Aiyangar*(4). It appears to me that *Sandhu Taraganar* v. *Hussain Sahib*(5) was relied on under a misapprehension as pointed out in *Krishna Satapasti* v. *Sarasvatula Sambasiva Row*(6). Nor do the other cases, viz., *Kasinatha Ayyar* v. *Uthumansa Rowthan*(7) *Isham Chundar Sirkar* v. *Beni Madhub Sirkar*(8), and *Prosunno Kumar Sanyal* v. *Kali Das Sanyal*(9) support the judgment in *Manickka Odayan* v. *Rajagopala Pillai*(1). Section 244 therefore does not bar the suit.

I would however in the view already expressed set aside the decree of the District Judge and dismiss the suit with costs throughout.

(1) (1907) I.L.R., 30 Mad., 507.
(2) (1897) I.L.R., 19 All., 40.
(3) (1897) I.L.R., 20 Mad., 487.
(4) (1900) 10 M.L.J., 228.
(5) (1905) I.L.R., 28 Mad., 87.
(6) (1908) I.L.R., 31 Mad., 177.
(7) (1902) I.L.R., 25 Mad., 529.
(8) (1897) I.L.R., 24 Calc., 62.
(9) (1892) I.L.R., 19 Calc., 683.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Krishnaswami Ayyar.

1909. Nov. 26. 1910. May 6. September 21.

DEVULAPALLI KAMESWARA SASTRI AND OTHERS (PLAINTIFFS AND LEGAL REPRESENTATIVES OF SECOND PLAINTIFF), APPELLANTS,

v.

POLAVARAPU VEERACHARLU, MINOR BY HIS GUARDIAN KODAMACHI BHIMANNA (THIRD DEFENDANT), RESPONDENT.*

Hindu Law—Joint family, manager of—For what purposes managing member may contract debts binding on coparceners—Family necessity—marriage of son a necessary purpose for which manager may bind joint family.

The marriage of a member of the coparcenary is a family purpose; and where it is reasonably necessary on the part of a prudent manager to borrow money for such purpose, the transaction will bind the coparceners whether they are Sudras or belong to the twice-born classes.

Marriage is one of the necessary samskaras or religious rites, in the case of Sudras, as well as the twice-born classes.

The necessity, which will justify an alienation by the manager is not to be understood in the sense of what is absolutely indispensable but what according to the notions of a Hindu family would be regarded as reasonable and proper.

Govindarazulu Narasimham v. *Devara Bhotla Venkata Narasaysa*, [(1904) I.L.R., 27 Mad., 206], dissented from.

The ceremonies for the performance of which immovable properties can be alienated by the manager do not include only those for the mere performance of which forfeiture of caste is the penalty.

THE Second Appeal against the decree of V. Subrahmania Pantulu, Subordinate Judge of Cocanada, in Appeal Suit No. 146 of 1906, presented against the decree of T. Swami Aiyar, District Munsif of Peddapur, in Original Suit No. 139 of 1906.

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

T. Prakasam for appellants.

S. Narayanamurti for respondent.

ABDUR RAHIM, J.—I entirely agree in the conclusion reached by my brother Krishnaswami Aiyar in the learned and instructive judgment which he is about to read. I have

* Second Appeal No. 1306 of 1907.

nothing to add. The decree of the Subordinate Judge will be set aside as regards the third defendant and that of the District Munsif will be restored. There will be no costs.

KRISHNASWAMI AYYAR, J.—This second appeal has been preferred against the decree of the Subordinate Judge disallowing the plaintiff's claim against the third defendant's share in the mortgaged property. The mortgage was executed by the first defendant, the father, and the second defendant, the adult son, while the third defendant a minor was represented by the father, who also signed the document as his guardian. The money was borrowed for the marriage expenses of the second defendant. The defendants have been dealt with as Sudras in this case, and no question has been raised as regards the correctness of that view. It is contended that the Subordinate Judge is wrong in holding that the marriage expenses of the second defendant are not under the Hindu Law a justifiable necessity for the borrowing of money and the execution of the mortgage. The powers of a Hindu manager of family property have been expounded in the judgment of Lord Justice KNIGHT BRUCE in *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree*(1). At page 423, his Lordship says "the power of the manager for an infant heir to charge an estate not his own, is, under the Hindu Law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate." The need above referred to is afterwards spoken of at page 424 as "a sufficient and reasonably credited necessity." *Bonâ fide* and reasonable enquiry may be sufficient to validate the charge though the actual necessity is not made out. We may at once dismiss from consideration, so far as the present case is concerned, the justification of benefit to the estate. In the case of the father, the discharge of an antecedent debt is in addition a sufficient ground to justify alienation. As regards the widow who has succeeded to her husband's estate her power to charge it so as to bind her reversioners may extend to loans contracted for the performance of religious ceremonies or pilgrimages for the benefit of her husband's soul. As the present is not a case of an antecedent debt, the validity of the mortgage as regards the third defendant's share must be tested with reference to the consideration whether it was a case

(1) (1856) 6 M.I.A., 393.

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of need. In *Suraj Bunsi Koer* v. *Sheo Proshad Singh*(1) it was held that the alienation would be valid if it was made by the managing member of the family "for legitimate family purposes." See page 101. The need or "the reasonably credited necessity" spoken of in Hunooman Persaud's case has been paraphrased into legitimate family purpose. Necessity therefore is not to be understood in the sense of what is absolutely indispensable but what according to the notions of a Hindu family would be regarded as reasonable and proper. Speaking of the cryptic phrase "legal necessity" Golapchandra Sarcar Sastri in his Hindu Law, page 210, observes "the expression *legal necessity* is very often used, to signify the causes for which, or the circumstances under which, a single member of a joint family, or a like person, having a limited interest in property, is authorised to transfer it so as to pass to the transferee a right to the entire property. It comprises maintenance and support of the family, preservation of the family estate, management of the family business, if any, performance of necessary religious rites such as marriage and the like initiatory ceremonies, exequial rites and *Sraddha* ceremony,—and the payment of debts contracted for the above purposes." In the Tagore Lectures for 1884-85 Bhattacharyya says at page 488 "Legal necessity is of various forms. All the indispensable religious ceremonies, the sacraments, such as marriage and the investiture with the sacred thread, the obsequies, the cremation, the periodical oblations to the manes, the ceremonies customary in the family, the subsistence of the family, the education of the younger members, the payment of the ancestral debts, the giving of presents at particular seasons and on special occasions to the relatives,—these and a thousand other causes of expenditure are constantly cropping up in a fairly prosperous Hindu joint family. All these are in the strict sense of the word, lawful necessity." In *Babaji Mahadaji* v. *Krishnaji Devji*(2), where a sum of money was borrowed to buy a stock of buffaloes with which to resume the business of a milkman, it was held that the debt was contracted to put the father in the way of earning a maintenance and therefore under the pressure of family necessity. Mr. Justice West observes at page 669 "Family necessity is an expression that must receive a reasonable construction, and the head of the family and those

(1) (1878) 6 I.A., 88. (2) (1878) I.L.R., 2 Bom., 666.

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dealing with him must, in the interest of the family itself, be supported in transactions which, though in themselves diminishing the estate, yet prevent or tend to prevent still greater losses. A reasonable latitude, too, must be allowed for the exercise of a manager's judgment, especially in the case of a father, though this must not be extended so as to free the person dealing with him from the need of all precaution, where a minor son has an interest in the property." Judged by these principles it is first of all difficult to suppose that the marriage of the second defendant was not a legitimate family purpose. I put it to the respondent's vakil whether he contended that having regard to the age of the second defendant at the time of the marriage it was not a purpose for which the father could legitimately incur expenditure or contract a loan. He disclaimed any intention of resting his case on that ground. Dismissing therefore from consideration any question of propriety based on the ground of age, we are confronted with the broad question whether the father was justified in borrowing money for the marriage of his son while the income of his property was insufficient to meet the expenditure. In *Mahadeva Pandia* v. *Rama Narayana Pandia*(1), which was a case of partition between uncle and nephews, it was held that the nephews were entitled to deduct from the properties to be divided "the cost of the marriages of two of them as a legitimate charge on the family funds." In *Saravana Tevan* v. *Muttayi Ammal*(2) which was a suit to enforce a mortgage by the manager of the family, it was held that the loan incurred to defray the expenses of the marriage of a coparcener was for a family purpose and showed a reasonable necessity to justify the alienation. See pages 382, 383 and 384. In *Garibullah* v. *Khakk Singh*(3), the Privy Council spoke of a loan contracted for the marriage of a junior member as for a family purpose and as a case of necessity and upheld the alienation as binding upon the family. The gift of a small portion of family property by the father or by the widowed mother at the time of a daughter's marriage without the consent of the sons which has been upheld as valid cannot be justified on the ground of necessity in a strict sense, *Ramasami Ayyar* v. *Vengidusami Ayyar*(4) and *Kudutamma* v. *Narasimhacharyulu*(5).

(1) (1903) 13 M.L.J., 75. (2) (1871) 6 M.H.C.R., 371.
(3) (1893) I.L.R., 25 All., 407. (4) (1899) I.L.R., 22 Mad., 113.
(5) (1907) 17 M.L.J., 528.

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(3) (1893) I.L.R., 25 All., 407. (4) (1899) I.L.R., 22 Mad., 113.
(5) (1907) 17 M.L.J., 528.

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These cases seem to be sufficient authority for holding that in case the debt is contracted for a family purpose (and the marriage of a junior member of a coparcenary is a family purpose) and it is reasonably necessary on the part of a prudent manager to borrow the money for such expenditure, the transaction will bind the coparceners. But the Subordinate Judge in the Court below and the learned vakil for the respondent have laid great stress on the decision in *Govindarazulu Narasimham* v. *Devarabhotla Venkatanarasayya*(1), where the learned Chief Justice and Mr. Justice MOORE refused to uphold a sale of family lands by the father to defray the marriage expenses of one of his sons on the ground that there was no moral or religious obligation to get a son married. That case no doubt which purports to follow some observations of Mr. Justice MUTHUSAMI AYYAR in *Ponnappa Pillai* v. *Pappurayyangar*(2), supports the respondent's contention. The parties to that case were Brahmins. It was held that as failure to perform marriage did not entail a forfeiture of caste it was not a necessary ceremony or *Samskara* in the case of a Brahmin and the expenditure incurred for the performance of such a ceremony was in consequence no justification for the incurring of a debt. None of the cases to which I have referred appears to have been cited. There is no reference to them in the judgment. The decision itself has been very ably criticised and dissented from by Mr. Justice CHANDAVARKAR with the concurrence of KNIGHT, J., in *Sundrabai* v. *Shivnarayana*(3). But for the fact that the defendants in the present case are Sudras to whom part of the reasoning in that case has no application, I should have felt inclined to ask the Full Bench to reconsider the decision in *Govindarazulu Narasimham* v. *Devarabhotla Venkatanarasayya*(1). That case proceeds upon the view of Mr. Justice MUTHUSAMI AYYAR that pl. 29 of chapter I, section 1 of the Mitakshara is confined to such ceremonies as if unperformed would entail a forfeiture of caste or status and upon the assumption that marriage in the case of a male amongst Brahmins is not included in the initiatory ceremonies (*Samskara*). Reliance is also placed upon a text of Narada (quoted and interpreted in the Smrithi Chandrika, chapter XIII. pl. 33 and 34). Before examining this decision

(1) (1904) I.L.R., 27 Mad., 206. (2) (1882) I.L.R., 4 Mad., 1.
(3) (1908) I.L.R., 32 Bom., 81.

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further, it is necessary to point out that amongst Sudras marriage is an initiatory ceremony or *Samskara* and perhaps the most important of all the *Samskaras* performed for them. In commenting on the second hemistich of verse 10 of the Acharadhyaya of Yagnavalkya rendered by Mandlik thus "their (of the twice-born) ceremonies from conception to the funeral are performed with *Mantras*," the great commentator Apararka observes "that for the Sudra the *Samskaras* are without *Mantras*." He adds on the authority of the Brahmapurana "But the Sudra shall have the marriage *Samskara* alone. By the use of the word 'alone' either the absence of the *Mantras* or of the previous *Samskaras* is meant. Then there is the alternative for them notwithstanding the injunction." Commenting on the effect of the *Samskaras* dealt with in the first half of verse 13 of Yagnavalkya rendered by Mandlik thus "In this manner, the sin produced from the seed and the womb is destroyed" (Mandlik, page 161), Apararka says this is intended to apply to the four castes, not merely to the twice-born. In the Samskara Mayukha of Nilakanta, the great Bombay authority, the author commenting on the second half of verse 10 of Yagnavalkya already quoted observes "By reason of the statement that to them (the twice-born) the ceremonies (from conception to death) are with *Mantras*, it is to be inferred that to the Sudra they are without *Mantras*. Amongst them as he has no study of the Vedas he has not the ceremonies which are incident to it like the *Upanayana* and the *Vedavratas*." The Samskara Bhaskara which is a work of authority on initiatory ceremonies says in leaf 2 (Bombay Sanskrit Edition, Venkateswara Press) "the sixteen *Samskaras* beginning with *Garbadhanam* are for all. They are accompanied by *Mantras* only for the twice-born." In the Samskara Ratnamala, Volume 39, Anandasrama Series, the author commenting on the same sloka of Yagnavalkya observes "It is to be inferred that to the Sudra the ceremonies from *Garbadhanam* to the last rites are without *Mantras*." He adds "Yama says after stating the *Samskaras* but the Sudra should have the *Samskaras* done thus without *Mantra*. Among them those (*Samkaras*) have no application like *Upanayana* and *Kandavratas* which are incident to Vedic study as he has no Vedic study, &c. . . . ." Banerjee in his Tagore Lectures, First Edition, page 31, speaks of marriage as the only sacrament for women and Sudras. See also West and Buhler,

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page 1064, Note (*b*) citing Colebrook's Digest. The foregoing texts are sufficient authority for the position that marriage is a *Samskara* or initiatory ceremony amongst Sudras and as such it ought to be performed in their case. What I have said so far is sufficient for the disposal of this case. But as the decision in *Govindarazulu Narasimham* v. *Devarbhotla Venkatanarasayya*(1), deals with an issue of great importance as regards the position of the marriage ceremony in the case of the Hindus it is necessary to examine the principles on which the obligatory character of the marriage ceremony rests. There are two paths laid down for the Hindu in the sacred texts (see Mahadeva Sastri's Bhagavat Gita with Sankara's commentary, page 2). One is the path of work or attachment to the things of this world and the other the path of non-attachment or renunciation. The four *asramas* or stages of life are prescribed for the regenerate classes or at all events for the Brahmin. The journey from stage to stage in regular order of succession is contemplated as progress along the path of wordly work. And every Hindu of the twice-born classes has to pass from each stage to the next and until he developes complete non-attachment in the last, the stage of the ascetic, when he prepares himself for final liberation. It is true that it is laid down in the Srutis (see the text of Jabala Upanishad, volume 29, Anandasrama Series, pages 242 and 243) that if he has conquered his passions and cultivated the feeling of non-attachment he may pass direct without going through the intermediate stages to the *Asrama* of the Sanyasin (see Medhadhithis commentaries on verse 36 of Manu, chapter VI, and also the Mitakshara on verses 56 and 57 of the Prayaschittadhyaya of Yagnavalkya, page 309 of the Sanskrit Edition). But except for him who has thus qualified for entry direct into other *Asramas* than that of house-holder the stage of house-holder is practically compulsory. The twice-born Hindu is not to be a student as long as he chooses. He may remain a *Naishtika Brahmachari* devoted to life-long studentship under strict conditions. Slokas 49 and 50 of Yagnavalkya, Acharadyaya, have been translated as follows by Mandlik, "the *Naishtika Brahmacharin* is to live near the *Acharya*: in his absence near his son or his wife, or his fire. In this manner the *Bramacharin* using his body, and subduing his senses, attains

(1) (1904) I.L.R., 27 Mad., 266.

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the world of *Brahma*, and is not born again." I translate the commentary of the Mitakshara on these verses as follows "In this manner, *i.e.*, in the manner stated, *Naishtika*, *i.e.*, one who conducts himself till death, he shall live all his life near his preceptor. He shall not be his own master after the period of receiving instruction in the Veda. In his absence near his son; in the absence of the latter near his wife, in her absence near the fire, disciplining his body in the manner stated, his senses being controlled the *Brahmachari* attains the world of *Brahma*, *i.e.* achieves deathlessness Never is he born here again." Apararka in his commentary on the same verses at pages 71 and 72 of Volume 46 of the Anandasrama Series enters into a more elaborate explanation of the two classes of *Brahmacharis*, Upakurvana and Naishtika, the former being one who passes to the stage of *Grahastha* in the ordinary course of life and the latter being one who stays with his preceptor for life under rigid rules of self-discipline. In chapter II of Manu, verses 243 to 249 deal with the *Naishtika Brahmachari*. It is enough to quote the first of those verses in order to indicate that the life of the *Naishtika* is a life of discipline under the teacher for life to qualify for liberation. Verse 243 (Buhler's 'Translation') says "But if a student desires to pass his whole life in the teacher's house, he must diligently serve him, until he is freed from this body." But to the *Upakurvana* or a student who remunerates his teacher to pass on with his leave to the next stage of life Manu has the following injunction. Chapter III, verse 2, says "A student who has studied in due order the three Vedas, or two, or even one only, without breaking the rules of studentship, *shall* enter the order of house-holders." Verse 4 says "having bathed, with the permission of his teacher, and performed according to the rule the *Samavarthanam* (the rite on returning home), a twice-born man shall marry a wife of equal caste who is endowed with auspicious bodily marks." The house-holder's entry into the next stage of Vanaprastha or the hermit in the forest is thus enjoined. Manu, chapter VI, verse (1), says "A twice-born *Snataka*, who has thus lived according to the law in the order of house-holders, may, taking a firm resolution and keeping his organs in subjection, dwell in the forest, duly (observing the rules given below)." The following slokas relate to the entry into the fourth stage namely that of the ascetic. Chapter

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VI, verses 33, 34, 36 and 37. "But having thus passed the third part of (a man's natural term of) life in the forest, he may live as an ascetic during the fourth part of his existence, after abandoning all attachment to worldly objects. He who after passing from order to order, after offering sacrifices and subduing his senses, becomes tired with (giving) alms and offerings of food, an ascetic, gains bliss after death. Having studied the Vedas in accordance with the rule, having begot sons according to the sacred law, and having offered sacrifices according to his ability, he may direct his mind to (the attainment of) final liberation. A twice-born man who seeks final liberation, without having studied the Vedas, without having begotten sons, and without having offered sacrifices, sinks downwards." The obligatory character of marriage or entry into the order of house-holder is thus propounded by Manu with great emphasis. Verses 51 and 52 of Yagnavalkya, Acharadhyaya and also verses 45, 56 and 57 of the Prayaschittadhyaya (see pages 167, 249 and 250 of Mandlik) enforce the same view. Both the commentators of Manu and the commentators of Yagnavalkya have come to the conclusion after a full discussion of Sruti and Smriti texts that the stage of house-holder is obligatory on all the twice-born. But to those who have pursued the path of non-attachment, *Naishtika Brahmacharya* or perpetual studentship or entry from studentship into the stage of the hermit or ascetic direct is open. Some indeed have maintained that there is no warrant for the *asramas* of hermit and ascetic and that the stage of house-holder is the only one in which a man is at liberty to pass his life. The text of Gautama, Sacred Books of the East, volume II, verse 36 at page 193, supports that view. "But the venerable teacher (prescribes) one order only, because the order of house-holders is explicitly prescribed (in the Vedas)." And, in verse 1 he expresses it as the opinion of "some" that "he (who has studied the Veda) may make his choice (which) among the orders (he is going to enter)." Gautama's view is however rejected by Medhathiti and Vigneswara. But that rejection is not to be understood as a sanction to each man to follow which order he likes or to be in no order at all. Marriage is a *Vyavasthitha Vikalpa* or fixed alternative, *i.e.*, compulsory when certain conditions exist (see Jaiminiya Nyayamala, chapter 12, pada 4, adhikarna 7) and not an *Aichchika Vikalpa* or alternative to be chosen according to pleasure (Jaiminiya Nyayamala, chapter 12, pada 3, adhikarna 4). Except to the man who pursues the path of non-attachment to all others the order of a house-holder is a necessary stage in the journey of life. A person is not justified in being in none of the *Asrams*. Daksha (Manmathanath Dutt's 'Translations,' page 434), says "a twice-born person should not live even for a day without following any order. If he lives without following an order he is required to perform a penetential rite." See the Sanskrit text in volume 48, Anandhasrama Series, page 72. Apararka (Anandasrama Series, volume 46) relies on the same text of Daksha. He further adds on the authority of a text whose author is not named "a man is not fit for Karma, O King, without a wife whether he is a Brahman, Kshathria, Vaisya or Sudra. The wife is the chief factor for men in the attainment of *Dharma*, *Artha* and *Kama*" which are three out of the four ends of life, the last being final liberation. The stage of the house-holder is extolled by Gautama in verse 3 of chapter III, page 190, Sacred Books of the East, volume II. "The house-holder is the source of these (the four orders), because the others do not produce offspring." Manu expresses the same view. He says in sloka 78, chapter III, "because men of the three (other) orders are daily supported by the house-holder with gifts of sacred knowledge and food, therefore (the order of) house-holders is the most excellent order." In chapter VI again he returns to the same theme. Verse 87 runs "The student, the house-holder, the hermit and the ascetic, these (constitute) four separate orders, which all spring' from (the order of) house-holders." Verse 88 "But all (or) even (any of) these orders, assumed successively in accordance with the Institutes (of the sacred law), lead the Brahmana who acts by the preceding (rules) to the highest state." Verse 89 "And in accordance with the precepts of the Veda and of the Smriti, the house-keeper is declared to be superior to all of them; for he supports the other three" (Buhler's 'Translation').

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There is again a text of the Yajurveda which is referred to by the commentators on Manu and Yagnavalkya and which is to the following effect:—That a person is born with three debts—one of which is to the *pithris* and that debt is discharged by the begetting of offspring. Manu refers to the same rule in chapter VI, verses 35 and 94. Verse 94 says "a twice-born man who, with collected mind, follows the tenfold law and has paid his (three) debts, may, after learning the Vedanta according to the prescribed rule,

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become an ascetic." Both Medhathiti and Vigneswara quote the Vedic text in their commentaries on Manu and Yagnavalkya to enforce the view that the stage of house-holder is compulsory to all who have not attained to the level of non-attachment which fits them for perpetual studentship or the stages of hermit and ascetic.

Passing now to the grounds of the decision in *Govindarazulu Narasimham* v. *Devarabhotla Venkatanarasayya*(1), the first that invites our attention is the statement "nowhere is marriage in the case of a male included in the initiatory ceremonies." Having regard to the numerous statements in authoritative works on the *Samskaras* that marriage is an essential *Samskara* it is perfectly plain the learned pleaders who argued the case failed to draw the attention of the learned Judges to such texts. Mr. Mayne says "A Hindu marriage is the performance of a religious duty," Hindu Law, page 108. Banerjee says in his Tagore Lectures, first edition, page 30: "It is regarded as one of the ten *Samskaras* necessary for regeneration of men of the twice-born classes." West and Buhler say (page 873, note (*f*)) "marriage is a *Samskara* that is strongly enjoined." The Samskara Mayukha, the Samskara Bhaskara and the Samskara Ratnamala, all of them authoritative treatises on the *Samskaras* but none of which have yet been translated into English deal exhaustively with the *Samskaras*. Marriage is there shown by them to be among the most important. See the Samskara Mayukha leaf 6, Samskara Dhaskara leaf 2, and the Samskara Ratnamala pages 2—5, Anandasrama series, volume 39. These works show that according to Gautama the *Samskaras* are forty, of which marriage is one. According to Angiras they are twenty-five including marriage. According to Asvalayana and others they are sixteen and marriage is among the number. The Samskara Ratnamala quotes the sages in full and points out at page 6 the fruit of the several *Samskaras*. As regards marriage, "the fruit of the Samskara is stated to be the discharge of the debts to the Gods and the Pitris—." The learned Chief Justice in *Govindarazulu Narasimham* v. *Devarabhotla Venkatanarasayya*(1) refers to the opinion of Colebrooke at page 301 of volume II of Janannadha's Digest and also to the note in Stokes, H.L. Books, at page 398, and observes

(1) (1904) I.L.R., 27 Mad., 206.

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"we cannot find that Mr. Colebrooke had any sufficient authority for including marriage among the ceremonies necessary to perfect the class of a twice-born man." The statement would no doubt be correct if it was intended to mean that in order to become a twice-born person marriage is not a necessary condition. But Mr. Colebrooke does not say and it is not necessary for the purpose of establishing the obligatory character of marriage to say it, that marriage is a necessary condition to make a person twice-born. All that he says is that marriage is among the obligatory *Samskaras*. The eight ceremonies or *Samskaras* he refers to, are also those that are prescribed for girls as made without *Mantras*. See leaf 2, Samskara Bhaskara. He includes marriage as an additional *Samskara* on the authority of Jagannadha himself who speaks of ten *Samskaras* at page 295 of the Digest. There is also another reason for separating marriage from the *Samskaras* that precede it for as pointed out at page 300 of the Digest it is not a *Samskara* which a father does for the sons as he does in the case of the preceding *Samskaras* but one in which the son himself participates as the active agent. Stress has been laid on the text of Narada in chapter XIII. Verse 34 is as follows "Or, no paternal wealth being left, the initiatory ceremonies must be invariably performed for their brothers by those previously initiated contributing the required funds from their own portions." The Smriti Chandrika no doubt in pl. 41 of chapter IV quotes this verse as prescribing the rule in case there is no patrimony and adds the comment in pl. 42 "that the ceremonies contemplated by this text commence in *Jatakarma* and end in *Upanayana*." The marriage of an unmarried brother is certainly not a duty cast on the married brothers when there is no patrimony. And the limitation of verse 34 of Narada's text in the particular case of no patrimony to the ceremonies that end with *Upanayana* does not justify the inference that the author of the Smriti Chandrika regarded marriage as a *Samskara* which was not obligatory. Dr. Jolly's note which is perfectly correct with reference to the comment of the Smriti Chandrika is perhaps appended by mistake to verse 33 instead of verse 34. There is no note under verse 34 and it may be Dr. Jolly's observation is not applicable to the case put in verse 33 of Narada. But, however this may be, there can be no doubt that the Smriti Chandrika is no authority for the

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position that marriage is not an obligatory *Samskara*. There remains one important matter to be noticed. I have not been able to find on what authority Mr. Justice Muthusami Ayyar based his observations in *Ponnappa Pillai* v. *Pappuvayyangar*(1) that the phrase "the like" in pl. 29, Mitakshara, chapter I, section 1, refers only to such ceremonies as if unperformed would entail a forfeiture of caste. The discussion in the Mitakshara from pl. 17 to 29 is with reference to the question whether property arises by birth or by partition. As usual with the author he first propounds the problem, see pl. 17. He states the argument of the opponent strengthening it by apt quotations in pl. 18–22. In pl. 23–26 he states his argument in answer to the opponent's view and in pl. 27 his conclusion, namely, that property is by birth. Some texts apparently inconsistent with this view are explained away as referring to particular exceptions. Pl. 27 after stating the conclusion explains the text showing that the father has greater power than the mere holder of a joint interest as applicable to moveables. Another text which deals with a single member's power over immoveables is explained as confined to exceptional cases. There is no reference in pl. 28 to the single member being the manager. But the text, however, is generally cited as dealing with the powers of a manager. The explanation of that text in pl. 29 (Colebrooke's 'Translation') is as follows: "while the sons and grandsons are minors, and incapable of giving their consent to a gift and the like, or while brothers are so and continue unseparated; even one person, if capable, may conclude a gift, hypothecation, or sale, of immoveable property, if a calamity affecting the whole family require it, or the support of the family render it necessary, or indispensable duties, such as the obsequies of the father or the like, make it unavoidable." The words in the Mitakshara which have been rendered in English by Colebrooke by the clause "or indispensable duties such as the obsequies of the father or the like make it unavoidable" are simply अवश्यं कर्तव्येषु पितृश्राद्धादिषु. They simply mean "father's *shradha*, etc., which have to be necessarily done." It will be noticed that Mr. Colebrooke has by using the words "indispensable" and "unavoidable" added to the stringency of the condition under which an alienation is permissible. The word '*Adi*' which is

(1) (1882) I.L.R., 4 Mad., 1 at p. 17.

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translated "or the like" means "beginning with" and merely indicates that the father's ceremony which is named is one out of a group of ceremonies. There is no implication that forfeiture of caste is a consequence of a failure to perform the obsequies and that a similar consequence flows from a failure to perform other ceremonies which are grouped together with the obsequies of the father. If we dismiss this idea then of forfeiture of caste as the penalty which must characterise the class of ceremonies for which the immoveable property of the family may be alienated by the manager there is nothing in pl. 29 of the Mitakshara which prevents our holding that a debt borrowed for defraying the expenses of the marriage of the son is recoverable from the family property as having been incurred for a family purpose in a case of necessity. The importance of the marriage ceremony in the case of every Hindu subject to the exceptions already noticed is so well recognised by the Mitakshara that in the commentary at page 416 on sloka 289 of Yagnavalkya, Vignaneswara observes "Harita says a person who is in no *Asrama* (after leaving studentship) for a year shall perform *Prajapatya Krichra* and enter the (next) *Asrama*. After the second year the penance of *Athi Krichra*; after the third *Krichrathi Krichra*; beyond that *Chandrayana*. This is in case (the *Asrama*) is not available. But if available ordinarily the purifications prescribed *Upapathakas* should be ordered according as the abstention was intentional or not." It is unnecessary for our present purpose to explain these expiatory rites. The above passage from the Mitakshara is decisive of the obligatory character of the marriage ceremony. This passage is quoted in leaf 199 of the Samskara Bhaskara with approval. I have therefore no hesitation in holding that the marriage of the second defendant for which the loan was contracted by the first defendant and the mortgage executed was a proper family purpose and the third defendant's interest in the mortgaged property is consequently liable for the mortgage debt. I would set aside the decree of the Subordinate Judge as regards the third defendant and restore that of the District Munsif. I make no order as to costs.

APPELLATE CIVIL.

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

1910. February 11.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT), APPELLANT,

v.

M. K. SUBBA ROW OF KURNOOL (PLAINTIFF), RESPONDENT.*

Madras Board of Revenue Standing Orders, Edition 1900, Chapter I, Appendix I, section D, rules 2 and 3—"Full water-rate," meaning of.

The words "full water-rate" in rule 2 of the Standing Orders of the Madras Board of Revenue, Chapter I, Appendix I, Section D (Edition 1900, page 91) mean full water-rate in respect of wet cultivation and not full water-rate in respect of the crop actually raised.

SECOND APPEAL against the decree of M. J. Murphy, District Judge of Kurnool, in Appeal Suit No. 25 of 1906, presented against the decree of T. S. Krishna Ayyar, District Munsif of Kurnool, in Original Suit No. 610 of 1904.

Certain lands in this case were classed as block concession lands or lands newly granted to the ryots on application under the rules of the Board of Revenue.

As set out by the Munsif the case for plaintiff on the question here raised was as follows:—

"In the block A-35 acres 77 cents second crop was raised, but only 9 acres 98 cents was charged for as the crops in the remaining portion failed. Rs. 14-15-0 at Rs. 1-8-0 an acre was charged, but plaintiff's contention is that Rs. 4-15-8 only at Rs. 0-8-0 an acre should have been charged."

Rule 2 of Chapter I, Appendix I, Section D of the Board's Standing Orders, Edition 1900, page 91, is as follows:—

"In order to assist the ryots to meet the expense of converting dry lands into wet, the following reduction will be allowed in the case of lands which have not been cultivated with wet crops within the last ten years—

* Second Appeal No. 741 of 1907.

50 per cent. for the first five years,

25 per cent. for the second five years,

after ten years the lands will be liable to the full water-rate. The ryots' liability to pay water-rate continues only until they have put in a relinquishment giving the prescribed notice of their intention to discontinue the use of the canal water. *Vide* paragraph 2 of Board's Proceedings, No. 338, dated 25th October 1895."

The Munsif held that the second crop was liable to pay water-rate. As regards the contention that the rates given are for one amalgamated assessment for any number of crops raised on the land he held that if the plaintiff's contention was correct Government would have precluded itself from imposing any second crop assessment on these lands at any time whatever and that the words did not clearly support this interpretation. All that Government had laid down was with reference to first crop leaving the general principles of law relating to second crop assessment to take effect as usual.

The Government Pleader for appellant.

H. Balakrishna Rao for respondent.

JUDGMENT.—The rule in question is not easy to construe but we have come to the conclusion that the view taken by the Munsif was right.

It seems to us clear that the words "full water-rate" in rule 2 means full water-rate in respect of wet cultivation and not full water-rate in respect of the crop actually raised, wet or dry as the case may be. We are not prepared to say that the same words in rule 3 should be construed as having a different meaning. It seems to us that "full" means something different from "whole." If it does not, the word is redundant. It was argued on behalf of the respondent that "full" means without the deduction in the case of "lift" which gives the cultivator the benefit of the lower scale. If this is the meaning, the cultivator, after the ten years, would have to go on cultivating without being entitled to any deduction for baling which is altogether unreasonable and contrary to the rules with reference to deduction for baling.

The charge is leviable on the whole block whether it is irrigated or not. If the respondent is right, there would be no provision in a case where a wet crop was raised on part of the

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land, a dry crop on another part, and a part left uncultivated as to the rate payable in respect of the land which had been left uncultivated.

The appeal must be allowed and the decree of the District Munsif restored.

Each party will bear his own costs throughout.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice.

1910. January 31. February 1.

HAZARITH SYED GULAM GHOUSE SHA SAHIB KADIR (PLAINTIFF), PETITIONERS IN ALL THE CASES,

v.

SHUNMUGAM PILLAI (DEFENDANT), RESPONDENT IN CRIMINAL REVISION PETITION No. 739 OF 1907,

AMIR ISMAL KARIM ROWTHEN (DEFENDANT), RESPONDENT IN CRIMINAL REVISION PETITION No. 740 OF 1907,

BEERBAI MADARSA ROWTHEN (DEFENDANT), RESPONDENT IN CRIMINAL REVISION PETITION No. 741 OF 1907,

BEERBAI SULTAN MOIDIN (DEFENDANT), RESPONDENT IN CRIMINAL REVISION PETITION No. 742 OF 1907,

ATHI LAKSHMI ACHI (DEFENDANT), RESPONDENT IN CRIMINAL REVISION PETITION No. 743 OF 1907,

BEERBAI DAVUD MOIDEEN (DEFENDANT), RESPONDENT IN CRIMINAL REVISION PETITION No. 744 OF 1907,

RAHIMAN BIVI AMMAL (DEFENDANT), RESPONDENT IN CRIMINAL REVISION PETITION No. 745 OF 1907.*

Limitation Act XV of 1877, sch. II, art. 110—When arrear becomes due—Limitation runs under art. 110 only from date when rent is ascertained by proceedings under Rent Recovery Act.

In the case of rents recoverable under the provisions of the Rent Recovery Act, such rents become ascertained only when they have been ascertained by means of the procedure provided by the Act.

In a suit brought by the tenants against their landlord for a declaration that the latter was not entitled to vary the terms of previous puttas, judgment in favour of the tenants was given by the High Court in August 1902.

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* Civil Revision Petition Nos. 739 to 745 of 1907.

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Prior to that date the landlord had instituted Summary Suits under the Rent Recovery Act against the tenants to enforce acceptance of puttas by them in respect of the same lands and the decision in those cases was given by the Sub-Collector in May 1904. The landlord tendered puttas as directed in the Summary Suits and brought suits for rent within three years from the date of the summary decisions but more than three years from the date of the High Court judgment:

Held, in the circumstances, that the rent was ascertained and the arrears became due within the meaning of article 110 of schedule II of the Limitation Act on judgment of the High Court, not on the date of the judgment in the Summary Suits.

Arunachellam Chettiar v. *Kader Rowthen*, [(1906) I.L.R., 29 Mad., 556], distinguished.

Rangayya Appa Rao v. *Bobba Sriramulu*, [(1904) I.L.R., 27 Mad., 143], referred to.

PETITIONS under section 25 of Act IX of 1887 praying the High Court to revise the decrees and judgments of K. S. Lakshiminarasa Ayyar, District Munsif of Valangiman, in Small Cause Suits Nos. 620 to 626 of 1907 respectively.

The facts of these cases are sufficiently stated in the judgment.

S. Srinivasa Ayyar for petitioners in all.

K. Ramachandra Ayyar for respondent in the above in C.R.P. No. 739 of 1907.

S. Muthiah Mudaliyar for respondents in C.R.P. Nos. 740 to 745.

JUDGMENT.—These are suits for rent and the Munsif sitting as a Small Cause Judge has decided that the suits are barred by limitation. The question I have to consider is was he right in law in so holding?

The tenants say that the suits are barred because the arrears became due within the meaning of article 110 of the second schedule to the Limitation Act on the date of a judgment which was delivered on a first appeal by this Court, the date of the judgment being the 7th August 1902. The landlord says that the arrears did not become due within the meaning of that article until a later date, viz., the 24th May 1904, that being the date of a judgment by the Sub-Collector in certain proceedings before the Revenue Court under the Rent Recovery Act. The judgment of this High Court to which I have referred is a judgment in a suit in which the tenants sued the landlord for a declaration that the landlord was not entitled to vary the terms of previous puttas—the puttas in that suit relating to the

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same lands as the lands for which rent is now sought to be recovered in the present suits. The judgment by the Revenue Court was a judgment in a suit by the landlord in the Revenue Court which was instituted in 1902 and in which, as I have said, judgment was given by the Sub-Collector on the 24th May 1904.

The Munsif in deciding that the suits were time-barred has relied upon the decision of this Court in *Arunachellam Chettiar* v. *Kader Rowthen*(1) in which the learned Judges distinguished the case before them on the facts from the decision of the Privy Council in *Rangayya Appa Rao* v. *Bobba Sriramulu* (2). If the present case is on all fours with the case decided in *Arunachallam Chettiar* v. *Kader Rowthen*(1) sitting as a single Judge, I should of course follow it. But it seems to me that the present case is not on all fours with *Arunachellam Chettiar* v. *Kader Rowthen*(1). That is a case in which the circumstances are somewhat special and in which it was shown that by custom the rents were payable in kind, not at the end of the fasli which I understand to be the ordinary rule, but at the time of the harvest. And it was there held that the rent was ascertained as soon as the harvest was reaped. The question I have to determine is not whether rent was ascertained at the end of the fasli or at some date before the end of the fasli, but whether the rent was ascertained at the date of the judgment of the High Court in the tenants' declaratory suits, or whether it was ascertained at the date of the judgment of the Sub-Collector in the Revenue Proceedings brought by the landlord. Consequently it seems to me I am not bound by the decision in *Arunachellam Chettiar* v. *Kader Rowthen*(1).

Then I go back to the decision of Privy Council case in *Rangayya Appa Rao* v. *Bobba Sriramulu*(2). It must be borne in mind that in the present cases, the Revenue proceedings were pending at the date of the judgment in the High Court in the suits by the tenants. I am not at all satisfied that the judgment in the declaratory suit by the tenants did determine once and for all the rate of rent which was payable in respect of these lands. The declaration given is in somewhat guarded terms. At the end there is this provision "A general declaration will not, of course, prevent either party from claiming a modification

(1) (1906) I.L.R., 29 Mad., 556. (2) (1904) I.L.R., 27 Mad., 143.

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of the pattah should circumstances arise." But even supposing that this judgment did determine the rate of rent, it does not seem, to me necessarily to follow from that, that in the state of things which existed here, where, at the date of the judgment of the High Court, proceedings properly brought by the landlord were pending in the Revenue Court, the date of the judgment of the High Court must be the date from which the statute of limitation begins to run as against the landlord.

In the case of *Rangayya Appa Rao* v. *Bobba Sriramulu*(1) their Lordships after examining the provisions of the Rent Recovery Act say "Under this procedure it seems clear that as long as proceedings are pending before the Collector and on appeal from him before the Civil Courts, the rate of rent is in suspense, for no one can say what it will prove to be, and that therefore no arrear of rent can be said to have become due within the meaning of the Limitation Act." I think I must apply that proposition to the facts here. Of course it is argued that the rate of rent is not in suspense, because it has been held that it is a certain amount in the High Court proceedings. I say I am not satisfied as to that. My attention has been drawn on behalf of the tenants to another passage. "In their Lordships' opinion this whole series of sections applies to ascertained rents, not to rents at rates which have yet to be determined." That passage in the judgment occurs after the examination of the provisions of the Rent Recovery Act. And I think when their Lordships speak about 'ascertained rents' they mean rents which have been ascertained by means of the procedure provided by the Rent Recovery Act.

Now it is beyond question that the landlord cannot get his rent until he has tendered a pattah which the tenant has accepted or with regard to which the Courts have held that he is bound to accept it. And I think it is anomalous that limitation should begin to run against him at a date anterior to the date when he can enforce his claim for rent.

I think the Munsif was wrong in his view of the law.

In Civil Revision Petitions Nos. 739, 740 and 743 the decrees of the Munsif will be set aside and the cases will go back to be dealt with according to law. Costs will abide the event.

(1) (1904) I.L.R., 27 Mad., 143.

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Civil Revision Petition No. 744 is dismissed with costs.

In Civil Revision Petitions Nos. 741, 742 and 745 there will be a decree for rent with costs throughout.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Abdur Rahim.

1908. December 18, 21, 22. 1909. February 15.

SUBBARAYA ROWTHU MINDA NAINAR (FIFTH COUNTER-PETITIONER, FIRST DEFENDANT), APPELLANT IN APPEAL AGAINST ORDERS NOS. 107 TO 109 OF 1906.

MUTHUKUMARASAWMY MINOR BY KOCHI KALIYANA RANGAPPA KALAKA THOLU UDAYAR (SIXTH COUNTER-PETITIONER, SECOND DEFENDANT), APPELLANT IN APPEAL AGAINST ORDERS NOS. 130 TO 132 OF 1906,

v.

KUPPUSAWMY AIYANGAR AND OTHERS (PETITIONERS AND SIXTH COUNTER-PETITIONER, SECOND DEFENDANT), RESPONDENTS IN ALL.*

Civil Procedure Code, Act XIV of 1882, s. 273—Civil Rules of Practice, Rule 184—Mortgagee of mortgage decree entitled to sell mortgaged property by executing the mortgage decree—Effect of s. 273 on sale of mortgage decree—Pledge of mortgage decree, validity of.

A mortgaged certain properties to *B* who sued on his mortgage and obtained the usual *decree directing payment and sale* in default. *B* mortgaged the decree to *C* who sued *B* in the Court which passed the *decree mortgaged and obtained* a decree directing the sale of the decree obtained by *B* against *A*. *C* became the purchaser of the decree at the *auction and applied for execution* of the decree as the transferee thereof:

Held, that *C's* application was sustainable and neither section 273 of the Civil Procedure Code nor rule 184 of the Civil Rules of Practice *debarred him from* doing so.

Per CHIEF JUSTICE.—The interest mortgaged to *C included the right* which *B* had to sell in default of payment. No order for sale of the decree obtained by *B* was *necessary to enable C to execute* his decree and neither section 273 nor rule 184 applied.

Per ABDUR RAHIM, J.—For the purpose of section 273 of the Civil Procedure Code, a decree on a mortgage *is a money decree* and the section by

* Appeal against Orders Nos. 107 to 109 and 130 to 132 of 1906.

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implication prohibits the sale of such decree when attached. Such prohibition is not however based upon any grounds of public policy so as to render the sale an absolute nullity. *Section 273 merely lays down a rule of procedure and it cannot* be so construed as to interfere further than is necessarily called for by its language with the substantive rights conferred upon the creditor by section 266 of the Code or with the right of alienation recognised by section 232 of the Code.

Section 273 has no application where attachment of the decree is not asked for.

Section 232 of the Code recognises the validity of pledges of decrees and it must be within the competence of a Court, in the exercise of its general power of enforcing contract to order the sale of the decree pledged.

APPEALS against the orders of V. Srinivasa Charlu, Subordinate Judge of Kumbakonam, in Execution Petition Registers Nos. 255, 257 and 256 of 1905, in Execution Petitions Nos. 10, 12 and 10 in Original Suits Nos. 33 of 1893, 35 of 1895, and 43 of 1883, respectively.

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

Ponnusamy Nadar and three others obtained mortgage decrees in Original Suits Nos. 33 of 1893, 43 of 1893 and 35 of 1895 against the first defendant Subbaraya Rowthu Minda Nainar and his son, the second defendant. The abovementioned decrees were hypothecated by Ponnusamy Nadar and three others to Ramanadan Chetty and Kuppusawmy Aiyangar. The latter obtained a decree in Original Suit No. 62 of 1901 on the file of this Court against Ponnusamy Nadar and three others and the decree directed the sale of the interest of Ponnusamy Nadar and three others under the three decrees abovementioned. In pursuance of the said direction, the interest of Ponnusamy Nadar, etc., in the said three decrees was sold and purchased by Ramanadan Chetty and Kuppusawmy Aiyangar. Exhibit A is the sale certificate. Sometime after the issue thereof and on the 21st July 1904 Ramanadan Chetty died and the present application is by his two sons and Kuppusamiengar to execute the decree in Original Suit No. 33 of 1893 against first and second defendants. There are two other connected applications for the other two decrees also.

The lower Court ordered execution of the three decrees to issue according to their terms.

The first defendant appealed.

K. Ramachandra Ayyar for appellant.

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K. Srinivasa Ayyangar for second and third respondents.

THE CHIEF JUSTICE.—I agree with the conclusion at which my learned brother has arrived in his judgment, which I have had the advantage of reading.

It seems to me, however, that the order of the Subordinate Judge may be supported on this short ground. The Nadars mortgaged to the respondents their mortgage interest under the decree which they (the Nadars) had obtained against the appellants. For the purpose of realizing their security the respondents brought a suit on the mortgage to them of the Nadars' mortgage interest in the mortgaged property. This mortgage interest under the decree obtained by the Nadars includes the right to sell the property in default of payment. It seems to me no order for the sale of the decree obtained by the Nadars against the appellants was necessary in order to enable the respondents to execute the decree which they had obtained and I do not think that either section 273 of the Code of Civil Procedure or section 184 of the Civil Rules of Practice applies.

I would dismiss the appeals with costs.

ABDUR RAHIM, J.—This appeal raises the question of the correctness of the order of the Subordinate Judge of Kumbakonam dated the 20th April 1906, allowing, on the application of Kuppusami Aiyangar, Chidambara Chettiar and Vairavan Chettiar whom for brevity's sake I shall call the Chetties, execution of three mortgage decrees made in Original Suits Nos. 33 of 1893, 43 of 1893 and 35 of 1895 against one Subbaraya Rowthu Minda Nainar and his son, the appellants before us. These decrees were obtained by certain persons who may be shortly described as the Nadars and were purchased by the Chetties who now seek to execute them at a Court auction sale held on the 24th April 1904. The sale was held in pursuance of a decree made on the 30th July 1902 in Suit No. 62 of 1901 instituted by the Chetties against the Nadars to enforce a hypothecation bond by which the latter had pledged as security the mortgage decrees which they held against the appellants. The Nadars, it ought to be mentioned, had contested that action on the ground amongst others that mortgage of a mortgage decree was invalid and could not be enforced. But the defence did not prevail and the Nadars preferred an appeal to this Court (Appeal No. 190 of 1902) against the judgment of the lower Court. Pending the appeal however

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the decree of the first Court was executed and the hypothecated mortgage decrees were sold at the instance of the Chetties and bought by them with the leave of the Court. The Nadars objected to the sale under section 311, Civil Procedure Code, but the objection was disallowed by an Order, dated the 21 October 1904 and they preferred an appeal to this Court against that order (Civil Miscellaneous Appeal No. 37 of 1905). When these two appeals of the Nadars (Appeal No. 190 of 1902 and Civil Miscellaneous Appeal No. 37 of 1905) came on for hearing before us they arrived at an amicable settlement with the Chetties and a compromise decree was passed with sanction obtained from the Court as some of the parties were minors. By this decree the sale to the Chetties who abandoned their claim under the unsatisfied portion of their mortgage decree was confirmed. The judgment-debtors of the Nadars who are the appellants in the present appeal were not parties to those appeals nor to the suit and the proceedings which gave rise to them. Now that the Chetties on the strength of their purchase at the Court sale seek to execute against the appellants the mortgage decrees which the Nadars had originally obtained against them, the judgment-debtors try to resist execution on the ground—the only ground pressed upon us—that the sale did not pass any title to the Chetties. Their argument shortly stated is: a mortgage decree is a money decree; a money decree held by a judgment-debtor can be made available for the satisfaction of his debts only in the mode prescribed by section 273, Civil Procedure Code; such a decree cannot be sold in execution as laid down by rule 184 of the Civil Rules of Practice, 1902 and that the sale in question was sale of a money decree in execution of a money decree and must therefore be treated as a nullity and of no effect in law. In estimating the force of this argument it has to be borne in mind that the Nadars whose decrees against the appellants the Chetties have bought do not now question the validity of the sale.

Now whether a mortgage decree which directs the defendant to pay a certain sum of money as well as directs the sale of the mortgaged property as is the character of the decrees bought by the Chetties is to be regarded as a money decree depends on the connection in which the question arises. So far as it gives the first relief there can be no doubt that it is a money decree pure and simple and so far as the other relief is concerned it is directed

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against certain specific property. But the right to the last relief as well is given as a mere means of realising the money to which the plaintiff is found to be entitled. Whenever therefore we find that the legislature in speaking of money decrees in a particular context has in contemplation the ultimate end which it is intended to reach by such decrees it would be right to hold that the description applies to ordinary mortgage decrees (see *Vaidhinadasamy Ayyar* v. *Somasundram Pillai*(1)). The Courts in considering the meaning of the word money decree as used in different contexts or even in the same context have held different views and it is not necessary for the decision of the present case to discuss all these rulings (see the decisions with reference to section 4, Succession Certificate Act, reported in *Nanchand* v. *Yenawa*(2), *Mahomed Yusuf* v. *Abdur Rahim Bepari*(3) and *Fatehchand* v. *Muhammad Bakhsh*(4)). For the purpose however of section 273 on which the learned pleader for the appellant mainly relies in support of his contention, supposing that it applies to the facts of this case, a decree for money which is sought to be attached in execution has been held in a number of cases to include a decree upon a mortgage, and the Courts have further ruled that the effect of section 273 is to prohibit the sale of a decree for money which has been attached in execution (see *Sultan Kuar* v. *Gulzari Lal*(5), *Tiruvengada* v. *Vythilinga*(6), *Jotindro Nath Chowdhry* v. *Dwarka Nath Dey*(7), *Gopal Nanashet* v. *Joharimal* and *Dada Balshet* v. *Joharimal*(8)). Taking the law on this point to be thus settled, I have next to consider what is the scope of the prohibition, does it make the sale held in spite of it a nullity so that it confers on the purchaser no title which he can enforce against the judgment-debtor. That would be the result if the prohibition can be said to be based on grounds of public policy or as striking at the jurisdiction of the executing Court. But it would be otherwise if the provision of section 273 as suggested by Mr. P. R. Sundara Ayyar who appeared for the Chetties is intended only for the protection of the holder of the decree sought to be sold or of the person seeking execution against it. It is easy to conceive that it

(1) (1905) I.L.R., 28 Mad., 473.
(2) (1904) I.L.R., 28 Bom., 630.
(3) (1899) I.L.R., 26 Calc., 839.
(4) (1894) I.L.R., 16 All., 259.
(5) (1879) I.L.R., 2 All., 290.
(6) (1883) I.L.R., 6 Mad., 418.
(7) (1893) I.L.R., 20 Calc., 111.
(8) (1892) I.L.R., 16 Bom., 522.

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might be in the interest of either of them to insist that the decree should be executed and the money realised in execution be utilised in discharging the debt due to the latter. On the other hand, the judgment-debtor under the decree which is proceeded against has in any event to satisfy the judgment outstanding against him and it can make no difference to him who puts it in force so long as he has not to pay twice over and whatever equities he has against his judgment-creditor are safe guarded.

Can it then be said that the prohibition contained in section 273 is founded on reasons of public policy or is such as to oust the jurisdiction of the Court to sell a decree in order to discharge the debts of the decree-holder? I think it is not difficult to gather an answer to these questions from the different provisions of the Code of Civil Procedure bearing on the matter. Section 232 recognises that a money decree can be transferred by a voluntary act of assignment and that it is capable of devolving on others by the operation of law. In the case of an assignment all that the law requires is that it must be made in writing. Section 266, Civil Procedure Code, lays down generally that all saleable property of the judgment-debtor which would apparently include a decree for the payment of a sum of money is liable to attachment and sale in execution. This provision only embodies the general rule of law which entitles a creditor in order to realise his judgment debts to have recourse to whatever property is or may be made available for the benefit of the debtor. But the legislature for reasons apparently of public policy has at the same time exempted certain descriptions of property, and rights, some of which at least are transferable by a voluntary act of the owner from compulsory sale, but a money decree is not on that list. Section 273, on the other hand, does not say in so many words that a decree shall not be sold though such a prohibition is inferred from its provisions as a matter of implication. This section primarily lays down how a decree for money can be attached and section 284 generally lays down that whatever is attached may be sold. But in a case where the decree to be proceeded against was passed by the Court which passed the decree sought to be executed, section 273 says that the attachment shall be made by an order directing the execution of the former decree and that in other cases the attachment shall be an order staying the execution of

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the decree proceeded against unless and until the holder of the decree sought to be executed applies for execution of the attached decree. No doubt this procedure does not contemplate the sale of a decree for money. And if we take it, as has been held, that it also precludes the sale of a decree, such exclusion must be considered as having the effect of an exception engrafted upon the general substantive rights of the creditor as recognised by section 266, Civil Procedure Code. Section 273 is a mere rule of procedure and I do not think we ought to give it or rule 184 which merely embodies the effect of that section a scope which would interfere with the provisions of section 266 any further than is necessarily called for by its language. I think that it would be extending the application of section 273 beyond all reasonable limits if we were to hold that it has the effect of rendering the sale of a decree for money held in execution altogether invalid and without jurisdiction. On the other hand, it seems to be unreasonable that where no objection is raised to such a sale by the holder of the decree or his creditor who in this case has in fact brought about the sale, it should be open to the judgment-debtor under that decree to raise any objection. This view is warranted by the principle of the decisions reported in *Gulzari Lal* v. *Daya Ram*(1), *Balkrishna* v. *Masuma Bibi*(2) and *Naigar Timapa* v. *Bhaskar Parmaya*(3). No doubt in *Tiruvengada* v. *Vythilinga*(4) the facts of which were similar to the present case the objection to the execution which was upheld was raised by the judgment-debtor, but the question whether he was competent to raise such an objection in the absence of any objection on the part of the person whose decree was sold was not argued before the learned Judges nor considered by them.

I have assumed so far that section 273 applies. That section however seems to have no application to a case like this where attachment of the decree was never asked for. The point for decision before the Full Bench in *Mallikarjunadu Setti* v. *Lingamurti Pantulu*, etc.(5) which is relied on by the learned pleader for the appellants in this connection was whether sections 310-A and 311,

(1) (1887) I.L.R., 9 All., 46.
(2) (1883) I.L.R., 5 All., 142 at p. 157.
(3) (1886) I.L.R., 10 Bom., 444.
(4) (1883) I.L.R., 6 Mad., 418.
(5) (1902) I.L.R., 25 Mad., 244.

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Civil Procedure Code, applied to sales held in execution of a mortgage decree and in coming to a conclusion on that question that majority of the learned Judges held that an order under section 89, Transfer of Property Act, was substantially an order in execution of a decree. It may also well be that many of the provisions of the Civil Procedure Code as stated in that case apply to mortgage decrees. But in order to determine whether a particular section of that code is applicable or not in a given case one must have regard to its language as well as to its scope, section 273 of the Civil Procedure Code as well as rule 184 of the Civil Rules of Practice, as I have said, deals with cases where a decree is attached in execution but such a process would be wholly unnecessary in enforcing an ordinary mortgage decree ordering sale of the property. If section 273 applied the result would be that if the holder of a mortgage decree—which in this connection we shall regard as a money decree—pledges it as security for his debts authorising the creditor to obtain an order for its sale in default of payment the Court cannot enforce such a contract or in other words a mortgage decree cannot be pledged as security. We have not been referred to any authority in support of such a proposition and I am not prepared to accord to section 273, Civil Procedure Code, which merely enacts a rule of procedure, a scope which would indirectly affect an important question relating to the right of the decree-holder to deal with his rights under the decree. On the other hand, section 232, Civil Procedure Code, the language of which is quite general seems to me to recognise the validity of a pledge of a decree as security no less than the validity of its sale. And there is nothing in reason why if a decree-holder can sell his decree he cannot make it security for his debts. It then follows that if there is nothing in the law to prevent a decree-holder from pledging his decree as a collateral security it must be within the competence of the Court which is asked to enforce such a contract to order the sale of the property pledged. But it is said that the Transfer of Property Act makes no provision for such a transaction but that statute does not purport to deal exhaustively with the law relating to different forms of securities, for instance, it does not deal with pledges of tangible moveable property, Government promissory-notes, policies of insurance and the like. In cases not specifically dealt with by that Act the Court acts upon its general power of enforcing contracts.

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I think therefore that the petition of the Chetties for execution of a mortgage decree obtained by the Nadars has been rightly allowed by the lower Court and would dismiss these appeals with costs.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Krishnaswami Ayyar.

1909. August 4. 1910. August 5.

KUPPANA KAVUNDAN (PETITIONER), APPELLANT,

v.

KUMARA KAVUNDAN AND OTHERS, RESPONDENTS.*

*Civil Procedure Code, Act V of 1908, s. 47, Order XXI, Rules 95, 98—Application by purchaser at Court sale for delivery of possession against a purchaser of attached property subsequent to attachment maintainable under Order XXI, Rule 98—*Res judicata*—Erroneous decision in one execution proceeding that no appeal lay not* res judicata *in a subsequent proceeding.*

A decree-holder who had purchased properties in execution of his decree and who was obstructed by a purchaser from the judgment-debtor after attachment, applied to the Court under Order XXI Rule 95, and obtained an order for delivery of possession. An appeal by the purchaser against the order was dismissed on the ground that no appeal lay as he claimed in his own right and not on behalf of the judgment-debtor. The auction purchaser being further resisted in attempting to take delivery applied under Order XXI, Rule 98, for delivery and for commitment of the obstructing purchaser.

Held, that the application under Rule 98 was maintainable, as the resisting purchaser was the representative of the judgment-debtor within the meaning of section 47 of the new Civil Procedure Code.

Held, also that the erroneous appellate order in the previous proceeding that no appeal lay did not operate as *res judicata*.

APPEAL against the order of F. H. Hamnett, District Judge of Madura, in Interlocutory Application No. 408 of 1909 (Original Suit No. 33 of 1899) on the file of the Subordinate Judge of Madura (West).

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

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* Appeal against Order No. 248 of 1909.

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S. Srinivasa Ayyangar for appellant.

B. Sitarama Rau for respondent.

JUDGMENT.—The petitioner who was the decree-holder purchased properties in execution of the decree and was obstructed by the respondents. He obtained an order for delivery and an appeal against it was dismissed. Being resisted by the respondents when attempting to take delivery he applies under Order XXI, Rule 98, of the Civil Procedure Code. The District Judge has dismissed the application holding that the said rule has no application. As regards the seventh defendant against whom no decree was passed and who was therefore not the judgment-debtor the order is right. But we are unable to uphold it as regards the first defendant and Kumara Goundan who is alleged to have purchased the property subsequent to the attachment and while the same was pending. The purchaser of the attached property is the representative of the judgment-debtor within the meaning of section 47 of the new Code of Civil Procedure corresponding to section 244 of the old Code. See *Paramananda Das* v. *Mahabeer Dossji* (1) *Latji Mal* v. *Nand Kishore* (2) *Gur Prasad* v. *Ram Lal* (3) and *Mathewson* v. *Gobardhan Tribedi* (4). Under Rule 95 of Order XXI, the Court is authorized to order delivery to a purchaser against a person "claiming under a title created by the judgment-debtor subsequently to the attachment of the property." The first respondent is such a person and any question between him and the decree-holder purchaser would fall under section 47. There is nothing in Rule 98 which militates against this view. That rule has to be read along with Rule 95. No inference can be drawn against the applicability of section 47 from the omission in Rule 98 of a person claiming title by purchase from the judgment-debtor after attachment. In fact Rule 102 which recognizes the transferee from the judgment-debtor as his representative in execution of decrees for possession of immoveable properties shows that a similar view must be taken of the purchaser of attached property. Rules 95 and 102 between them cover the cases of representatives of the judgment-debtor in cases of transfers after attachment under a money decree and

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(1) (1897) I.L.R., 20 Mad., 378. (2) (1897) I.L.R., 19 All., 332.
(3) (1899) I.L.R., 21 All., 20. (4) (1901) I.L.R., 28 Calc., 492.

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transfers of property whose possession is decreed to the plaintiff. The decision in *Jathavedan Nambudiri* v. *Kunchu Achan*(1) has no application as the obstruction there was caused by a person who was not the judgment-debtor nor his representative. Assuming that there is any doubt in the matter on the language of Rule 98 itself we should be quite prepared to hold that under section 146 Judge was bound to deal with the application under Rule 98. The District Judge was therefore wrong in holding that he could not entertain the application. It follows that we must also overrule the objection that no appeal lies.

It is urged for the respondent that the case is concluded by a previous order of the District Judge in Appeal No. 147 of 1909 on the file of his Court which we have already referred to. There the Judge dismissed an appeal of the present first respondent against the Subordinate Judge's order for delivery and the ground of his dismissal was that the appellant was a person claiming in his own right and not on behalf of the first defendant. This was erroneous and we cannot regard that error as concluding the present appeal. A decision in one proceeding that no appeal lay has not the force of *res judicata* so as to preclude an appeal in another proceeding. We set aside the order of the District Judge except as regards the seventh defendant and remand the case for the disposal according to law. Costs hitherto incurred will be provided for by the Court below.

(1) (1907) I.L.R., 30 Mad., 72.

PRIVY COUNCIL.

BOMBAY-BURMAH TRADING CORPORATION, LIMITED (DEFENDANTS),

v.

AGA MAHOMED KHALEEL SHIRAZI (PLAINTIFF).

[On appeal from the High Court of Judicature at Madras.]

P.C.*
1911.
May 26.
June 21.
July 11.

Contract—Suit for damages for breach of contract in not supplying railway sleepers according to contract—Specification of Railway Company as to dimensions and quality of sleepers—Implied warranty where agents had knowledge of purpose for which the sleepers were required—Stipulation that "passing" of sleepers was to be by manufacturer, a party to contract—Requirements in such a case—Insufficiency of means taken to make sleepers conform with the contract—"Passing" of sleepers not reliable.

In this case the respondent was the transferee of contracts entered into by one Iyer (1) with the Madras Railway Company to supply them with 1,500 sleepers, and (2) with the appellants through their agents at Madras to purchase from them 1,500 sleepers to enable him, as he stated to the appellants' agents, to carry out his contract with the Madras Railway Company the basis of which was a specification of the Railway Company's requirements in the matters of dimensions and quality. The contract with the appellants through their agents was contained in letters which passed between the parties, and was never embodied in a formal instrument. In one of the letters written by the agents to Iyer it was stipulated that "the passing of our Moulmein or Rangoon friends the Bombay-Burmah Trading Corporation" (the appellants) "is as usual final as regards both measurement and quality". On the transfer of the contracts to the respondent a formal agreement was drawn up between him and the Madras Railway Company and duly executed by both, and in it the description of the sleepers to be supplied was practically identical with that in the specification of the Railway Company; and the stipulation as to the "passing" of the sleepers was again insisted upon in the correspondence between the appellants' agents and the respondent. In a suit by the respondent for damages in consequence of the rejection by the Railway Company of a quantity of the sleepers as not being in accordance with the contract nor fit for the purpose for which they were required, one of the questions raised was whether Iyer had ever given a copy of the specification of the Railway Company to the appellants' agents and so made it the basis of his contract with the appellants. As to this the first Court found that he did so, and the Appellate Court came to a contrary conclusion.

Held that it was unnecessary to decide the question, first, because their Lordships concurred with the opinion of the Court of Appeal that "the evidence

* *Present:*—Lord Macnaghten, Lord Atkinson, Lord Robson and Mr. Ameer Ali.

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showed that the specification merely contained an enumeration of the qualities of a good sleeper usually insisted on by railway authorities": secondly, because the appellants having through their agents been fully informed of the purpose for which Iyer purchased the sleepers from them must be taken to have impliedly warranted that they were reasonably fit for that purpose: and thirdly because their Lordships thought that a sleeper the qualities of which were inferior to those "of a good sleeper as usually insisted on by railway authorities" could not well be considered a sleeper of the dimensions specified reasonably fit for use by the Madras Railway Company: and the point was therefore irrelevant.

Another question was whether the main defence of the appellants that they had not contracted to supply the sleepers in accordance with the specification of the Railway Company but according to the stipulation as to the "passing" of the sleepers in the contract between themselves and Iyer which was confirmed by them on the transfer of the contract to the respondent, was maintainable. On this point the Courts below also differed, the first Court deciding in favour of the appellants, and the Court of appeal in favour of the respondent.

Held that on the true construction of the stipulation as to "passing" it must have been contemplated that there was some standard with which these sleepers should be compared, which at the lowest must have been the standard set up expressly or impliedly by the contract between the parties, which was the specification or at least the requirement that the sleepers were reasonably fit, as sleepers of the dimensions described, for use by the Madras Railway Company so that the right conferred upon the appellants by the stipulation amounted merely to the right to determine by and through the skilled and experienced persons whom they should necessarily employ for the purpose, acting honestly and impartially according to the best of their judgment whether the goods supplied were in conformity with the requirements of the contract under which they were so supplied. The real defence therefore rested upon the alleged fact that the sleepers were "passed" by the two expert persons employed for the purpose in the impartial exercise of their judgment. They may have acted honestly, as the first Court thought they did; but the evidence showed that they never approached the question they had to determine, namely, the conformity of the sleepers supplied with the contract under which they were supplied. They merely determined that the sleepers were fit to be sent out as the manufacture of their employers; and there was not therefore any "passing" of the sleepers within the meaning of the contract.

APPEAL from a judgment and decree (21st December 1908) of the High Court at Madras on its appellate side, which reversed a decree (28th August 1906) of the same Court in the exercise of its original civil jurisdiction.

The suit out of which this appeal arose was brought by the respondent as plaintiff against the appellants as defendants. The plaintiff in his plaint alleged that the defendants had entered into a contract with one Chinnappa Iyer for the supply of 1,500 teak

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sleepers according to the Madras Railway Company's specification on certain terms, and that subsequently by agreement between the plaintiff and defendants and Chinnappa Iyer the contract was transferred to the plaintiff who was accepted by the defendants as the purchaser of the sleepers. It was further alleged in the plaint that two consignments of 748 and 600 sleepers respectively delivered by the defendants under the contract were not in accordance with the specification of the Madras Railway Company, nor fit for the purpose for which they were required; that the Railway Company had rejected 593 sleepers of the first consignment and 513 sleepers of the second consignment and that the plaintiff had called on the defendants to take back the rejected sleepers and cancel the balance of the contract, and that he was entitled to be repaid the purchase price of the rejected sleepers and to damages for breach of the contract by the defendants.

The defendants by their written statement admitted that they had entered into a contract with Chinnappa Iyer for the supply of sleepers, but denied that they had contracted to supply the sleepers in accordance with the specification of the Madras Railway Company or as alleged by the plaintiff. The defendants admitted that they had agreed to the transfer of Chinnappa's contract to the plaintiff but said that by that contract and their agreement with the plaintiff it was expressly stipulated that the passing of the sleepers by the defendants at Moulmein or Rangoon was to be final both as regards measurement and quality. They also alleged that the sleepers had in fact been passed in terms of the contract and that there had been no breach of contract by them. They also stated that the plaintiff had so dealt with the goods that he was not entitled to reject the sleepers or any of them; that he had omitted to give notice within a reasonable time after discovering all the facts which could evidence a breach of warranty, if there was one, and was not entitled to claim damages. The defendants also said that when they agreed to cancel the balance of the contract they did so because they were induced and led by the conduct of the plaintiff to believe that no claim was or would be made in respect of the delivered sleepers; and they submitted that the cancellation was a settlement of all disputes, and that the plaintiff was precluded thereby as well as estopped by his conduct from bringing the suit.

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The suit was heard in the Original Court by Sir CHARLES ARNOLD WHITE, C.J., who held that the defendants did not contract to supply sleepers for the purpose of enabling the plaintiff to carry out his contract with the Railway Company in accordance with the particular specification, but that there must be attributed to the defendants the knowledge that the sleepers were intended to be used for railway purposes, and that before they could be so used the railway authorities would satisfy themselves that their quality came up to the usual standard insisted upon by railway companies in regard to sleepers. He was of opinion that it was a term of the defendants' contract with Chinnappa Iyer, and afterwards with the plaintiff that the "passing" by the defendants was to be final, that the sleepers had been so passed, and that the plaintiff could not go behind the passing, and therefore he dismissed the suit. In view of there being an appeal however the learned Chief Justice proceeded to deal with the facts, and found that there had been a breach of the implied warranty that the sleepers should be fit for the purpose, namely, for use as railway sleepers, and assessed the damages for breach of such warranty.

The material portions of his judgment were as follows:—

"The defendants, whilst denying that they are under any liability in respect of the alleged breach of warranty, rely upon the stipulation contained in the contracts made on their behalf by Messrs. Arbuthnot with Mr Chinnapa Iyer in the first instance, and afterwards with the plaintiff, that the 'passing' by the defendants is to be final. Messrs. Arbuthnot's letter of April 25th (B) to Mr. Chinnappa Iyer, contains the stipulation 'subject to the usual terms, *i.e.*, their (viz., the defendants') passing is final.' In their letter of May 23rd (F) to Mr Chinnappa Iyer Messrs. Arbuthnot say 'the passing of . . . . the Bombay-Burmah Trading Corporation, Limited, is as usual final as regards both measurement and quality which please take note.' This stipulation was clearly a term of the contract between Mr. Chinnappa Iyer and the defendants. It was equally clearly a term of the contract between the plaintiff and the defendant. The defendants' letter of June 23rd (N) and the plaintiff's letter of June 27th (O) leave no doubt as to this.

"With regard to this part of the case the first question for consideration is, was there in fact a 'passing' of the sleepers by the defendants within the meaning of the word as used in the contract? If there was, the second question is, is the plaintiff entitled to go behind the 'passing'? Mr. Napier contended that there was no

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'passing,' in fact, since the Railway's specification was the basis of the contract and the officers who passed the sleepers on behalf of the defendants did not inspect and pass with reference to the terms of the specification. I have already said that in my judgment the particular specification (exhibit A) was not the basis of the contract, but that there must be attributed to the defendants the knowledge that the railway authorities would not accept sleepers which did not come up to the usual railway standard One cannot attribute knowledge of this fact to the defendants for one purpose and at the same time assume for another purpose that they were ignorant of the fact. I think it must be taken that the 'passing' was with reference to railway requirements. The sleepers were 'passed' by Mr. Pyne and Mr. MacGeorge who were respectively the Superintendents of the defendants' mill at Moulmein and the Manager of the Moulmein branch of the defendants' business. These two witnesses described the process of selection and inspection and final 'passing'. Mr. Pyne stated that he had at one time been engaged continuously cutting sleepers for six years. Mr. MacGeorge did not profess to have any special knowledge in the matter of sleepers. In connection with the inspection and the passing both witnesses admitted that they only regarded themselves as acting on behalf and in the interests of the defendants. They did not profess to have acted in any sense as arbitrators or referees. In answer to me Mr. MacGeorge said 'We only did what we considered necessary in the interests of our firm. We did not think we were acting on behalf of the buyers. We should have acted in precisely the same way if the contract had contained no such special provision.' And in answer to me, Mr. Pyne said 'I inspected from the point of view of passing the goods in the ordinary course of business as fit to be sent out.' With regard to the quality Mr. MacGeorge said 'I thought the sleepers sent off were good merchantable sleepers for ordinary use as railway sleepers.' Mr. Pyne said 'I passed them as good serviceable sleepers.' It is not suggested that there was any want of good faith on the part of these two witnesses. The plaintiff's case as regards this matter is not put higher than that these witnesses had no special knowledge of the requirements of Railway Companies with regard to sleepers, and that the 'passing' was of a somewhat perfunctory character. On the evidence I am satisfied that these two witnesses exercised an honest judgment, when they passed the sleepers, and in my opinion the fact that they only purported to act on behalf of the defendants, does not make the passing any the less a 'passing' within the meaning of the contract. I hold that there was a passing in fact within the meaning of the contract. The next question is can the plaintiff go behind the

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passing for the purpose of showing that the sleepers were not fit for the purpose for which they were ordered. In my opinion he cannot. I do not think the case falls within the *principle* of the authorities—of which *The Secretary of State for India* v. *Arathoon*(1) is an illustration—cases where the party who contracts to supply the goods agrees that the approval of the purchaser or of a third party shall be a condition precedent to his right to recover under the contract. No question of the fulfilment or non-fulfilment of a condition precedent arises in this case No doubt the purchaser leaves it absolutely to the vendor to say whether the goods the vendor supplies are in accordance with the contract. Contracts in which it is left to the buyer to say whether the goods supplied are or are not in accordance with the contract are common enough, but I confess I have never come across a contract in which it was provided that the decision by the seller should be final; and counsel have not been able to call my attention to any case in which a contract of this kind has come before the Courts. But if a party chooses to tie himself hand and foot in this manner the Courts cannot untie him. Why should they? Mr. Napier on behalf of the plaintiff had to concede that, assuming the goods were passed within the meaning of the contract, I could not give effect to his contention without reading the contract as if the provision as to passing found no place therein. I cannot make a new contract for the parties in this way. There is no suggestion of over-reaching or the taking of an unfair advantage, by the defendants. Mr. Chinnappa Iyer and the plaintiff are both competent and experienced men of business. In fact the plaintiff from the way he gave his evidence, struck me as a particularly shrewd and capable person. It was not seriously contended on behalf of the plaintiff that the contract was one to which section 28 of the Contract Act applied. The contract cannot be said to have been in any way against public policy. It is no doubt a well established rule of law that a person cannot be a judge in his own cause, but I see no reason why the parties to a contract should not contract themselves out of this rule if they so choose. It must be presumed that the plaintiff thought it worth his while to agree to this unusual condition, and it may very well be that, as a matter of business, it was worth his while. Neither he nor Mr. Chinnappa Iyer had had any business experience in the matter of sleepers, and it may be that the plaintiff was content to abide by the defendants' 'passing' in consideration of a lower price being fixed for the goods in question than would otherwise have been the case. At any rate a Court of law would find itself in all sorts of difficulties if, with a view to

(1) (1879) I.L.R., 5 Mad., 173.

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cancelling a stipulation of this character it attempted to investigate the motives which prompted a party to accept the stipulation as part and parcel of the contract."

After referring to the observations of COOKBURN, C.J., in *Standard* v. *Lee*(1), the judgment continued

"I am of opinion that the 'passing' by the defendants of the goods in question in this case is binding on the plaintiff and he cannot go behind it. This being my view, I must of course dismiss the suit, but as the case may go further, it seems desirable that I should deal with the plaintiff's case for damages for the alleged breach of warranty.

"As regards this part of the case, I am of opinion that the goods were ordered for a specified purpose for which goods of the denomination mentioned in the order are usually sold within the meaning of the Contract Act, and that, consequently there was an implied warranty by the seller that the goods supplied were fit for that purpose. The word 'sleepers' itself indicates the purpose for which the timber was to be used, quite as clearly as the word 'coatings' in the case of *Drummond* v. *Van Ingen & Co.*(2), per Lord Herschell."

On the question of whether the evidence established that there had been a breach of the implied warranty, the learned Chief Justice came to the conclusion on a consideration of the evidence that "the plaintiff had proved a breach of the implied warranty as regards the rejected sleepers"; and that there was a breach of warranty as regarded 850 sleepers. An appeal by the plaintiff came before an Appellate Bench of the High Court (SANKARAN-NAIR and ABDUR RAHIM, JJ.) which came to the conclusion, differing from the Original Court, that the specification contained in the circular of the Madras Railway Company was the basis of the contract between the plaintiff and the defendants; and that the 'passing' of the sleepers by the defendants' agents had not been a 'passing' with reference to the specified standard of quality, and that therefore the defendants were not protected by the 'passing' that had taken place. As to the latter point they said:

"We have next to consider how the stipulation as to the passing of the sleepers by the defendant corporation affects their liability. We think that what was intended by the parties was that if the defendants through competent persons *bonâ fide* exercised their judgment and skill in manufacturing the sleepers wanted by the plaintiff

(1) (1863) 32 L.J.Q.B., 75 (77, 78). (2) (1887) 12 A.C., 284 (293).

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having in regard the purpose for which sleepers are ordinarily required and the standard of quality mentioned in the specification, which as we have said is the ordinary standard of a good sleeper, they would not be liable if, in the opinion of the Railway Company or of the Court, if the matter went so far, the sleepers supplied were not in fact in accordance with the specification. But if the articles turned out by the defendants are in fact neither suitable for such purpose nor of the requisite quality, and the defendants wish to bring themselves within the exemption, they must satisfy the Court, that in manufacturing and selecting the sleepers for the purpose of the contract they had in regard not merely the use to which they were intended to be put but also the specified standard of quality. If the defendants manufactured them in accordance with what they thought might serve the purpose designated by the word 'sleeper' but made no attempt whatever to conform to the stipulated quality they cannot be held to have exonerated themselves. It is not shown—indeed the facts of the case negative the idea—that the defendants in manufacturing the sleepers had ever in view the standard set out in exhibit A, and they therefore cannot be said to have passed them within the meaning of the contract. In fact neither Mr. Pyne who was employed to cut the sleepers and to pass them, nor Mr. George who helped him generally in the work, was furnished with a copy of the specification. Even if Arbuthnot & Co. failed to supply the defendants with such a specification, which however has not been proved, it would, of course, avail the defendants nothing. It is however said that Mr. Pyne did in fact pass the sleepers as 'good serviceable sleepers,' but 'good serviceable' sleepers are not the same thing as 'good sleepers.' The defendants never purported to supply good sleepers at all. We must therefore hold that the defendants are not protected by the clause as to passing.

"The plaintiff has contended that he is entitled to succeed also on another ground, that even if the parties did not contract on the basis of the specification, Arbuthnot & Co. knew that the sleepers were required in order to carry out the plaintiff's contract with the Railway Company, under which he was under an obligation to supply sleepers of the specified standard, and as this knowledge must be imputed to the defendants, the latter are to be taken to have warranted that the sleepers supplied by them should be such as were required by the plaintiff's contract with the Railway Company. There can be no doubt upon the evidence that Arbuthnot & Co. fully knew that the sleepers were required for the purpose of the plaintiff's contract with the Railway Company. In fact having regard to their own letters it is impossible to escape the conclusion that Arbuthnot & Co. not only

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had such knowledge but that they exercised a voice in the decision of the Railway Company as to whose tender they should accept, so that the business might ultimately come into the hands of the defendants. Their object apparently was that the defendants should have the supplying of the sleepers without undergoing the risk of any rejections by the Railway Company, which risk they wanted should be taken by an intermediary. But we have been referred to no authority in support of the proposition which the plaintiff's contention involves, that because the agent of a manufacturer knew that the goods for the supply of which he has obtained an order for his principal was required to fulfil a contract which the buyer had entered into with a third person, therefore the manufacturer must be held to have warranted that the goods supplied by him should be such as to enable the buyer to fulfil his contract with the third person. We think we should not be justified in extending the doctrine of implied warranty so far unless we found a clear authority for it.

"As we, however, hold that the defendants expressly warranted that the sleepers supplied by them should be of the quality described in the specification and there has been a breach of such warranty, and the defendants failed to protect themselves by acting in terms of the stipulation as to passing, they must be liable for whatever damages the plaintiff has suffered."

In the result the Appellate Court held that the plaintiff had proved, as to 850 sleepers, that they were not in accordance with the contract, and assessed the damages at Rs. 11,913-4-6.

On this appeal by the defendants.

Martelli, K.C., and *D. C. Leck* for the appellants contended that the appellants did not contract with Chinnappa Iyer that the sleepers to be supplied by them should be in accordance with the specification of the Madras Railway Company, nor did they, when they agreed to the transfer of Chinnappa Iyer's contract to the respondent, agree or make any contract that the sleepers should be in accordance with such specification. On the contrary, it was one of the terms of the appellants' contract with Chinnappa Iyer, and also of their agreement with the respondent when assenting to the transfer of the contract to him, that the passing of the sleepers by the appellants at Moulmein or Rangoon should be final as regards both measurement and quality, and the sleepers had been duly passed under the terms of the contract, and such passing was final and binding on the respondent. It was, therefore, submitted that the judgment of the Original Court was correct, and should be restored.

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DeGruyther, K.C., and *Kenworthy Brown* for the respondent contended that the sleepers delivered by the appellants had been rightly rejected because they were not in accordance with the specification contained in the Madras Railway Company's circular which formed the basis of the contract between the appellants and the respondent; that both Courts in India had concurred in holding on the evidence, and apart from the said specification, that the sleepers rejected were not of such a quality as to be suitable for railway sleepers; and that the alleged 'passing' of the sleepers by the agents of the appellants at Moulmein was not binding on the respondent, the defence set up that the representatives of the appellants at the ports of shipment were to be the sole judges as to whether the sleepers satisfied the terms of the contract as regards both measurement and quality, and that this decision was final, not having been established in the evidence. Reference was made to *Brown* v. *Edgington*(1), *Drummond* v. *Van Ingen & Co.*(2) and *Jones* v. *Just*(3).

Martelli, K.C., replied.

1911, *July 11th.*—The judgment of their Lordships was delivered by

Lord ATKINSON.—This is an appeal from a judgment and decree of the High Court of Judicature at Madras, dated the 21st December 1908, made in the exercise of its appellate jurisdiction, whereby the judgment and decree of the Chief Justice of the same Court made in the exercise of its ordinary jurisdiction were reversed, and judgment entered for the respondent the plaintiff in the suit, for the sum of Rs. 11,913-4-6 damages for the breach of contract for the sale and delivery to the plaintiff of 1,500 teakwood railway sleepers.

The facts of the case are not complicated, and as far as it is necessary to set them out are as follows:—

A person named M. Chinnappa Aiyar, of 209, Thambu Chetty Street, Madras, in the month of May 1905, entered into a contract with the Madras Railway Company for the sale to them of 1,500 teakwood sleepers of the dimensions 12' by 12" by 7", deliverable in two instalments of 750 each.

The Company had advertised for tenders for 3,000 teak sleepers on a specification which set forth that the sleepers should

(1) (1841) 10 L.J.C.P., 66. (2) (1887) 12 A.C., 284 (295).
(3) (1868) 3 Q.B., 197.

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be of the dimensions above mentioned, and should be of the following description:—

"Each teak sleeper to be delivered at the Terminal Buildings Yard at Royapuram must be straight, sound, and well seasoned, sawn uniformly square and to correct dimensions throughout its length, and be free from holes, shakes, cracks, sap, and other imperfections. The sleepers so delivered at Royapuram will be inspected by an Engineer deputed by the Chief Engineer, whose decision as to those to be accepted or rejected will be final. The sleepers which may be condemned as not complying with this specification will not be paid for, and they must be removed from our yard at your own cost within seven days of your receiving notice to do so."

The price to be paid was apparently Rs. 210 per ton.

The appellants are large timber merchants, part of whose business it is to manufacture and supply teak sleepers. Their duly accredited agents at Madras are Messrs. Arbuthnot & Co., one of the members of which firm is Mr. F. S. Arbuthnot. Aiyar, before tendering to the Railway Company for this contract, entered into negotiations with F. S. Arbuthnot in reference to the terms upon which they would supply him with sleepers to enable him to carry out any contract which he might make with the Railway Company for the supply of any portion of the sleepers required. This cannot be disputed. It is practically admitted; and, from the following letter, signed by F. S. Arbuthnot and addressed to the appellants' manager at Rangoon, coupled with the evidence which he gave at the trial hereafter referred to, it would rather look as if he regarded the appellants as the real contractors, and Aiyar and a firm of King & Co. merely as intermediaries. The letter is exhibit D, and runs as follows:—

"Madras,
"22nd May 1905.

"Dear Sir,

* * * *

"*Sleepers.*—With reference to your telegram of 20th April for 3,000 sleepers 12 ft. by 12 in. by 7 in. at Rs. 170 landed Madras, we have just heard unofficially that we have secured the business—1,500 through King and 1,500 through another dealer. This sale will be advised definitely next week when we receive written confirmation from the buyers."

Ultimately Aiyar entered into a contract with the appellants through Arbuthnot & Co. for the sale to him of 1,500 sleepers 12'

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by 12″ by 7″ at the rate of Rs. 170 per ton (Rs. 40 per ton less than the price to be paid by the Railway Company), landed at Madras, to be shipped from Moulmein or Rangoon at appellants' option. The contract is contained in the letters which passed between the parties. It never was embodied in a formal instrument. Much controversy arose as to whether Aiyar had, during his negotiations with Arbuthnot & Co., ever given to F. S. Arbuthnot, who appears to have been the member of the firm in charge of this transaction, a copy of the specification of the Company on which he had tendered, thus making it the basis of his contract with them. The Chief Justice, the Trial Judge, was of opinion that the respondent had failed to establish that Aiyar had done this. The Court of Appeal thought the contrary. A copy of the specification in the form of a letter (marked exhibit A), signed by the Chief Engineer of the Company, and addressed to Messrs. Arbuthnot & Co., was, on search, subsequently found amongst the papers of Mr. F. S. Arbuthnot. This gentleman stated on his examination (page 118, Record) that he knew nothing about this letter till after the suit was instituted. He admits it bears his signature, as well as those of Mr. Young and M. Arbuthnot (members of the firm), and also of a Mr. Peebles. All letters, he states, came to him in the ordinary course of business, and this letter after having been initialled was sent down to be placed among the records of the office. He adds: "My firm did not tender. King & Co. did not tender. They procured the 1,500 through my firm. I knew they (the sleepers) were required for the Madras Railway. I think it is probable I was told they were for the purpose of the contract for 3,000 with the Madras Railway. I expect I added 1,500 and 1,500 together." Lower down on the same page, he states that their firm considered they had the control of the Madras Railway contract, that they had power to select the person who was to have the order, that Chinnappa Aiyar unlike King & Co. (who would not take sleepers from Moulmein) had not been doing business with them regularly and that they had only selected him because they had been asked by one Dubash of the Import Department to give him a chance. Their Lordships think it unnecessary to decide this point as to the alleged delivery of the copy specification to F. S. Arbuthnot by Aiyar for these reasons:—First, because they concur in the opinion expressed by the Court of Appeal at page 156, line 29, of the

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Record that "the evidence shows that exhibit A (the copy specification) merely contains an enumeration of the qualities of a good sleeper usually insisted on by railway authorities," and secondly, because the appellants, having through their agents been fully informed of the purpose for which Aiyar purchased these sleepers from them, must be taken to have impliedly warranted that they were reasonably fit for that purpose, and thirdly, because they think that a sleeper whose qualities are inferior to those "of a good sleeper, as usually insisted upon by railway authorities," cannot well be considered to be a sleeper of the dimensions specified reasonably fit for use by the Madras Railway Company. The point therefore becomes, in their Lordships' view, irrelevant. One of the letters forming the written contract with Aiyar, namely, that dated the 23rd May 1905, written by Arbuthnot and addressed to Aiyar contains the following paragraph:—

"The passing of our Moulmein or Rangoon friends, the Bombay-Burma Trading Corporation, Limited, is as usual final as regards both measurement and quality, which please take note."

In their Lordships' view the defence of the appellants to the claim made against them will ultimately be found to rest upon this paragraph, the rights it confers, and the manner in which those rights have been exercised. The first question is as to its true construction. What does it mean? It cannot mean that the appellants were entitled to deliver under the contract any kind of sleeper they chose. It must have contemplated that there was some standard with which these sleepers should be compared. That standard must at the lowest have been the standard set up expressly or impliedly, by the contract between the parties; that was the specification, or at the least the requirement that the sleepers were reasonably fit, as sleepers of the dimensions described for use by the Madras Railway Company. So that the right conferred upon the appellants amounted merely to the right to determine by and through the skilled and experienced persons whom they should necessarily employ for the purpose, acting honestly and impartially according to the best of their judgment whether the goods supplied were in conformity with the requirements of the contract under which they were so supplied.

So much as to the contract entered into between the appellants and Chinnappa Aiyar. Some short time after that event, and before any sleepers had been delivered, Aiyar, finding himself

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unable to pay the deposit stipulated for in his contract, with the consent of the appellants, and of the Railway Company, transferred to the respondent the benefit of his contracts with both Companies and procured the latter to be accepted in both in his stead.

A formal agreement was drawn up between the respondent and the Railway Company, and was duly executed by both. It is dated the 19th of June 1905, and the description of the sleepers to be supplied contained in it differs from that contained in exhibit A in this, that the words "from teakwood" are inserted in the agreement after the word "sawn." In other respects the descriptions were identical.

There was much controversy on the point as to whether, whatever the precise contract between the appellant and Aiyar may have been; new terms were not, on the occasion of this transfer, added to it, and the stipulation made then, if not before, that the sleepers supplied should conform to the specification of the Railway Company.

The question turns upon the two letters following, dated respectively the 16th and 21st June 1905, and three paragraphs from a letter of Arbuthnot & Co., dated the 23rd of the same month, coupled with the evidence of F. S. Arbuthnot on the point at page 119, line 12 of the Record. The letters are as follows:—

"Madras, 16th June 1905.

"Mr. Aga Mahomed Khaleel Shirazi,
"36-37, Ungappa Naick Street,
"Madras.

"Dear Sir,

"We are in receipt of your letter of to-day's date enclosing original letter from M. Chinnappa Aiyar from which we note that he has transferred to you his contract with Madras Railway for 1,500 sleepers 12′ × 12″ × 7″, for which he has contracted with us at Rs. 170 per ton, landed Madras. To this we agree, on condition that you send us by return your cheque for the deposit due, Rs. 8,925 all other terms and conditions as mentioned in our various letters to M. Chinnappa Aiyar. You ask us to allow interest on the deposit, but this is only granted to our two very large contractors, and on account of the troubles which M. Chinnappa Aiyar has given us over this contract we are not disposed to make an exception in his favour. As, however, the contract is now transferred to you, as a special case we agree to allow you interest on the deposit at the rate of 5 per cent. per annum,

but on the condition only that each shipment of sleepers arriving for you is paid for in full immediately on arrival.

"Yours faithfully,
"Per pro. Arbuthnot & Co.,
"(Signed) F. S. ARBUTHNOT,
"Agents, B.B.T.C. (Ltd.),
"36-37, Ungappa Naick Street,
"Madras, 21st June 1905.

"To
"Messrs. Arbuthnot & Co.,
"Agents, B.B.T.C., Limited,
"Madras.

"Dear Sirs,

"In your letter of the 16th instant you said that the terms and conditions are as mentioned in your letters with Mr. M. Chinnappa Aiyar. On my enquiry he said that the conditions are this (*i.e.*) the teak sleepers of 750, 12′ × 12″ × 7″ should be delivered in the month of October and the remainder of 750 in March next. The same should be taken delivery within a month, if it exceeds a month, an interest of 9 per cent. should be charged. The teak sleepers must be delivered as per railway specification which was sent to you by Mr. M. Chinnappa Aiyar, an interest of 5 per cent. must be allowed on deposit money. On these conditions I herein enclose you a cheque on Chartered Bank of India, Australia and China, for Rs 8,925 (eight thousand nine hundred and twenty-five). An early reply with the receipt is solicited.

"I am, Sirs,
"Yours faithfully,
"(Signed) MAHOMED KHALEEL SHIRAZI.
"Madras, 23rd June 1905.

"Mr. Aga Mahomed Khaleel Shirazi,
"36-37, Ungappa Naick Street,
"Madras.

"Dear Sir,

"We are in receipt of your letter of 21st instant enclosing a cheque on the Chartered Bank of India, Australia and China, for Rs. 8,925 which has been placed to the credit of your account as a deposit against the order of M. Chinnapa Aiyar (now transferred to you) for 1,500 sleepers 12′ × 12″ × 7″ at Rs. 170 per ton landed Madras.

"As regards the terms of delivery M. Chinnappa Aiyar is under a misapprehension. We have never undertaken to deliver 750 sleepers in September and 750 in March next, nor could we under any

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circumstance bind ourselves to deliver the sleepers precisely in the months specified by you. We have however informed our friends of the delivery which would suit you best.

"As regards other terms, the passing of our friends the Bombay-Burma Trading Corporation, Limited, either at Rangoon or Moulmein (whichever port shipment may be made from) is as usual final as regards both measurement and quality. No exception is ever made to this rule."

Mr. Arbuthnot's evidence is in substance to the effect that he considered the third paragraph of this letter of the 23rd of June a contradiction of the statement contained in the letter to which it was a reply as to the obligation to deliver sleepers according to the railway specification, but not as a contradiction of Aiyar's allegation that the specification had been sent to him. The evidence of this gentleman on this point cannot be regarded as satisfactory; but having regard to the view which their Lordships have taken as to the true nature of the implied warranty to be imported into the written contract, the point so much discussed is, they think, as already stated, irrelevant. There is not and cannot be any pretence for the suggestion that the sleepers supplied were in fact either in conformity with the specification, or were reasonably fit to be used as sleepers of the specified dimensions by the Madras Railway Company

Of the 748 sleepers delivered by the appellants on the 8th of September no less than 593 were rejected by that Company, and of the 600 delivered on the 9th of December 1905 no less than 513 were rejected, and as to the balance of the 1,500 the contract was rescinded by mutual consent.

The real defence, therefore, of the appellants is rested upon the alleged fact that the sleepers delivered were passed by the two expert persons they employed for the purpose in the impartial and honest exercise of their judgment.

On examining the evidence of these witnesses, James McGeorge and William Pyne, however, it clearly appears that they did not correctly appreciate the position in which they had been placed, or the true nature of the task they were appointed to perform. They were in truth constituted judges or arbitrators to decide upon a matter in which the interests of the two contracting parties were in conflict. They were the employés of one of these parties. That would render their task all the more delicate and difficult, and would make it all the more incumbent upon them to

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take care to avoid even the appearance of injustice to the respondent. Well, in the first place Mr. McGeorge had scarcely had skill and experience sufficient for the work he was put to do. And in addition neither he nor his colleague was ever supplied with the materials necessary to enable him to do it. He never saw the specification "A." He said he did not think he ever saw a "Railway contract for sleepers." Pyne, the other witness, who was both skilled and experienced, was left in the same state of ignorance as to the contract. He never saw the specification, nor does he appear to have ever been informed what were the terms of the respondent's contract with the appellants. At the bottom of page 130 he says, "Masters informed me as to dimensions and time for delivery. We had logs in stock. I had simply to go round and make suitable logs." At foot of page 131 he is reported as having said "I applied the same process of examining them as I did to them in ordinary course of business." And in reply to questions put to him by the Chief Justice he further deposed, "When I approached inspection I did so from point of view of passing goods in the ordinary routine of business as fit to be sent out." The Chief Justice finds that these men acted honestly according to the best of their skill and judgment. That may be so, but that is not the point. The point is that they never approached the question they had to determine, namely, the conformity of the goods supplied with the contract under which they were supplied. They never applied their minds to this. They merely determined that the sleepers were fit to be sent out as the manufacture of their employers. There was not, therefore, any 'passing' of the sleepers within the meaning of the contract, and the contention of the appellants on this appeal that there was such a 'passing' in their Lordships' view entirely fails.

They accordingly think that the decision appealed from was right and that this appeal should be dismissed, and they will humbly advise His Majesty accordingly.

The appellants must pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellants: *Budd, Johnson and Jecks.*

Solicitor for the respondent: *Douglas Grant.*

J.V.W.

APPELLATE CIVIL.

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

1909. August 4, 5, 6, 18.

SRI SETHURAMASWAMIAR AND OTHERS (DEFENDANTS Nos. 1, 3 AND 4), APPELLANTS,

v.

SRI MERUSWAMIAR AND OTHERS (PLAINTIFFS AND DEFENDANTS Nos. 2, 5, 6 AND 9), RESPONDENTS.*

Hindu Law—Property granted to owner of office when partible—Conduct of parties in determining nature of property—Acquisition of property by holder of office—Charities, devolution of right to manage—Grant, construction of.

When property is granted to the holder of an office, but the grant does not state that it was given for the maintenance of the office or to the grantee as such holder, the grant will be deemed to be a personal grant and will be ordinary partible property.

The conduct of a person who deals with property as if it belonged to himself and his undivided co-parceners will be strong and cogent evidence that the property belongs to the co-parcenery. The recognition by Government and public officers of such property as ordinary partible property will be strong evidence of its partibility. It is competent to holders of offices to acquire properties for the benefit of themselves and their descendants and there is no presumption that such acquisitions are for the benefit of the office, where it is not shown that such properties were treated as attached to the office.

The right of management of family properties devoted to charities ordinarily descends to the heirs of the donor except in the few cases where the office is descendible to a single heir. According to well established usage and custom, the enjoyment of the office of manager is divided between the different members or branches of the divided family.

Ramanathan Chetty v. *Muruyappa Chetty*, [(1904) I.L.R., 27 Mad. at p. 192], referred to.

APPEAL against the decree and judgment of V. Subramaniyam Pantulu, Subordinate Judge of Tanjore, in Original Suit No. 61 of 1904.

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

The Hon'ble Mr. *V. Krishnaswami Ayyar* and *N. Rajagopalachariar* for appellants.

The Advocate-General (Hon'ble Mr. *P. S. Sivaswami Ayyar*) *and S. Varadachariar* for first respondent.

T. R. Krishnaswami Ayyar for second respondent.

* Appeal No. 52 of 1907.

JUDGMENT.—Plaintiff sues for partition and delivery to him of one-third of the properties annexed to the plaint which are claimed to be the properties of the joint family consisting of himself and of the first and second defendants. He also prays for the settlement of a scheme for the management of the charitable and religious endowments mentioned in Part III of the second schedule.

The defence of the first defendant is that the properties are impartible. His contention is that he and his ancestors were the hereditary gurus of the family of the Maharajas of Tanjore and that these properties appertain to the office of guru as such. He further contends that his ancestor who was brought to Tanjore as his guru by the then Maharaja was also the head of a mutt and that these properties appertain to that mutt.

The Subordinate Judge has found that the parties formed an ordinary Hindu family and has decreed partition. This is an appeal against that decision.

Most of the properties specified in Parts I and II of schedule II were given by the then Maharajah of Tanjore to one Sri Sethubavaswami stated to be a disciple of the Meruswamy Mutt in Mannárgudi. He had an only son Sri Ramasethuswami who left an adopted son Sri Sethuramaswamy who died in 1854. His adopted son, Sriramasethuswami, died in April 1886 leaving three sons, the plaintiff and the first and second defendants and two daughters. From the date of the gift there was no occasion for partition. That gift seems to have been made by the Maharaja to Sethubhavasami, as the latter was accepted by the Raja as his guru. Till the extinction of the Raj, the ancestors of the first defendant continued to be the gurus and after the resumption of the Raj, by the British Government, the first defendant's father and after him the first defendant, continued to be recognized as the gurus of the Royal Family. It is the case of the first defendant, appellant, that the gift was made to his ancestor on account of his being the Raja's guru and those properties together with the rest which form an accretion to that estate are attached to that office of Raja Guru, cannot be separated therefrom and are therefore impartible.

Sethubhavasami, it is said, also established a mutt, and it is contended these properties appertain to that mutt. Mutts are usually associations of Sanyasis, or celibates, devoted to divine worship, who give upadesam or instruction to deserving candidates. There

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are also matams of which the members are allowed to marry. The house in which they live is also called mutt. The office of the Raja guru and the headship of the mutt are attained at the same time.

The first defendant's predecessors were all married men when they became Raja gurus. His father is not alleged to have become a sanyasi. His grandfather and great grandfather became sanyasis in their last moments. The disciples do not live with the first defendant. There is no doubt the residence of the first defendant is generally called a mutt. It is however also called 'Aramani' by some and 'house' by others.

In support of his contention that there is an office of guru of the Tanjore Maharaja's family the appellant relies upon the ceremonies which were performed at the time when, on the death of one guru, the eldest son succeeded to the office. Evidence has been given in this case of the ceremonies that were performed at the time of the first defendant's installation. It appears that a few days before his father's death in the presence of the heads of certain other mutts, the first defendant was taught Rama Mantram by his father and a few days after his death he was installed as the head of the mutt. Various persons were invited to attend the said ceremony. The first defendant was made to wear a dress made of kashaya cloth which the head of the mutt should wear. He was made to sit on what is called an 'adhistanapalaki' which consists of two wooden planks—one to sit on and the other to lean against. The head of Muruswami Mutt, who is said to be the guru hereditarily of the first defendant's mutt placed the first defendant on that seat. Then his disciples made obeisance to him and he gave upadesam to one or two of the disciples. The representative of the Maharaja's family then placed him on what is called the 'Gadi' which is a raised seat with a mattress on it. He had the Dhandam (stick) given him. After that he started on a procession from his house, went to the Hanuman temple and as far as the Raja's palace and after receiving alms from the palace he came back.

It is said that no other person is entitled to sit on the gadi and the right to sit on the gadi is supposed to have been conferred upon the first defendant and his predecessors as they were the gurus of the royal family of Tanjore.

It is also alleged and proved that a flag is raised on the new year's day on the mutt and that the anniversaries of all the predecessors of the first defendant are also performed. The

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sandals used by the predecessors of the first defendant are worshipped on the respective anniversary days.

The first defendant and his predecessors, in addition to their ordinary names, have also got spiritual names, the first defendant being called Chitgnana Brahmam, his father was called Sachit Sakhananda Brahmam, his grandfather Ananda Brahmam, and his grandfather's father Vimala Brahmam, and his father, the first guru, Taraka Brahman.

The first defendant's predecessors except his father who were gurus had also samadhis. These facts are no doubt clearly proved and they show, undoubtedly, that the family is one of great importance in that locality. They have been called Raja gurus no doubt from their having been the gurus of the Maharajas of Tanjore. It is also clear from the evidence that the first defendant and his predecessors were also called Madhathipathies.

The question for our consideration is, however, whether there are properties attached to this office or belong to the mutt as such and for that reason whether they are impartible.

In order to decide this question we have to consider the documentary evidence adduced. Exhibit C series are apparently the sanads by which the Maharajas of Tanjore granted the properties in part II of the second schedule as well as the properties shown in part III of the said schedule, which are admittedly devoted to charitable purposes, to the predecessor in title of the first defendant. The earliest of them exhibit C3 is of 1739, and the latest of them is about 1760. Exhibit C3 purports to be a grant made by the Maharaja of Tanjore to Rajasri Setu Goswami Baba. It is not stated to have been given to him for the maintenance of the office, nor was it given to him as the head of the mutt. In fact he is not referred to in these documents as the Rajah's guru or even as the head of the mutt. His spiritual name also is not given. The sanad itself is in the form of an order issued to his officials by the Maharaja reciting that these grants have been made to Sri Sethu Babaswami with the exception of exhibit C3 where he is styled Goswami. There is also a direction in the sanad which is translated thus: "Let it be conducted from sons to grandsons in succession. Let not the objection of a renewed document itself be taken every year."

The appellants' pleader relies upon these words to show that this 'sanad' cannot be treated as evidence of an absolute personal

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gift since the obligation is laid upon the revenue officials to see that the injunctions of the Maharaja are carried out and it could therefore only refer to the performance of the duties by Sethu Babaswami of his office or as the head of the mutt. We are unable to accept this construction in the absence of anything in the body of the document itself to show that it appertained to the office, or the mutt. It may probably be intended to show that any further sanad was unnecessary every year or in case of succession on the grantee's death.

In the case of the properties which were granted for charitable and religious performance the purpose is recited in the sanad itself (exhibit C2) and there is a specific direction "let the charity be conducted perpetually." On a comparison of these two recitals it appears to us to be clear that these were only directions to the officials by the Maharaja to see that in the case of the charities they were properly performed and in the case of the other properties the descendants of the grantee enjoyed them. After these 'sanads' by the Tanjore Rajah, the only other sanad that we have is exhibit II which purports to be a grant of a village by the then Governor of the Madras Presidency in exchange for some salt pan which the Government seems to have taken up for public purposes. This was in 1806. In that, the grantee is described as the domestic priest to the Maharaja of Tanjore.

Of course the property newly granted possesses the same incidents as the one resumed. In the absence of any recital in exhibit II itself to show that these properties were either attached to the office or they were granted to the Madhathipathi, we must assume that they were held on the same tenure as the properties of the grantee under the C series were held.

The Tanjore Raj was resumed by the British Government about 1855. The grandfather of the first defendant died in the year 1854; and in 1856 his widow presented a petition to the Board of Revenue in which, after referring to her husband's death and his adoption, before his death, of the first defendant's father, she stated that his installation ceremony including procession was not performed either by her husband or the Maharaja "to qualify him for my husband's adhinam and the "Maharaja's priesthood," and she stated that until the abhishekam is performed he is ineligible for the priesthood. And she also stated that in collusion with the subordinate revenue officials, the first defendant's

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father without her own consent and without the permission of the Rajah of Tanjore had performed the abhishekam and the procession and taken possession of the properties. She alleged that till then the property was in her possession. But the Board of Revenue referred her to the officiating Resident. There are statements made by the widow about her husband's atheenam and the necessity of an installation which support the first defendant. But her claim to hold the properties is against him. The properties, however, seem to have been placed under attachment, a report called for, and the matter in dispute appears to have been finally disposed of by an order which is exhibit Z in the case. That order was mainly based upon a report by the then Commissioner of Tanjore. The Commissioner referred to the death of the Swami in 1854. He also said that the adoption was perfectly legal and conferred on the adoptee the first defendant's father all the rights of the deceased Swami. With reference to the properties which were called 'Swami inams' he was of opinion that the inams would necessarily fall into the hands of the adopted son. He further pointed out that it was the practice of the Tanjore Rajahs themselves to appoint as managers of the estates persons for whom the Rajahs entertained feelings of regard; and that in the case of this family the agent of the Rajah's estates had, for some time after 1826, been also looking after the affairs of the inams but that the inam proceeds never reached the servants of Rajah as such and that "the revenue derived from the inams as well as the inams themselves were in nowise interfered with by the Rajah and the Swami was quite free to hoard or dissipate their produce as to him seemed best." "No accounts were rendered to the Rajah himself or to any one about his durbar or person."

If the Rajah was interested in those properties, it is scarcely likely that the Rajah's officials would have refrained from any such interference, more especially when we take into consideration the fact that the native Rajahs in ancient days actively interfered in the management of religious institutions.

Then, in finally passing orders, the Government observed that the lands could in no way be treated as service lands or endowments attached to the priestly office conferred for the performance of duty but that they were simple personal grants unconditionally bestowed from favour and affection, and the properties were

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accordingly made over to the first defendant's father. Those assigned for the maintenance of chattrams and charities were charged with the support of the institutions for which they were granted. This is undoubtedly strong evidence against the first defendant's contention.

In the subsequent enquiry by the Inam Commissioner, that officer seems to have acted on the same view. Exhibits L series are extracts from Inam Registers and exhibits D series are the inam title-deeds. The title-deeds of the lands which were granted for charitable purposes, those in part II of the plaint schedule, were granted to the first defendant's father, as the manager for the time being and his successors so long as the charity and the religious institutions are properly maintained. The lands which were treated by the Government as personal inams were confirmed to the grantee and his heirs as personal inams. If these lands were attached to the office, it was probably open to the Government to have them resumed. If they were properties belonging to the mutt, they would certainly have been so treated. The conduct of the first defendant's father after obtaining possession of the properties also is only consistent with the same view as was adopted by the Government and the Inam Commissioner. In 1867 he sold certain properties for a sum of Rs. 5,000. In 1875 he made a gift of certain properties to his foster daughter and in 1877 he sold certain other items of property for Rs. 14,000. In 1878 he mortgaged certain other properties for a large sum of Rs. 60,000. In all these, the properties were treated by him as his own: and a security bond (exhibit A3) executed by him contemplates the possibility of a suit for partition. But there is no suggestion anywhere of the properties appertaining to either the office or to the mutt.

When he appointed an agent in 1878 he specified certain properties as chatram properties and the other properties he treated as his own. The first defendant's father died in the year 1886, when he (the first defendant) was a minor. The Court of Wards seems to have taken possession of the property, and managed it till 1889. They managed the property not only on behalf of the first defendant but on behalf of the first defendant and his brothers (see exhibits T, T1, and O2): and they never attempted to dispute the validity of any of the alienations made by the first defendant's father on the ground that he had only a life interest in

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the property, and that they appertained to the office of Guru or that they belonged to the mutt.

The first defendant seems to have succeeded to the management in 1890. He also recognised his father's alienations and undertook (see exhibit A9) to discharge the balance of what remained due of the debt of Rs. 60,000 under exhibit A4. On that occasion (exhibit A9) he treated the property as family property, neither the office nor the mutt being referred to. Suits were brought not against the first defendant solely but against the first defendant and his brothers with reference to these properties by third parties and in the written statement filed by the first defendant and his brothers and in the Razi that followed (see exhibits O and O3) the properties were treated as joint family properties and then a decree for specific performance was passed against the first defendant and also against his brothers—not against him alone (see exhibit O4). Similarly he filed suits with his brothers as co-plaintiffs. On one occasion he seems to have protested on the ground that he alone is entitled to sue and that it was unnecessary to make other parties to the suit as he was in exclusive possession of the estate on that occasion. The Sub-Collector pointed out that he originally sued as the managing member of an undivided family and refused his prayer. After the estate was delivered to the first defendant by the Court of Wards in 1890, pattas were granted by him in the capacity of the manager of an undivided family (exhibit E).

Mortgages were taken in the name not only of the first defendant but also of his brothers and the discharge was also signed by them all. All this evidence can lead only to one conclusion and no document has been referred to before the date of this plaint in which the first defendant ever asserted his exclusive title as against the other members of the family.

Assuming that the defendant's predecessors were holders of an office or heads of a mutt, they were also competent to acquire property for the benefit of themselves and descendants, including the female members of the family, and there is no presumption that properties acquired by them were acquired for the office or mutt and not for their own use and benefit. Other members of the family also may have acquired properties. The properties referred to in exhibit L14 included in this suit are alleged to have been acquired by a lady who is a member of this family.

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It would require strong evidence to show that these properties also were devoted to the office or mutt.

There is nothing in the account books to show that these were treated as trust property.

For these reasons the appellant's contention must be disallowed.

It was further contended that the management of the family properties devoted to charitable or religious uses descended according to the rule of primogeniture and that the plaintiff as a junior member is not entitled on partition to any share therein. We are unable to accept this contention It is now well settled that the right of management ordinarily descends to the natural heirs of the donee (Mayne 439) and there is nothing to take the present case out of the rule. The authorities are collected by BHASHYAM AYYANGAR, J., in *Ramanathan Chetty* v. *Murugappa Chetty*(1). The way in which the right of management is enjoyed is stated by the learned Judge as follows:—

"Except in the few cases in which the hereditary office may be descendible only to a single heir, the usage and custom generally is that along with other properties the office" (of manager) "is divided also in the sense that it is agreed to be held and the duties thereof discharged in rotation by each member or branch of the family, the duration of their turns being proportionate to their shares in the family property. Even in cases in which recourse is had to a suit for the partition of the family property the Courts give effect to the usage and custom referred to by providing for the management of religious and charitable institutions by different members or branches of the family in rotation on the above principles." There can be no doubt that these statements are correct. The case of *Nub Kissen Mitter* v. *Hurrischunder Mitter*(2) appears to show that the usage and custom were well established as far back as the year 1818, and it is now too late to question them. It will be observed that the enjoyment is stated to be divided between the different members or branches of the divided family, and this is in accordance with the recent decision of this Court in *Thandavaroya Pillai* v. *Shunmugam Pillai*(3) that the managing member of an

(1) (1904) I.L.R., 27 Mad., 192. (2) 2 Morley's 'Digest,' 295.
(3) (1909) I.L.R., 32 Mad., 167.

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undivided family has the right to manage the family charities and that the other members of the family have no right to participate in the management so long as they continue undivided.

We therefore dismiss the appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Miller.

1910. February 28.

ANSUR SUBBA NAYUDU AND ANOTHER (DEFENDANTS Nos. 1 AND 2), APPELLANTS,

v.

BATHULA BEE BEE SAHIBA, MINOR, BY NEXT FRIEND (PLAINTIFFS Nos. 2 AND 6), MOHAMED ABDUL SATHAR SAHIBA AND OTHERS, RESPONDENTS.*

Cause of action—Right of vendor to sue purchaser for default in paying creditors as agreed in the sale.

A vendor has a cause of action against the purchaser, when the latter commits default in paying the creditors of the vendor, as directed in the sale deed. It is not necessary to maintain such a suit that the vendor should show that he has sustained damage at the date of suit.

Dorasinga Thevar v. *Arunacheliam Chetty*, [(1900) I.L.R., 23 Mad., 441], followed.

Dorasamy Thevar v. *Lakshmana Chetty*, [(1904) M.L.J., 285], not approved.

APPEAL against the decree of A. Venkatramana Poi, District Judge of Nellore, in Original Suit No. 30 of 1903.

The facts are stated in the judgment of the lower Court, the material portions of which are as follows:—

Suit for specific performance of contract of sale of the plaint mentioned property entered into between the deceased first plaintiff, whose representatives are plaintiffs Nos. 2 to 6 and defendants Nos. 1 and 2, or in the alternative for cancellation of the sale and restoration of the properties covered by the deed of sale.

It is alleged that the vendees agreed to pay off the creditors of the first plaintiff named in the plaint, which however they have not done and hence the suit.

* Appeal No. 119 of 1906.

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ANSUR SUBBA NAYUDU v. BATHULA BEE BEE SAHIBA.

Defendants Nos. 1 and 2 contend *inter alia* that the first plaintiff had no cause of action to institute this suit for specific performance of contract or for cancellation of the sale in the alternative and plead payment of certain sums under the deed of sale for which they claim credit. Defendants Nos. 3 and 4 who are subsequent mortgagees from defendants Nos. 1 and 2 put in no defence.

Plaintiffs and the contesting defendants Nos. 1 and 2 agree (see their vakil's deposition taken to-day) that the latter have discharged the encumbrances of Rs. 13,000 and odd before and about one lakh of rupees after suit. Plaintiff accordingly states that he does not ask any of the reliefs claimed to be decreed, but that costs are due. The suit was brought on the last day of three years from the date of the plaint sale deed. It appears that in consequence of first and second defendants' failure to pay the debts, one of the mortgagees brought a suit (O.S. No. 23 of 1904) and obtained a decree for the larger amount due and in execution had the mortgaged property advertised for sale. It is not possible to contend that plaintiff made undue haste or had no substantial cause to file his suit. Indeed it is evident that the first and second defendants took the warning and discharged a greater portion of the liabilities and thereby avoided a contested trial. I find that plaintiff is entitled to his costs from first and second defendants.

P. R. Sundara Ayyar for appellants.

P. C. Lobo for *T. Prakasam* for third respondent.

The Hon. Mr. *T. V. Seshagiri Ayyar* for respondents.

JUDGMENT.—The appeal is for costs only. The lower Court has given costs to the plaintiff although the first and second defendants satisfied the claim after suit. If the plaintiff had a cause of action the payment after suit would be no reason for refusing him his costs, and the appeal is therefore grounded on the contention that he had no cause of action.

The defendants purchased property from the plaintiffs undertaking to pay the price or part of it to his creditor or creditors. For three years they failed to make any payment and thus left the plaintiff in the position that property other than that sold was still under encumbrance when it ought to have been freed from encumbrance. Though the property had not been actually sold up as threatened by his creditors, still there is authority that he had a cause of action against the defendants: a

MILLER, J.

ANSUR SUBBA NAYUDU v. BATHULA BEE BEE SAHIBA.

cause of action for damages to the amount of the money which he or his creditors ought to have received, if *Dorasinga Tevar* v. *Arunachalam Chetti*(1) is right—*vide* also *Nyapati Ranganadham Pantulu* v. *Nyapati Balarama Doss*(2) or a cause of action for nominal damages if I follow what is stated to be the rule in America—*vide* Mayne on 'Damages,' page 260. No doubt *Doraisami Thevar* v. *Lakshmanan Chetty*(3) suggests that he had no cause of action without proof of damage sustained at the date of suit; but that is in conflict with *Dorasinga Tevar* v. *Arunachalam Chetti*(1).

So far then as the question of costs is concerned it seems to me impossible to hold, whichever view of the law I take that the plaintiff was not justified in suing to secure that the defendants should pay money which they had undoubtedly undertaken to pay. When I say justified in suing I mean that he had authority not only in this Court but elsewhere in support of the existence of a cause of action, and I do not see why he should not if he sued, in reliance on that authority, get his costs when his suit, whether that authority lays down good law or bad law, was successful in causing the defendants to do what they ought to have done before.

I dismiss the appeal with costs.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Abdur Rahim.

1910. April 1.

THIMMAKKE AND OTHERS (PLAINTIFFS NOS. 1 TO 7), APPELLANTS,

v.

AKKU AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Aliyasantana Law—Ejman, removal of—Grounds on which Ejman of an Aliyasantana family may be removed.

When the Ejman of an Aliyasantana family in the discharge of his duties as Ejman not only neglects the interests of the family but takes advantage of his position to secure benefits for his children at the expense of the other members of the family, the Courts will be justified in removing such Ejman.

(1) (1900) I.L.R., 23 Mad., 441.
(2) (1909) 5 M.L.T., 247.
(3) (1904) 14 M.L.J., 285.
* Appeal No. 180 of 1905.

WHITE, C.J., AND ABDUR RAHIM, J.

THIMMAKKE v. AKKU.

When unjustifiable alienations of family property are made, the Ejman although not a party to such alienations will be liable to be removed, if, in a suit brought to set aside such alienations for the benefit of the family, he sides with the defendants and seeks to support such alienations.

APPEAL against the decree of P. J. Itteyerah, Subordinate Judge of South Canara, in Original Suit No. 43 of 1903.

The facts are sufficiently set out in the judgment.

K. Naraina Rau for appellants.

P. C. Lobo for *K. P. Madhava Rau* for respondents.

JUDGMENT (THE CHIEF JUSTICE).—This is an appeal by the plaintiffs from the decree in a suit in which the plaintiffs are the same parties as the plaintiffs in the suit which we have just disposed of on appeal. The first and second defendants are respectively the elder daughter of Chennamma and her son. They were the sixth and seventh defendants in the other suit. The plaintiffs in this suit ask for a declaration that two mortgages which stand in the name of the second defendant belong to the family and they also ask for an order removing the first defendant from the position of Ejman.

According to the finding in the other suit which we have accepted the first defendant in this suit is the *de jure* Ejman of this Aliyasantana family and also *de facto* joint Ejman together with Devapparai. The finding of the learned Subordinate Judge with reference to these two mortgages is in paragraph 12 of his judgment. He says "I find that exhibit I," (that is the first mortgage) "was obtained from private funds." He therefore upholds that transaction. He says: "Exhibit II," *i.e.*, the second mortgage, "to the extent of Rs. 500 was from family funds." I suppose inferentially he finds as to the residue that it was obtained from private funds of the first defendant. He therefore decides in favour of the plaintiffs to the extent of Rs. 500 in regard to the second mortgage and in favour of the defendants with regard to the residue. The first defendant being a *de jure* manager and for certain purposes, at any rate, *de facto* manager with the deceased Devapparai, the *onus* is no doubt upon her to show that these transactions were entered into out of her own private funds. In this case we have specific affirmative evidence and definite findings with reference to the question as to the source from which, it might reasonably be inferred, the monies which were advanced under these two mortgages were obtained.

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In paragraph 6 of his judgment, the learned Subordinate Judge says "The first defendant swore in the connected suit"—by agreement the evidence in the connected suit is treated as evidence in this suit— . . . . "that she received Rs. 1,500 from her father." The learned Subordinate Judge does not say so in so many words, but I think it must be taken that he accepts her evidence, because in paragraph 8 he says: "there is further indubitable evidence of first defendant having obtained money from her husband." Now these two sums of money would be sufficient if not entirely, at any rate to a substantial extent, to provide funds for these transactions, which the first defendant says were entered into for the benefit of her son and with regard to which the title-deeds stand in the name of her son, the second defendant. I may say the evidence is not very strong; but we are not prepared to say that the learned Subordinate Judge in holding that the evidence is sufficient to rebut the presumption which arises in a case of this sort in plaintiffs' favour, or, in other words, to discharge the *onus* which rests on the defendants, we are not prepared to say the learned Subordinate Judge in so holding was wrong. Therefore as regards this portion of the appeal, we are of opinion that it should be dismissed.

We now come to a question which, to my mind, is one of greater difficulty, and as to which, I confess, I have been in some doubt; and that is the question whether the plaintiffs have made out a case for the removal of the first defendant from the management of this family. Now the grounds of alleged misconduct on the part of the first defendant in her capacity as joint manager were: first, that the two mortgages in the name of the second defendant really belonged to the family and that she acted in fraud of the family rights in entering into these transactions on behalf of her son. As to that I have said we are not prepared to differ from the learned Subordinate Judge.

The second ground of complaint is 'allowing'—that is how it is put—allowing the wife and children of Devapparai to claim the four items of property in the other suit. The third ground of complaint is playing into the hands of Devapparai's wife's brother. I do not quite know what that means. Mr. Naraina Rau did not explain what it means. At any rate he did not press the point. Therefore I may leave it out of consideration. The question therefore is "was the conduct of the first defendant with reference

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to the attempt made by Devapparai to secure the four items of property, which were the subject matter of the other suit, for the benefit of his wife and children a good ground for removing the first defendant from the office of Ejman?" Now the principles which have been relied on in the cases where this question has arisen are to a certain extent, at any rate, in conflict. In the case of *Eravanni Revivarman* v. *Ittapu Revivarman*(1), it was held that "the position of a Karnavan" of a Malabar tarward—and the law I take it is the same in the case of an Ejman of an Aliyasantana family—"the position of a Karnavan is not analogous to that of a mere trustee, officer of a corporation or the like. The person to whom the Karnavan bears the closest resemblance is the father of a Hindu family. He should not be removed from his situation except on the most cogent grounds." And the learned Judges in the course of that judgment observe that "the question is not merely whether a man is unworthy of his position, for that is not the ground for removing him, but whether the removal will benefit the family." In the later cases, I do not find that this question as to what would be the effect of the removal with regard to the interest of the family was a matter which was considered relevant or at any rate taken into consideration. In a later case on the subject *P. P. Kunhamod Hajee* v. *P. P. Kuttiath Hajee*(2) it was held "that the grant of a very improvident lease following on a course of conduct pursued for some years, in which the interests of the tarwad were persistantly disregarded, is sufficient ground for removing a Karnavan from the management of the tarwad property." And the same principle seems to have been applied in the case of *Kunhan* v. *Sankara*(3). The question, as I have said, as to whether the appointment of a new Karnavan or a new Ejman would be likely to be more beneficial or less beneficial to the family than the existing Karnavan or Ejman does not seem to have been considered. In the *P. P. Kunhamod Hajee* v. *P. P. Kuttiath Hajee*(2) case the alleged misconduct in the Karnavan was in connection with what he did and what he purported to do as a Karnavan and it was there held that although one isolated improvident transaction is not in itself a sufficient ground to remove him, if an improvident transaction was established, that coupled with a long

(1) (1876) I.L.R., 1 Mad., on p. 153. (2) (1881) I.L.R., 3 Mad., 169.
(3) (1891) I.L.R., 14 Mad., 78.

course of unbusinesslike or improvident conduct as Karnavan constituted a ground for his removal. Here we have a good deal more than that. The allegation is not that the first defendant in the discharge of her duties as Ejman neglected the interests of the family but that she took advantage of her position as Ejman to enrich her son at the expense of the other members of the family. The learned Subordinate Judge with regard to this question which is raised in the second issue says in paragraph 13 of his judgment :—"There is no evidence to show that first defendant allowed Devapparai to alienate family properties to his wife and children under exhibit VIII, the deed of settlement which is the subject of dispute in the connected suit, Original Suit No. 42 of 1905, although she supported the alienation in the course of that suit. It will be seen from the judgment in the connected suit that the alienation has not been set aside in its entirety." Well the conclusion at which we arrived in the case which we have just disposed of was that the plaintiffs had made out a case for setting aside the alienations made by Devapparai in their entirety. And it may well be that if the Subordinate Judge had himself arrived at that conclusion he might have felt constrained to hold that a case was made out for the removal of the first defendant, the Ejman in the present suit. That may or may not be so. But we have to deal with the case, of course, by the light of the conclusions at which we have arrived in the other suit; and as we have arrived at the conclusion that the plaintiffs are entitled to have the alienations set aside, it seems to me to follow almost as a corollary that we must hold that a case for the removal of the first defendant from the Ejmanship has been established. True, in that case she was not the party who made the alienations, but it was her duty as the Ejman of the family to protect the interests of the family. Not only did she fail to take any steps to secure these properties, which we have held were wrongly alienated, for the benefit of the family, but when the question was raised in the Court below she took the side of the defendants and went into the witness box to give evidence on their behalf. It seems to me that being so, we must hold that it is impossible to reconcile her conduct in connection with Devapparai's alienations and the consequent litigation with a due regard for the interests of the family.

As regards the question whether the present agent is physically incapable of discharging the duties of her office, I do not think one

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need consider that. In that respect I do not think there is very much to choose between the two old ladies. They are both considerably over 60. There is no evidence to show that either of them is physically or mentally incapacitated.

It may be when the present plaintiff succeeds to the office of agent, she will seek to avail herself of the opportunity to benefit her own children. I do not think we are entitled to assume that she will do this.

In coming to the conclusion at which I have arrived, I rely mainly upon the conduct of the first defendant in connection with the litigation with reference to Devapparai's alienations to his wife and to his children. Mr. Lobo has contended that it is within the power of the Ejman of an Aliyasanthana family or the Karnavan of a Malabar tarward, after making due provisions for the maintenance of the members of the family, to do what he liked with the surplus income. And he has contended that as regards the Rs. 500, the subject-matter of the second mortgage, she was perfectly within her rights in giving the son, the second defendant, the benefit of it since he was a member of this Aliyasanthana family. Well I am not prepared to say that I accept that contention. But as I have said I prefer to rest the conclusion at which I have arrived in the main on the conduct of the first defendant with reference to Devapparai's alienations and the consequent litigation. It seems to me that the plaintiffs have, for the reasons I have stated, made out a case for the removal of the first defendant. I do not think it necessary therefore to consider whether it is in the family interest that she should be removed or not. In fact, to speak of 'family interests' in this case is rather a misuse of terms, because the family consists of the elder daughter of Chennamma, *i.e.*, the first defendant and her only son and the younger daughter of Chennamma and her children. It is therefore a fight between two old ladies. Perhaps it may be said, and not unreasonably, that as the younger daughter and her progeny are much more numerous than the elder daughter and her one child, it is more consistent with the interests of the family that we should take away the management of the family from the first defendant, and put it in the hands of the younger daughter. However that may be, for the reasons I have stated the plaintiffs have in my opinion made out a case for the removal of the first defendant, and that follows as a corollary to the conclusion at

which we have arrived in our judgment in the other appeal. Accordingly I would modify the decree of the Court of First Instance by giving the plaintiffs a decree for the removal of the first defendant and make an order for the appointment of the first plaintiff as Ejman in her stead. In the circumstances we think the fair order as to costs will be that each party do bear their own costs. The memorandum of objections is dismissed.

ABDUR RAHIM, J.:—I agree.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Krishnaswami Ayyar.

CHINTAKINDY PARVATAMMA (PLAINTIFF), APPELLANT,

v.

LANKA SANYASI AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1910. July 19. August 2.

Easement - Easement Act, V of 1882, ss. 38, 47—Drain a continuous easement—Mere non-user does not extinguish continuous easement under s. 38 or 47 of the Act.

A drain from one land to another is a continuous easement within the Easement Act.

Where such a right of easement by drainage has been granted but was not possessed or enjoyed for more than twenty years from the date of grant but no obstruction to such use existed more than three years prior to the institution of the suit, such non-user without anything more, does not extinguish the right under section 38 or section 47 of the Easement Act.

The non-user without anything more, is not an implied release or abandonment of the right.

The period of twenty years of non-enjoyment which will extinguish the right under section 47 begins when the enjoyment was obstructed by the servient owner or rendered impossible by the dominant owner.

SECOND APPEAL against the decree of D. Raghavendra Rao Pantulu, Temporary Subordinate Judge of Vizagapatam, in Appeal Suit No. 319 of 1907, presented against the decree of K. Sambasiva Rao, District Munsif of Vizianagram, in Original Suit No. 404 of 1906.

Suit for a perpetual injunction restraining the defendants from obstructing the flow of sewage water from the plaintiff's house into the suit lane and for removal of the obstruction already caused.

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* Second Appeal No. 261 of 1909.

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It is alleged in the plaint that plaintiff owns a house in Chintakindivari Street, that the vacant site to the south of this house was purchased by Chintakindi Kamayya Pantulu from the lawful owners, Padam Bangari and Yelliah under a registered sale-deed, dated 1st April 1874, with all rights of passage and drainage over the lane to the west of the house of the said Bangari and Yelliah; that ever since the sale, Chintakindi Kamayya Ch. Venkanna Pantulu (plaintiff's husband) and plaintiff have been in succession in enjoyment of the said vacant site; that the house of the above mentioned Bangari and Yelliah came to be purchased in the end by the defendants three years ago; that this house is burdened with easements above mentioned; that in May 1906 the defendants blocked up the gutter and prevented the sewage water from plaintiff's house to flow into the lane; that there is no other exit for the rain and sewage water from plaintiff's house to flow out; that though demanded to remove the obstruction and permit the water to flow out, the defendants failed to do so, and hence this suit is instituted the cause of action for which arose at Vizianagram in May 1906 when obstruction was caused.

The defendants contend that there was never any mamool for the sewage water of plaintiff's house to flow through the suit lane, that the suit land is being used only as a passage for the totties going to the latrines of the parties respectively; that there is a gutter in plaintiff's backyard through which the sewage water from plaintiff's house can flow out and that this gutter is being used for the purpose since the construction of the plaintiff's house; that the sewage water never flowed out through the lane within the last twenty years and more; that this suit is instituted because the defendants raised objection to the improper use of their backyard.

The District Munsiff decreed for plaintiff. On appeal, the Subordinate Judge reversed the decree and dismissed the suit.

Plaintiff appealed.

P. Narayanamurti for appellant.

V. Ramesam for respondents.

JUDGMENT (WALLIS, J.).—In dealing with this case the lower Appellate Court has not sufficiently considered the provisions of the Indian Easements Act under which an easement may be extinguished by an express or implied release (section 38) and also by non-enjoyment for twenty years (section 47). The latter

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section distinguishes between the case of continuous and discontinuous easements—a continuous easement being defined in section 5 as "one whose enjoyment is, or may be continual without the act of man." It is well settled that a drain is a continuous easement, see among other cases *Pearson* v. *Spencer*(1) which expressly contrasts continuous easements such as drains with discontinuous easements such as rights of way, also *Pyer* v. *Carter*(2) which has never been questioned on this point. In the case of continuous easements, the period of twenty years under the section begins from the day on which enjoyment was obstructed by the servient owner or rendered impossible by the dominant owner. Under the sale-deed, exhibit A, dated the 1st April 1874, the plaintiff acquired the right to pass sewage as well as rain water through a sluice to be constructed in his compound at the point now in question, and he still has that right unless it has been released by him (section 38) or extinguished by prescription (section 47). The lower Appellate Court has found that the plaintiff cannot rely on exhibit A in the absence of satisfactory proof that she was exercising and enjoying the right of passing sewage water on to the defendant's land at the point in question. This is not a finding either that it has been released or lost by prescription, and cannot be accepted as disposing of the suit. The defendant's plea in the written statement was that it has not been the mamool to pass sewage water in this way, that such a right had not been exercised for twenty years, and that the plaintiff had recently enlarged the opening through which rain water used to pass to make it carry sewage water. There is no plea or evidence that enjoyment was obstructed by the servient owner or rendered impossible by the dominant owner which could support a finding that the easement was lost by prescription under section 47 of the Easements Act nor is there any plea that there was an implied release under section 38 as to which the explanation II to the section must be borne in mind that mere non-user of an easement, that is to say, non-user standing by itself without other evidence of abandonment, is not an implied release within the section, as to which see *Seaman* v. *Vawdrey*(3). No defence is shown and the decree of the lower Appellate Court must be

(1) 1 B. & S., 571. (2) (1857) 1 H. & N., 916.
(3) 16 Ves. Jun., 390.

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reversed and that of the District Munsif restored with costs here and in the lower Appellate Court.

KRISHNASWAMY AYYAR, J.—The suit is for an injunction to restrain the defendants from obstructing the flow of water from the drain in the plaintiff's land into the defendants' lane. Both the plaintiff's land and the defendants' lane originally belonged to a common owner. The plaintiff and the defendants have become owners of their respective grounds by purchase. In the sale-deed of 1874 by the common owner to a predecessor in title of the plaintiff it was provided that "the used water and rain water of the site sold, should be made to flow to the street through the sluice to be constructed in the compound wall opposite to the passage." The Subordinate Judge finds, and we are bound to accept his finding in second appeal "that there is no reliable evidence to show that the plaintiff was enjoying and exercising the alleged right, but there is reliable proof that she was not doing so." He observes also that "there is no reliable and satisfactory evidence to show that the provision (above quoted from exhibit A) was ever given effect to or the said right was ever exercised." Accepting these findings we see that an easement was granted in 1874 but never possessed or enjoyed till recently. I had at first some doubt whether in this case there was not a mere agreement to grant an easement as in *Smart* v. *Jones*(1) which has not been given effect to for over thirty years and has therefore terminated by the consent of both parties. But I am satisfied that no further grant was contemplated and the title to the easement was complete though no enjoyment commenced under it. In *Russell* v. *Watts*(2) an easement of light was held to be created in favour of buildings to be erected in accordance with a plan. See also Washburne on Easements, page 718. Holding then that the right came into existence in 1874, I ask myself whether it has been lost. It was argued that an easement to throw the water of a drain in one land on to the adjoining land was a continuous easement which could not be lost unless it had ceased to be enjoyed for an unbroken period of twenty years reckoned from the day on which its enjoyment was obstructed by the servient owner. See section 47 of the Easements Act and Hunter's Roman Law, 2nd edition, page 423 for a similar rule under the Roman Law. There

(1) (1894) 33 L.J.N.S. Com. P., 154. (2) (1885) 10 A.C., 590.

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is no doubt that the easement in this case was a continuous easement. See illustration (*h*) to section 13 where a drain is treated as an apparent and continuous easement. A continuous easement is defined in section 5 as "one whose enjoyment is, or may be, continual without the act of man." It was argued that drainage consequent on domestic use of water was a result of human activity and could not therefore be held to arise without the act of man. The argument if valid would apply to rain water dropping from the eaves of a building and even to artificial water courses. It is pointed out in Gale on Easements, 7th edition, page 121, that the word "continuous" may be understood to refer "not to continuity of enjoyment, but to permanence in the adoptation of the tenement." At page 123 he says "even in the case of drains the easement is not strictly 'continuous': the drain is not always flowing, but there is a necessary and permanent dependence of the house upon it for its enjoyment as a house, in the state in which it is at the time of the conveyance. Nor is distinction drawn between drains *arising by the act of man*, and those from natural causes, as rain water." *Pyer* v. *Carter*(1) which was relied on during the argument, though it must be treated as overruled as regards the rule of implied reservation by *Wheeldon* v. *Burrows*(2) and the cases which have followed it, *Allen* v. *Taylor*(3), *Taws* v. *Knowles*(4) and *Russell* v. *Watts*(5) is still authority for the position that an aqueduct or drain from one land to another for the benefit of either is a continuous easement. Washburne after defining continuous easements as those of which the enjoyment is or may be continued without the necessity of any actual interference by man (page 21) adds at page 107 that among the continuous and apparent easements are the rights of drainage and of aqueducts. The grant of a right to drain water amounting then to the creation of an apparent and continuous easement and it being admitted that there has been a continued non-user for more than twenty years but no actual obstruction by the servient owner, the question still remains whether section 47 of the Easements Act applies to the facts of this case. There is a continuous easement. There has been no obstruction except within the last

(1) (1857) 1 H. & N., 916. (2) (1879) 12 Ch.D., 31.
(3) (1880) 16 Ch.D., 355. (4) (1891) 2 Q.B., 574.
(5) (1885) 10 A.C., 590.

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three years before suit. It is said that the easement is therefore not extinguished under section 47. It seems to me however that section 47 has no application for another reason. A continuous easement is extinguished when it totally *ceases* to be enjoyed for twenty years. This language presupposes that the easement was for some time enjoyed. There can be no cessation of enjoyment when there was no enjoyment at any time though the title to the easement was created. The Subordinate Judge has found that the right was never exercised. I therefore agree with the appellant's contention that the easement has not been extinguished under section 47 of the Easements Act.

It was then suggested for the respondents that there was an implied release of the easement under section 38 of the Easements Act. But nothing is alleged to bring the case within clause (*b*) of explanation I. The state of the dominant heritage which was in no way altered showed no intention to abandon the easement. The question of non-user as affecting the continuance of an easement has been dealt with in the Roman and in the English Law. Gaius (Tomlin's translation, page 239) says servitudes are extinguished by *non-usus*. In Cachard's French Civil Code, section 706, it is stated that a servitude expires for want of use during thirty years. In *Ward* v. *Ward*(1) it was said whether mere non-user of a right amounts to an abandonment of the right will depend on the circumstances which caused the non-user. Where such non-user was caused by reason of a more convenient access by another road having been available it was held not sufficient evidence of abandonment. In *Crossle and Sons Ltd.* v. *Lightowler*(2) it was held by Lord Chelmsford that a mere suspension of the exercise of a prescriptive right was not sufficient to destroy the right. Whether under the English Law the mere non-user of a continuous easement which was the subject of a grant but never enjoyed for a comparatively long period would not be held sufficient proof of abandonment does not appear to be clear. Chancellor Kent in his Commentaries on American Law, Vol. III, page 703 says "The mere non-user of an easement for twenty years will afford a presumption of a release or extinguishment but not a very strong one in a case unaided by circumstances. See however foot-note at page 704, and Washburne on Easements, page

(1) (1879) 21 L.J.N.S. Ex., 334. (2) (1867) L.R., 2 Ch. Ap., 478.

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718. But explanation II of section 38 which says that mere non-user of an easement is not an implied release within the meaning of that section seems to conclude the matter. There is no other provision in the Act, which is a complete code, dealing with abandonment. I must therefore hold that the easement in question has not been extinguished or abandoned. The plaintiff is entitled to the decree prayed for. I would reverse the decision of the Subordinate Judge and restore that of the Munsif.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Munro.

1910. March 16. April 1, 7.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL REPRESENTED BY THE COLLECTOR OF KISTNA (FIRST DEFENDANT), APPELLANT,

v.

PISIPATI SUNKARAYYA (BEING MINOR) BY MOTHER AND NEXT FRIEND LAKSHMIDEVAMMA AND OTHERS (SECOND PLAINTIFF AND DEFENDANTS NOS. 2 AND 3), RESPONDENTS.*

Revenue Recovery Act (Madras) II of 1864, ss. 2, 5, 42—Provisions of s. 42 not confined to land on which the arrears become due—Land mortgaged by defaulter does not cease to be his property.

Land belonging to the defaulter does not, because mortgaged by him, cease to be his property within the meaning of section 5 of Act II of 1864. There is nothing in section 2 or 5 to restrict the land that may be sold thereunder to the land in which the arrears of revenue have accrued.

When therefore land belonging to the defaulter is sold for arrears accruing due on other lands belonging to him, the sale under section 42 of the Act is free of all encumbrances.

SECOND APPEAL against the decree of T. Gopalakrishna Pillai, Subordinate Judge of Masulipatam, in Appeal Suit No. 61 of 1907, presented against the decree of R. Gopala Rao, District Munsif of Gudiváda, in Original Suit No. 363 of 1905.

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

* Second Appeal No. 1213 of 1908.

MILLER AND MUNRO, JJ.

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The Government Pleader for appellant.

P. Narayanamurti for first respondent.

V. Ramesam for second respondent.

MILLER, J.—I think it is beyond doubt that what was sold in this case was land of the defaulter within the meaning of Act II of 1864, and the question is why should not the provisions of section 42 be applied to the sale.

The learned vakil for the first respondent with the aid of an ingenious piecing together of dicta to be found in *Secretary of State for India* v. *Narayanan*(1), *Narayana Raja* v. *Ramachandra Raja*(2) and *Ramachandra* v. *Pitchaikanni*(3), presents for our acceptance the conclusion that the sale is not free of encumbrances because the land sold is not by section 2 made security for the public revenue for which it was sold. His construction of section 2 is not established by any of the cases, and I am not prepared to decide that it is correct, but assuming its correctness I cannot see how the plain words of section 42 are to be limited by reference to section 2. A sale may be free of encumbrances whether or not it is held to enforce a first charge the liens being all transferred to the proceeds. In *Ramachandra* v. *Pitchaikanni*(3) the learned judges no doubt observe that the intention is clear that the purchase is free of prior encumbrances only when the arrear is of public revenue of which the land is the first security by statutory declaration, but there is nothing to suggest that they construed section 2 in the way we are asked to construe it: they were not dealing with that question, and their dictum was intended to support their view that a sale for an arrear of revenue due under a different statute is not by virtue of section 42 of Act II of 1864 free of encumbrances. I venture to think that if they are right as to the intention of the legislature we must construe section 2 as declaring all the land of a landholder to be security for all the land revenue payable by him, for the intention as expressed in section 42 is to my mind very plain; every sale of land conducted under the Act is to be free of encumbrances. The sale in question is a sale of land under the Act and I would therefore allow the appeal and dismiss the suit with costs of the first defendant throughout.

(1) (1885) I.L.R., 8 Mad., 130. (2) (1903) I.L.R., 26 Mad., 521.
(3) (1884) I.L.R., 7 Mad., 434.

MILLER AND MUNRO, JJ.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. PISIPATI SUNKARAYYA.

MUNRO, J.—The third defendant held lands in Kalidindi under one patta, and lands in Sana Rudravaram under another patta. All these lands were mortgaged to the plaintiff. Arrears of revenue having, subsequent to the mortgage, accrued on the lands in Kalidindi, those lands were attached and sold at auction by the Revenue authorities, and, as the proceeds did not cover the whole of the arrears due, the lands in Sana Rudravaram were attached and sold for the balance and were purchased by the second defendant. The plaintiff then brought the suit, out of which this second appeal arises, to have the revenue sale of the Sana Rudravaram lands set aside, and also for a declaration that the lands remained subject to his mortgage. The District Munsif refused to set aside the sale but gave a declaration that the sale was subject to the plaintiff's mortgage. This decree was confirmed by the Subordinate Judge on appeal. The present second appeal is by the Secretary of State for India in Council, and questions the propriety of the above declaration.

The villages of Kalidindi and Sana Rudravaram are in the same district. Act I of 1890 has therefore no application, and the point at issue must be decided solely in accordance with the provisions of Madras Act II of 1864. Under section 5 of that Act an arrear of revenue may be recovered by the sale of the defaulter's moveable and immoveable property and also by execution against the defaulter's person. There is nothing in the section to restrict the land that may be sold thereunder to the land on which the arrear of revenue has accrued. It is clear therefore that for the arrear which accrued on the third defendant's land in Kalidindi, the lands included in his Sana Rudravaram patta were liable to be sold if in the eye of the law they were his property at the time of the sale. The only ground on which it is suggested that they were not his property is the fact that they had been mortgaged to the plaintiff prior to the sale.

Section 42 of Act II of 1864 provides that all lands brought to sale on account of arrears of revenue shall be sold free of all encumbrances. From this it is clear that land may be sold for arrears of revenue, notwithstanding the fact that the defaulter has created an encumbrance upon it, and as under section 5 it is only land belonging to the defaulter that can be sold for an arrear due by him, it follows that under the Act land which a defaulter has encumbered is considered to be none the less his property.

MILLER AND MUNRO, JJ.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. PIRIPATI SUNKARAYYA.

The third defendant's land in Sana Rudravaram was therefore liable to be sold for the Kalidindi arrears, and under section 42 of Act II of 1864 the sale must be considered to have been free of the plaintiff's mortgage. It is contended that the result is inconsistent with the provisions of section 2 of the Act. That section lays down that the land, among other things, shall be regarded as the security for the public revenue. This language does not necessitate our reading the section as meaning that any particular land is security for the public revenue only in so far as that revenue is assessed upon itself. The Courts below relied upon *Narayana Raja* v. *Ramachandra Raja*(1). That case is not however on all fours with the present case, for there it was held that owing to a prior Civil Court sale the defaulter had no interest in the land at the time of the revenue sale. I would therefore reverse the decrees of the Courts below and dismiss the suit with costs of the first defendant throughout.

APPELLATE CIVIL.

Before Mr. Justice Sankaran-Nair and Mr. Justice Krishnaswami Ayyar.

1910. April 8. May 4.

K. VISHNU NAMBUDRI (DEFENDANT No. 1), APPELLANT,

v.

M. C. AKKAMMA (PLAINTIFF), RESPONDENT.*

Hindu Law—Succession among Nambudris in Malabar—Self-acquired property of Nambudri Brahman does not pass to the undivided family, but to his heirs under Hindu Law.

Nambudri Brahmans are governed by Hindu Law, except in so far as it is shown to have been modified by usage or custom having the force of law, the probable origin of the special usage being either some doctrine of Hindu Law as it stood at the date of their settlement in Malabar, though now obsolete or some Marumakkatayam usage. The Hindu Law applicable is that laid down in the Mitakshara.

The self-acquisition of a Nambudri Brahman passes to his heirs under the Mitakshara Law and not to the undivided family to which he belongs.

(1) (1903) I.L.R., 26 Mad., 521.

* Second Appeal No. 1769 of 1908.

SANKARAN-NAIR AND KRISHNA-SWAMI AYYAR, JJ.

VISHNU NAMBUDRI v. AKKAMMA.

No Marumakkatayam usage has influenced the family law of Nambudris in this respect and no doctrine of ancient Hindu Law denied the right of the son to succeed to the separate property of his father.

SECOND APPEAL against the decree of W. W. Phillips, District Judge of North Malabar, in Appeal Suit No. 283 of 1907, presented against the decree of T. N. Ramachandra Aiyar, District Munsif of Taliparamba, in Original Suit No. 71 of 1906.

Suit to recover Rs. 601 being the principal and interest due under a bond executed by third defendant's deceased husband to the plaintiff on 29th Vrischikom 1076 (14th December 1900). The bond was executed for Rs. 550 made up of Rs. 500 due under a bond dated 26th October 1897 executed by third defendant and her husband to pay plaintiff's debts incurred for illom purposes and Rs. 50 borrowed in cash at the time of execution for illom purposes. It is alleged in the plaint that the interest due up to 1080 (inclusive) has been paid and that defendants are in possession of the self-acquired properties of the deceased Parameswaran Nambudri, husband of the third defendant. Plaintiff seeks to recover the amount from the defendants personally and from the first defendant as Karnavan of the illom.

The first defendant ignores the plaint bond and the bond of 1073 and pleads that the deceased Parameswaran Nambudri was not the Karnavan of the illom and never managed illom affairs, that no money has been borrowed under the plaint bonds for illom purposes, that Parameswaran Nambudri had no self-acquired properties and that he is not in possession of such properties.

The second defendant pleads that the plaint debt was not incurred for illom purposes, that she is not in possession of the assets of the deceased Parameswaran Nambudri and that plaintiff is not entitled to a personal decree against her. The third and fourth defendants raise the same pleas.

The first defendant was the Karnavan of the illom and the fourth defendant, the son of the deceased Parameswaran Nambudri. The District Munsif found that the first defendant was in possession of the self-acquired properties of the deceased and passed a decree personally against him. This decree was confirmed on appeal.

First defendant appealed.

J. L. Rosario for appellant.

SANKARAN-NAIR AND KRISHNASWAMI AYYAR, JJ.

VISHNU NAMBUDRI v. AKKAMMA.

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

JUDGMENTS (SANKARAN-NAIR, J.).—The plaintiff sues to recover a debt contracted by the deceased Parameswaran Nambudri, a junior member of an illom, of which the first defendant is the head. His wife and child are also defendants. Parameswaran Nambudri was in possession of a piece of land belonging to the family and it is found that he built thereon a house worth Rs. 1,000 out of his own funds and also planted pepper vines on the land. It was conceded in the lower Courts that the house which was built by the deceased out of his own funds though on land belonging to the family was his self-acquisition and the point is not raised by the memorandum of second appeal. We accordingly accept that finding. As to the utensils, etc., worth Rs. 500 they are in the house left by the deceased and were admittedly the property of the deceased. The first question is whether the self-acquisition of Parameswaran devolved on the family to which he belonged or on his son, the fourth defendant. All the previous decisions were reviewed in *Chemnauthat Attekunnath Lakshmiamma* v. *Palakuzhu Thuppan Nambudri*(1) and the learned Judge therein arrived at the conclusion that the question is not concluded by authority and that there is no definite ruling of the High Court on the point. As to the law applicable to the Nambudris, it has been held in a case in which evidence was taken about their usage, that "Nambudris are governed by the Hindu Law, except so far as it is shown to have been modified by usage or custom having the force of law," the probable origin of the special usage being either some doctrine of Hindu Law as it stood at the date of "their settlement" in Malabar "though now obsolete or some marumakkatayam usage" (*Vasudevan* v. *The Secretary of State for India*(2)). The Hindu Law is generally speaking the law laid down by the author of the Mitakshara. Under that law, though the interest of an undivided member in family property passes by survivorship to the other members of the family, his separate property devolves exclusively on his own heirs. The fourth defendant, the son of the deceased, takes the property of the latter under the Hindu Law to the exclusion of the other members of the family. It is true that, under the marumakkatayam law, we have decided that the self-

(1) (1902) I.L.R., 25 Mad., 662. (2) (1883) I.L.R., 1 Mad., 157 at p. 162.

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acquisition of a male in Malabar lapses to his tarwad but it has also been decided that in the case of a female, her children succeed to the exclusion of the tarwad, while in Canara under the same law under another name, where the theory is more strictly carried out in practice, the self-acquisitions of a male also descend to his own heirs. It may be noticed that in the earliest case *Kamaran* v. *Ryru* of which there is any report, it is stated to be a very prevalent belief that the immediate juniors and not the tarwad are those entitled to the self-acquisitions and that not one of the decisions including that of the full bench in *Govindan Nair* v. *Sankaran Nair*(1) is based upon usage but, on the other hand, the majority of the Judges acted on the maxim "stare decisis." In these circumstances we cannot take it that any "marumakkatayam usage" would have influenced the family law of the Nambudris in this respect. Nor have we been referred to any doctrine of ancient Hindu Law which denied to the son the right of succession to the separate property of his father, which may have served as a basis for the existence, if any, of a different rule of law among the Nambudris. Under the old Hindu Law when self-acquisition was not recognised, no question could arise as to succession. When separate property or self-acquisition was recognised, the law of succession followed the nature of the property. The foundation of the right to take by survivorship is common interest and common possession during the life-time of the deceased. It is possible there may have been a stage in the growth of Hindu Law when a man who acquired any property had only the use of it, in which case his undivided family may have taken it on his death. But when after his complete dominion (with right of alienation) over self-acquisition was recognised it is difficult to conceive a different line of descent for it from property that may have been obtained by partition which would undoubtedly be made to descend to natural heirs to the exclusion of those from whom he may have divided The foundation of common interest in the property failing survivorship goes with it and the nature of the property determines the rule of succession. A Nambudri like any other Hindu has the right to alienate his self-acquisition in his life-time without regard to any necessity or to the wishes of the other members of his family. He may devise it to strangers. If the deceased had

(1) (1909) I.L.R., 32 Mad., 351.

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been a divided member there is no doubt his son would have succeeded to the property obtained on partition and in my opinion the self-acquisition will follow the same course of descent. The fourth defendant is therefore entitled to the house and utensils and not the first defendant. The decree against the first defendant as representative is therefore revised, but in the circumstances without costs. The suit was dismissed against the fourth defendant and there is no appeal.

KRISHNASWAMI AIYAR, J.—I agree in the judgment of Mr. Justice SANKARAN-NAIR. As regards the pepper vines we must treat them as the property of the illom. They were grown by the deceased Parameswaran Nambudri on illom property. They cannot be held to be his self-acquisitions. The first defendant as the Karnavan is not liable for the debt contracted by Parameswaran so far as this property is concerned. No question has been raised in second appeal that the house and vessels were not the self-acquisitions of Parameswaran. The house is in the occupation of defendants Nos. 2 to 4, the mother, widow and son of Parameswaran and the vessels too are in their possession. No decree can be given in this case against the first defendant on the ground that he is in possession of Parameswaran's property. But it is contended for the respondents that the illom succeeds to the self-acquisition of every member and that the first defendant as Karnavan is properly liable for Parameswaran's debts. This question has been left undetermined by the District Judge. In *Chemnauthat Attekunnath Lakshmiamma* v. *Palakuzhu Thuppan Nambudri*(1), the question was left open whether under the customary law governing the Nambudris of Malabar the self-acquisitions of a Nambudri pass at his death to the immediate heirs of the acquirer or to the illom. The observation in *Vasudevan* v. *The Secretary of State for India*(2) that self-acquired property merges on the death of the person acquiring it with family property as is the case among Nairs is not a binding decision. There is no course of decisions as is the case amongst marumakkatayam families that the self-acquisitions of a member of a Nambudri illom lapse to the illom. The recent decision by the majority of the Full Bench in *Govindan Nair* v. *Sankaran Nair*(3) which is

(1) (1902) I.L.R., 25 Mad., 662. (2) (1883) I.L.R., 11 Mad., 157.
(3) (1909) I.L.R., 32 Mad., 351.

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solely rested on the current of judicial authority as regards the descent of the self-acquisition of a marumakkatayam Hindu does not therefore apply to the case of Nambudris. Unfettered by authority there can be no question as to what is the rule of law we should apply to the descent of a Nambudri's self-acquisition. It is capable of gift *inter vivos*. It can be willed away at the pleasure of the acquirer. Unless the notion of heritable rights in son, widow and daughter is foreign to the Nambudri, we are bound to apply the ordinary Hindu Law of succession to the Nambudri's self-acquisition. If we go back to the archaic Hindu Law and repudiate the idea of self-acquisition itself then, of course, the property acquired, must lapse to the tarwad. But in that case even in the acquirer's life-time he would have no right over it. But this being recognised even to the extent of validating a posthumous disposition by will, I do not see how we are entitled to refuse succession to the natural heirs of the acquirer. If an illom became divided into individual units with the consent of all, each individual will pass his separate property to his own heirs and not to his divided brethren in a group. This was the analogy accepted by the Privy Council in the Sivaganga case (*Katama Nachiyar* v. *The Raja of Sivaganga*(1)) for the succession of self-acquisition. The same holds good in the case of the self-acquisition of a Nambudri. The Nambudri is governed by the Smritis. He is even more orthodox than the Brahmins of the rest of the country. He owes allegiance to the Vedas, the Smritis and the Puranas. Except in so far as recognised custom has made any inroad into the law of the Smritis, he is governed by that law. The fourth defendant as the son of Parameswaran must therefore be held entitled to the house and utensils. No decree has been passed against him and there is no appeal by the plaintiff to make him liable. We must therefore allow the appeal by the first defendant and dismiss the plaintiff's suit, but in the circumstances without costs.

(1) (1863) 9 M.I.A., 539.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Krishnaswami Ayyar.

1910. September 8, 9.

RAMASAMI REDDI AND OTHERS (DEFENDANTS), APPELLANTS IN APPEAL AGAINST ORDER No. 190 OF 1909,

v.

AUTHI LAKSHMI AMMAL AND OTHERS (PLAINTIFFS), RESPONDENTS IN THE ABOVE.

CHINNA CHENGA REDDI AND OTHERS (DEFENDANTS), APPELLANTS IN APPEAL AGAINST ORDER No. 191 OF 1909,

v.

MUTHAMMAL *alias* MUTHIALAMMAL (PLAINTIFF), RESPONDENT IN THE ABOVE.*

Limitation Act XV of 1877, *sch. II, arts.* 39, 109—*Article* 109 *not applicable where profits not received by defendant—Claim for mesne profits when plaintiff kept out of possession is a suit for damages and falls within art.* 39—*Judgment for possession, effect of.*

A suit for mesne profits by a plaintiff who had been kept out of possession by the defendant, does not, for purposes of limitation fall within article 109 of schedule II of the Limitation Act, when no profits have been actually received by defendant. Such a suit is one for damages for trespass on immoveable property and falls under article 39 of schedule II. *Abbas* v. *Fassuthudin*, (I.L.R., 24 Calc., 463), not followed.

A judgment for possession against a defendant must be deemed to decide that the defendant was in possession at least at the date of judgment.

APPEALS against the orders of V. Venugopaul Chetty, District Judge of Chingleput, in Appeal Suits Nos. 25 and 24 of 1908, presented against the decrees of B. Krishna Row, District Munsif of Chingleput, in Original Suits Nos. 142 and 143 of 1906, respectively.

The facts are sufficiently stated in the judgment.

T. Ranga Chariar for appellants.

Dr. *S. Swaminadhan* for respondents.

* Appeal against Orders Nos. 190 and 191 of 1909.

JUDGMENT.—The plaintiffs, having obtained a decree in ejectment against the defendants, sued them for the profits of the land for fasli 1312. The present suits were instituted on the 12th February 1906. The objection was taken that the suits were barred. The District Judge held that article 109 of schedule II of the Indian Limitation Act applied and that the suits were within time and remanded the cases to the Munsif. The defendants have preferred these appeals. The respondents raise a preliminary objection that no appeal lies in this case under order 43, rule 1, clause (*u*) of the Civil Procedure Code, 1908. There is a change of language in this clause of the new Code. It says that an appeal would lie from the remand order only if an appeal would lie from the decree of the Appellate Court. We have then to determine whether there would be a second appeal if the Appellate Court had passed a decree. The suit is framed as one for mesne profits. The form of the plaint determines the nature of the suit. Such a suit as the present is exempted from the cognizance of the Small Cause Court under clause 31 of the second schedule to the Small Cause Court Act. A second appeal would therefore lie in case there was a decree of the Appellate Court. The present appeal from the remand order is therefore regular. We overrule the preliminary objection.

As regards the merits of the appeals, we think the District Judge is wrong in applying article 109. It must be taken to be concluded between the parties by the decree in ejectment that the defendant was in possession between the date of the institution of the former suit and the date of the judgment. The judgment of two of the learned Barons of the Exchequer differing from the learned Chief Baron in *Pearse* v. *Coaker*(1) was in favour of this view. And we think that a judgment for possession against a defendant must be deemed to decide that the defendant was in possession at least at the date of judgment. But did defendant wrongly receive the profits of the land during the period for which the plaintiff claims? The finding is that the land lay waste. We cannot agree with the passing observation in *Abbas* v. *Fassuh-ud-Din*(2) that to such a suit as the present where the defendant has not

(1) (1869) 4 Ex., 92. (2) (1897) 24 Calc., 413.

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received the profits article 109 has any application. We have then to decide between article 39 and the residuary article 120. Is the present action one for compensation for trespass upon immoveable property? We have come to the conclusion, though not without hesitation, that it is. The action under the English Law in such a case as the present was in trespass (see Warvelle on 'Ejectment, page 584). A claim for mesne profits when the plaintiff has been ousted from possession is essentially one for damages. Though the measure of the profit is what, under the explanation to section 211 of the Civil Procedure Code, the defendant might with due diligence have received, the claim still stands in damages for trespass. This is the view which has been taken in *Girish Chunder Lahiri* v. *Shoshi Shikhareswar Roy*(1), *Mobaruk Ali* v. *Boistub Churn Chowdhry*(2), *Radha Churn Ghuttuck* v. *Zumuroonissa Khatoon*(3) and *Pandit Lachmi Narayan* v. *Sheikh Mazhar Hassan*(4). We are obliged to hold that the plaintiffs can only recover mesne profits for the period between the 12th February 1903 and the 30th June 1903 under article 39 of the Act. We modify the District Judge's orders accordingly. The costs will be provided for in the revised decrees.

(1) (1900) 27 I.A., 110 at p. 124. (2) (1869) 11 W.R., 25.
(3) (1868) 11 W.R., 8. (4) (1907) 12 C.W.N., 650.

APPELLATE CIVIL—FULL BENCH.

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

1909. November 4, 15, 25.

VATTAKULAKARAN SOWDAKER ABU BACKER SAHIB (CLAIMANT), APPELLANT IN SECOND APPEAL No. 262 OF 1907,

BEMBLASSERY SANKUNNI MENON (CLAIMANT), APPELLANT IN SECOND APPEAL No. 514 OF 1907,

KRISHNA MENON AND ANOTHER (CLAIMANTS), APPELLANTS IN SECOND APPEAL No. 522 OF 1907,

v.

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

Limitation Act XV of 1877, ss. 6, 12—Appeals under Indian Forest Act, V of 1882—In calculating period of limitation for appeals under the Indian Forest Act, time for obtaining copy of judgment not to be excluded.

The provision in section 12 of the Limitation Act of 1877 that in computing the period of limitation prescribed for an appeal the time requisite for obtaining a copy of the order appealed against should be excluded does not apply to appeals under section 10 of the Madras Forest Act, 1882.

The express power given to the Governor in Council by section 10 of the Forest Act to extend the time for appeal under this section shows that the Legislature did not intend that the general provisions of the Limitation Act should apply to such cases.

The Madras Forest Act is a special and local enactment and the application of section 12 of the Limitation Act to appeals under that Act affects the period prescribed by that Act, within the meaning of section 6 of the Limitation Act.

The provisions of section 6 of the Limitation Act exclude the applicability of section 12 of the Act in the case of appeals under section 10 of the Madras Forest Act.

Reference under the Madras Forest Act, 1882, [(1887) I.L.R., 10 Mad., 210], dissented from.

Veerammah v. *Abbiah*, [(1895) I.L.R., 18 Mad., 99], followed.

SECOND APPEALS against the decrees of J. H. Munro, District Judge of South Malabar, in Appeal Suits Nos. 16, 1 and 27 of 1906, presented against the orders of T. Raghaviah, Forest Settlement officer, South Canara, etc., districts in Claims Nos. II, I and IV of the Silent Valley proposed reserve.

* Second Appeals Nos. 262, 514 and 522 of 1907.

WHITE, C.J., WALLIS AND MILLER, JJ.

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The cases first came on for hearing before Sir RALPH SILLERY BENSON, Officiating Chief Justice, and KRISHNASWAMI AYYAR, J., when the Court made the following

ORDER OF REFERENCE TO A FULL BENCH.—In these cases appeals were preferred under section 10 of the Forest Act to the District Court from the decision of the Forest Settlement officer more than 30 days after the passing of the order by that officer. The District Judge dismissed the appeals as time-barred under the provision contained in clause (ii) of that section. It is argued for the appellants that the time for obtaining copies of the order in each case should be deducted and if such deduction is made they are in time. The question for consideration is whether the deduction can be made. Section 12 of the Indian Limitation Act, 1877, is relied on as sanctioning the deduction. The question has been often discussed whether the general provisions of the Limitation Act are applicable to special or local laws prescribing particular periods of limitation. It has been decided in *Reference under Forest Act V of* 1882(1), that in the case of an appeal under section 14 of the Forest Act, the time taken in obtaining a copy of the order appealed against should be deducted. This decision was doubted in the Full Bench case of *Veeramma* v. *Abbiah*(2), by Mr. Justice SHEPHARD at page 112, the other learned Judges expressing no opinion on the matter. In *Haji Ismail Sait* v. *Trustees of the Harbour, Madras*(3), however, Justice SHEPHARD appears to refer to *Reference under Forest Act V of* 1882(1) without disapproval.

In the two cases of *Sambasiva Chari* v. *Ramasami Reddi*(4), and *Haji Ismail Sait* v. *Trustees of the Harbour, Madras*(3), in which the Court was closed on the date on which the period expired, the appeals were allowed to be filed on the re-opening day on the principle that the general provisions of the Limitation Act must be deemed to apply to the periods prescribed by special or local acts where they were not complete codes in themselves. The decision of the Full Bench in *Veeramma* v. *Abbiah*(2), related to the application of section 7 of the Indian Limitation Act relating to minority to a suit to compel registration under the Registration Act. It was held that the Registration Act being a

(1) (1887) I.L.R., 10 Mad., 210.
(2) (1895) I.L.R., 18 Mad., 99.
(3) (1900) I.L.R., 23 Mad., 389.
(4) (1899) I.L.R., 22 Mad., 179.

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complete code in itself, the general provisions of the Limitation Act ought not to be had recourse to. The decisions, therefore, of this Court do not seem to be altogether reconcilable. So far as the present cases themselves are concerned, the applicability of section 12 of the Limitation Act is in question. There is nothing in the language of that section which restricts its applicability to suits, appeals and applications specified in the first column of the second schedule to the Limitation Act. On the other hand the language is general, although section 4 of the Limitation Act only states that suits, appeals and applications specified in the schedule are subject to the provisions of sections 5 to 25; it says nothing as regards the applicability of those sections to suits, appeals or applications under special or local Acts.

There is nothing in sections 5 and 7 to 25 about suits, appeals and applications under special or local Acts. It may be argued therefore, there being nothing in section 12 of the Limitation Act to limit its application to suits specified in the schedule to the Limitation Act, it is applicable to appeals under section 10 of the Forest Act. Against this may be urged the fact that the proviso to clause (ii) of section 10, Forest Act, enables the Governor in Council for just and reasonable cause to extend the period of 30 days. It is worthy of consideration, there being a special provision in the Act itself to extend the period provided, whether resort to the general sections of the Limitation Act is contemplated for the purpose of extending the period in any other manner.

It was pointed out by Mr. Rosario that there is no incompatibility in the application of both the proviso and the general sections of the Limitation Act, for none of the general sections would be of service whereas in this case an order is passed of which the party knows nothing for many days after it has been signed. It may also be that section 14 having provided a period of 60 days and section 10 only a shorter period of 30 days the power of extension for just and reasonable cause was inserted with a view to enable the Local Government to treat the appeal under section 10 on the same footing as an appeal under section 14. However this may be, the question is not one free from difficulty. We would therefore refer for determination by the Full Bench, the following question:—Whether section 12 of the Limitation Act providing for deduction of time occupied in

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obtaining a copy of the order is applicable to appeals under section 10 of the Forest Act V of 1882.

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

C. V. Anantakrishna Ayyar for appellant in Second Appeal No. 262 of 1907.

B. Govindan Nambiar for appellant in Second Appeal No. 514 of 1907.

J. L. Rosario for appellants in Second Appeal No. 522 of 1907.

The Government Pleader for respondent in all the appeals.

The Court expressed the following :—

THE CHIEF JUSTICE.—I am of opinion that the provision in section 12 of the Limitation Act, 1877, that in computing the period of limitation prescribed for an appeal the time requisite for obtaining a copy of the order appealed against should be excluded, does not apply to appeals under section 10 of the Madras Forest Act, 1882.

I think this opinion might reasonably be based on the short ground that section 10 of the Forest Act, which gives a right of appeal from the Forest Settlement Officer to the District Court, in the case of certain claims to a right in or over land within 30 days from the date of the order appealed against, empowers the Governor in Council to extend the time for appeal. The application of the provision of section 12 of the Limitation Act with reference to the exclusion of time in computing the period of limitation prescribed for an appeal, as it seems to me, necessarily operates as an extension of the prescribed period of limitation. Section 10 of the Forest Act in express terms gives the power to extend the period to the Governor in Council. Notwithstanding that the provision as to the exclusion of time in section 12 of the Limitation Act works automatically whilst the power of extension given to the Governor in Council is a discretionary power to be exercised on just and reasonable cause being shown, I should be disposed to hold that the express power to extend the time given to the Governor in Council shows that the legislature intended that the general provisions of the law requiring the Courts to extend the period of limitation in certain cases should have no application to appeals under section 10 of the Act in question.

It may well be, as suggested in the order of reference, that section 14 having provided a period of 60 days and section 10

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only a shorter period of 30 days, the power of extension for just and reasonable cause was inserted with a view to enable the Local Government to treat the appeal under section 10 on the same footing as an appeal under section 14.

Apart, however, from the special proviso in section 10, I am of opinion that the effect of section 6 of the Limitation Act, in the case of a special and local enactment such as the Madras Forest Act, is to exclude the application of section 12 of the Limitation Act in the case of appeals under the Forest Act. I cannot adopt the view that the application of section 12 of the Limitation Act does not affect or alter the prescribed period of limitation, and with all respect, I am unable to follow the reasoning of the learned Judges in *Reference under Forest Act V of* 1882(1) where, in dealing with a case under section 14 of the Forest Act, they draw a distinction between the words "shall affect such law" which occur in section 6 of the Act of 1871 and the words "shall affect or alter the period so prescribed" which were substituted in section 6 of the Act of 1877 and are reproduced in section 29 (1) (*b*) of Act of 1908.

In *Veeramma* v. *Abbiah*(2), SHEPHARD, J. (see page 112) dissented from the decision in *Reference under Forest Act V of* 1882(1) and although it would seem that in *Haji Ismail Sait* v. *Trustees of the Harbour, Madras* (3), SHEPHARD, J., referred to that decision without disapproval, in *Kumara Akkappa Nayanim Bahadur* v. *Sithala Naidu*(4), he says in so many words that he adheres to the opinion expressed by him in *Veeramma* v. *Abbiah*(2) on the question of construction. I think SHEPHARD, J., was right.

As regards the contention that, as there is nothing in section 12 of the Limitation Act to limit its application to suits specified in the schedule, the section is applicable to appeals under section 10 of the Forest Act, I think the answer is that section 12 must be read with section 4, and is one of the provisions to which section 4, which in terms applies the periods prescribed in the second schedule, is subject.

Further it seems to me that the provision in section 12 of the Limitation Act as to excluding the time requisite for obtaining a copy of the order appealed against does not apply when the

(1) (1887) I.L.R., 10 Mad., 210.
(2) 1895 I.L.R., 18 Mad., 99.
(3) (1900) I.L.R., 23 Mad., 389.
(4) (1897) I.L.R., 20 Mad., 476.

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special enactment which gives the right of appeal does not require that the notice of appeal should be accompanied by a copy of the order appealed against. I do not think it follows from the Full Bench decision in *Kamaraju* v. *The Secretary of State for India*(1) that a second appeal lies from a decision of a District Court passed under section 10 of the Forest Act, that the provisions of section 541 of the Civil Procedure Code of 1882 apply to an appeal from the Forest officer to the District Court.

The basis of the decisions in *Sambasiva Chari* v. *Ramasami Reddi*(2) and *Haji Ismail Sait* v. *Trustees of the Harbour, Madras*(3), was the general principle of law under which parties who are prevented from doing a thing in Court on a particular day, not by any act of their own, but by the Court itself, are entitled to do so at the first subsequent opportunity.

I do not think it necessary to consider whether the view I have indicated can also be supported on the ground that the Forest Act is an enactment dealing with a special subject, and intended, so far as the provisions of the Act go, to be a complete body of law. See *Veeramma* v. *Abbiah*(4), *Kumara Akkappa Nayanim Bahadur* v. *Sithala Naidu*(5) and *Nagendro Nath Mullick* v. *Mathura Mahun Parhi*(6).

On the true construction of section 6 of the Limitation Act, 1877, I think the answer to the question which has been referred to us should be in the negative.

WALLIS, J.—I am of the same opinion. The language of section 6 of the Limitation Act appears to me to be perfectly plain and unambiguous. That being so we are not, I think, at liberty to go back to the language of the earlier Acts, to speculate as to reasons which led the legislature to alter that language, and as a result of such speculation, to put a forced and unnatural construction upon the existing section.

MILLER, J.—I agree. To my mind it is clear that the provisions of section 12 of the Limitation Act of 1877 do 'affect' the periods of limitation prescribed by that Act, and would, if applicable to other laws, affect the period prescribed by those laws.

(1) (1888) I.L.R., 11 Mad., 309.
(2) (1899) I.L.R., 22 Mad., 179.
(3) (1900) I.L.R., 23 Mad., 389.
(4) (1895) I.L.R., 18 Mad., 99.
(5) (1897) I.L.R., 20 Mad., 476.
(6) (1891) I.L.R., 18 Calc., 368.

APPELLATE CIVIL—FULL BENCH.

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

1910. February 8. March 2.

KHADERSA HAJEE BAPPU (PLAINTIFF), APPELLANT,

v.

PUTHEN VEETTIL AYISSA UMMAH AND OTHERS (DEFENDANTS), RESPONDENTS.*

Limitation Act, XV of 1877, sch. II, arts. 120, 123, 144—Period of Limitation applicable to suit by Muhammadan to recover his share of his deceased wife's estate.

Article 123 of schedule II of the Limitation Act of 1877 applies only when the suit is for a share of an estate which it is the legal duty of the defendant to distribute.

Umardaraz Ali Khan v. *Wilayat Ali Khan*, [(1897) I.L.R., 19 All., 169], followed.

Where a Muhammadan dies intestate his estate at once vests in his heirs as tenants in common and there is no one charged by law with its distribution. In a suit by one of the heirs to recover his share, article 123 of the Limitation Act does not apply.

Kasmi v. *Ayishamma*, [(1892) I.L.R., 15 Mad., 60], dissented from.

Article 144 will apply in the case of immoveables and article 120 when the property sought to be recovered is moveable.

SECOND APPEAL against the decree of L. G. Moore, District Judge of South Malabar, in Appeal Suit No. 600 of 1907, presented against the decree of J. L. Jacques, Subordinate Judge of Cochin, in Original Suit No. 9 of 1906.

Suit by plaintiff, a Muhammadan, to recover his one-eighth share of his deceased wife's estate. The suit was brought more than twelve years after the death of the wife. Both the lower Courts held the suit barred by article 123 of schedule II.

Plaintiff appealed.

The appeal first came on for hearing before BENSON and KRISHNASWAMI AYYAR, JJ., who made the following

ORDER OF REFERENCE TO THE FULL BENCH.—On the facts found the question arises whether the suit is barred by limitation. The District Judge has applied article 123 of the Limitation Act.

* Second Appeal No. 121 of 1908.

MILLER, MUNRO AND ABDUR RAHIM, JJ.

KHADERSA HAJEE BAPPU v. PUTHEN VEETTIL AYISSA UMMAH.

It is argued for the appellant that this article does not apply. Reliance is placed on *Sithamma* v. *Narayana*(1) and certain observations in *Abdul Kader* v. *Aishamma*(2). For the respondent our attention is called to *Patcha* v. *Mohidin*(3) and *Kasmi* v. *Ayishamma*(4). These decisions are not overruled by the Full Bench though their authority appears to be doubted. It is pointed out in the Full Bench Case that attention was not drawn in *Patcha* v. *Mohidin*(3) and *Kasmi* v. *Ayishamma*(4) to the fact that in those cases the action was not against the representative of the estate of the deceased.

It seems to us that the authority of *Patcha* v. *Mohidin*(3) and *Kasmi* v. *Ayishamma*(4) has been considerably shaken by *Abdul Kader* v. *Aishamma*(2) and the reasoning in *Sithamma* v. *Narayana*(1) is against the view taken in those cases. The Calcutta High Court in *Issur Chunder Doss* v. *Juggut Chunder Shaha*(5) has taken the same view as the case in *Sithamma* v. *Narayana*(1). The observations in *Keshav Jagannath* v. *Narayan Sakharam*(6) are to the same effect. Looking at the language of the article itself, we are inclined to think that it applies only to suits against executors or administrators. We may refer to a full discussion of the question in *Kasim* v. *Ayishamma*(7) to which our attention has been drawn.

We refer the following question for the decision of the Full Bench :—

What is the article applicable to a suit by a Muhammadan for a share of his wife's property in the possession of another sharer more than twelve years after his wife's death.

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

J. L. Rosario for appellant.

B. Sitarama Rao for *P. R. Sundara Ayyar* for first respondent.

The Court delivered the following

OPINION.—We agree with the decision in *Umardaraz Ali Khan* v. *Wilayat Ali Khan*(8) where it is held that article 123 applies only when the suit is for a share of an estate which it is the legal duty of the defendant to distribute. In the case of a Muhammadan dying intestate the estate is at once vested in the heirs as tenants in

(1) (1889) I.L.R., 12 Mad., 487.
(2) (1891) I.L.R., 16 Mad., 61.
(3) (1892) I.L.R., 15 Mad., 57.
(4) (1892) I.L.R., 15 Mad., 60.
(5) (1883) I.L.R., 9 Calc., 79.
(6) (1892) I.L.R., 14 Bom., 236 at p. 240.
(7) (1883) I M.L.J., 727.
(8) (1897) I.L.R., 19 All., 169.

MILLER, MUNRO AND ABDUR RAHIM, JJ.

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common and there is no one charged by law with its distribution, and as pointed out in *Abdul Kader* v. *Aishamma*(1) it does not appear that in *Patcha* v. *Mohidin*(3) or *Kasmi* v. *Ayishamma*(3) there was any contention that the defendant was not the lawful personal representative of the deceased. In *Patcha* v. *Mohidin*(2) the question whether article 123 applied was not discussed or expressly decided but in *Kasmi* v. *Ayishamma*(3) the learned Judges do apply article 123 but, as we think, wrongly.

We think the answer to the question referred must be that article 144 is applicable when the property is immoveable and article 120 when it is moveable property.

The second appeal again came on for hearing before BENSON and KRISHNASWAMI AYYAR, JJ., after the expression of opinion of the Full Bench, the Court delivered the following

JUDGMENT.—The Full Bench has decided that article 144 and not article 123 of the Limitation Act applies. We cannot decide whether on the facts of this case the suit is barred under article 144. In accordance with the opinion of the Full Bench, we reverse the decree of the lower Appellate Court and remand the case to the District Court for disposal according to law. The costs will be provided for in the revised decree.

APPELLATE CIVIL.

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

1910. July 28. August 12.

SHIVI GOWDA AND OTHERS (DEFENDANTS Nos. 2, 4, 5, 7, 8, 9), APPELLANTS,

v.

FERNANDES AND OTHERS (PLAINTIFFS AND SUPPLEMENTAL PLAINTIFFS), RESPONDENTS.*

Limitation Act XV of 1877, sch. II, art. 85—Mutual account, test of.

Where the course of dealing between A and B was that A should finance B and that B should keep A secured in respect of such advances by consignments of coffee of a value equal to his indebtedness, the account between A and B though current and open is not 'mutual' within the meaning of article 85 of schedule II of the Limitation Act.

(1) (1891) I.L.R., 16 Mad., 61.
(2) (1892) I.L.R., 15 Mad., 57.
(3) (1892) I.L.R., 15 Mad., 60.

* Appeal No. 100 of 1906.

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Although the balance may shift from one side to the other, such shifting balance is not conclusive as a test of mutuality.

Payments made on account by one party and credited by the other whether in money or goods do not render the account mutual.

There must be independent obligations on both sides, to make the account mutual.

Hirada Basappa v. *Gadigi Muddappa*, [(1871) 6 M.H.C.R., 142], referred to.

APPEAL against the decree of the H. O. D. Harding, District Judge of South Canara, in Original Suit No. 18 of 1906.

The facts are fully set forth in the judgment.

K. Srinivasa Ayyangar for appellant.

K. N. Aiya for third and fourth respondents.

(Sir ARNOLD WHITE, C.J.).—The main question raised in this appeal is whether the suit is for the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties within the meaning of article 85 of the second schedule to the Limitation Act. If so, the defendants' plea of limitation fails. If not, the plaintiffs are not entitled to recover in respect of items in the account prior in date to three years before the institution of the suit.

The District Judge held that article 85 applied and the suit was not barred by limitation apparently on the ground that the accounts had been open and running for many years. He does not seem to have considered the question with reference to the words of the article "Where there have been reciprocal demands between the parties." The oral evidence affords little assistance as to the course of business between the parties and we have to rely in the main on the plaintiffs' accounts.

The plaintiffs are merchants and the defendants are coffee planters, and the plaintiffs' accounts show that, from the year 1893, the plaintiffs had been financing the defendants and the defendants had been sending consignments of coffee to the plaintiffs. In April 1893, a sum of Rs. 4,000 was advanced by the plaintiffs and the account for 1893-1894 (exhibit V) states that a document was executed for this amount. During 1893 further advances were made by the plaintiffs and sundry payments were made by them on the defendant's behalf. By January 1894 these advances and payments amounted to Rs. 10,700. In January 1894, a consignment of coffee was received by the plaintiffs from the defendants and other consignments were received later. These consignments were sold by the plaintiffs and the defendants were

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credited with the sale-proceeds with interest. A balance was struck in May 1894 the defendants being debited with interest on the moneys paid by the plaintiffs and also with what was termed 'commission.' This was not really commission but an amount calculated at Rs. 2 per candy, every Rs. 1,000 advanced being taken as the equivalent of 30 candies, in respect of advances made before any coffee was received by the plaintiffs, and every Rs. 1,000 being taken as the equivalent of 10 candies in respect of advances made subsequently. The higher rate is described in paragraph A of the plaint as damages for the defendants' default in not supplying the full quantity of coffee, in other words for not keeping the plaintiffs fully secured in respect of advances made by them to the plaintiffs or on their behalf. The accounts for 1894-1895 (exhibit IV) and 1895-1896 (exhibit III) show that business was continued on the same lines. In June 1896, the defendants made a cash payment of Rs. 13,000 and the balance against them was reduced to Rs. 5,500 (exhibit II). In May 1897, the balance was Rs. 5,545 odd and on this the plaintiffs claimed to charge interest at 15 per cent. In November 1899, the balance shown in the plaintiffs' accounts (exhibit A) was Rs. 7,500 odd and this is the amount for which the suit was brought. I am of opinion that, having regard to the course of business so far as it can be ascertained from the plaintiffs' accounts, the relation between the defendants and the plaintiffs was not that of seller and buyer as regards the coffee consigned to the plaintiffs—nor that of principal and agent in respect of the coffee sold by the plaintiffs, see *Mussamut Phool Koomaru Bibee* v. *Woonkar Pershad Rustoby*(1)—but that the contract between the parties was, as would seem to be suggested in paragraph 4 of the plaint and in the concluding portion of paragraph 6 of the learned Judge's judgment that the plaintiffs should finance the defendants, and that the defendants should keep the plaintiffs secured in respect of the advances made by the plaintiffs on their behalf by consigning to them coffee of a value equal to the amount of their indebtedness, the defendants being given credit for the proceeds of the coffee as and when sold by the plaintiffs and that if they failed to do this, they should make the further payment which is called commission but which is really a payment by way of damages.

(1) (1867) 7 W.R., 67 at p. 70.

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I do not think it can be said that this is a case in which there are independent obligations on both sides; see the observations in the judgment of Holloway, J., in *Hirada Basappa* v. *Gadigi Muddappa*(1). No doubt if at any time the sale-proceeds of the coffee had exceeded the amount of the defendants' indebtedness, the plaintiffs would have been accountable for the balance as money received for the use of the defendants, but this in my opinion does not in itself make the account mutual or give rise to reciprocal demands. I think the case falls within the principle of the decisions in *Hargopal Premsukdas and another* v. *Abdul Khan Haji Muhammad*(2) (where certain jewels were sold by the plaintiffs on the defendant's behalf and the defendants credited with the proceeds), *Velu Pillai* v. *Ghose Mahomed*(3) and *Ram Pershad* v. *Harbans Singh*(4). *Ganesh* v. *Gyanu*(5) where the dealings consisted of loans on both sides, and the parties were also partners in certain transactions the shares of profit and loss falling to each partner's share being debited and credited in the accounts, is clearly distinguishable on the facts. I accept the general principles laid down in the American Cyclopædia of Law and Procedure, vol. XXV, p. 1125, as applicable to the article in question under the Indian Limitation Act. "As a general rule payments made on account by one party, and credited by the other, whether in money or goods, do not render the account mutual so as to defer the operation of the statute to the date of last item, etc."

I am of opinion, though the matter is not free from difficulty, that the case before us does not come within article 85 of the second schedule to the Limitation Act, and that the plea of limitation must be upheld.

The plaintiffs are only entitled to recover in respect of transactions, which took place within three years *prior* to the institution of the suit and an account must be taken on this basis. Mr. K. Srinivasa Ayyangar intimated that if the plea of limitation was upheld, he would not press the point that the second defendant and defendants Nos. 3 to 8 did not form a joint family on the plea of discharge. The decree against the defendants Nos. 3 to 8 on the amount (if any) found to be due will be limited to the share of the family property.

(1) (1871) 6 M.H.C.R., 142.
(2) (1872) 9 B.H.C.R., 429.
(3) (1894) I.L.R., 17 Mad., 293.
(4) (1907) 6 C.L.J., 158.
(5) (1898) I.L.R., 22 Bom., 606.

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The appeal is allowed with costs. In the Court below, the plaintiffs will have proportionate costs on the amount (if any) found due on the taking of the account.

AYLING, J.—In the case out of which the present appeal arises the plaintiffs (respondents) sued to recover the balance due on a running account between themselves and the defendants (appellants) from the 24th April 1893 onwards and the chief contention raised by the latter in appeal is that the suit is time barred as regards all items arising before the 24th May 1897 three years prior to the filing of this suit. This contention, if established, reduces the plaintiff's claim to a comparatively insignificant amount.

On behalf of the respondents it is argued that the account is a mutual, open and current account with reciprocal demands between the parties, within the meaning of article 85 of schedule II, Indian Limitation Act.

The question of limitation is embodied in issue No. 4 but the learned District Judge in dealing with it in paragraph 6 of his judgment has confined himself to considering whether the account is open and current (which he rightly decides to be the case): and has apparently left the question of mutuality and reciprocity of demand out of consideration.

The oral evidence is directed to other points, but from the plaintiffs' accounts (produced and marked as exhibits A and II to V) aided to some extent by the pleadings of the parties it is possible to determine the nature of the business.

The latter opens on the 24th April 1893 with a loan of Rs. 4,000 from the plaintiffs to the defendants on a bond. The latter is not now in existence; but there seems to be no dispute that the conditions of the loan included interest at 12 per cent. per annum; and that repayment was to be effected by the defendants sending consignments of coffee to the plaintiffs which the latter were to sell crediting the proceeds to the defendants' account. The plaintiffs were further entitled to make a further charge which is called "commission."

This charge is not really commission at all, but a special additional interest calculated on all sums advanced, the rate being three times as high on all sums advanced before the receipt of the first consignment of coffee for the year as on those advanced subsequently. It is agreed that the same conditions

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applied to the numerous subsequent loans made by the plaintiffs to the defendants, as well as to the sums disbursed by them for purchase of goods and other objects on the defendants' behalf.

The accounts show that on the 5th May 1894 the balance due to the plaintiffs had increased to Rs. 8,050 for which another bond was executed. On the 30th May 1895 it had amounted to Rs. 15,581-4-3 and on the 15th May 1896 to Rs. 18,552-3-4. On the 5th June 1896 it was reduced by a cash payment of Rupees 13,000 (all the previous credits to the defendants being the sale price of coffee received and sold): and on the 6th June 1896 accounts were struck and the balance due to the plaintiffs was found to be Rs. 5,500. The account, exhibit II, was signed by the second defendant in token of liability. From this time forward, there are no further cash loans, and only a few disbursements on the defendants' account: but the small consignments of coffee received are insufficient to keep pace with the interest, and by the 30th November 1899 the defendants' debt had increased to Rs. 7,587-9-9, the amount sued for.

The learned District Judge sums up the business thus in terms which are in substantial accordance with the pleas of both sides, as well as with the accounts above summarised :—

" Defendants have borrowed money from plaintiffs, they have obtained goods of various kinds through them, and they have made payments from time to time by sending in coffee."

The question is whether this account is one falling under article 85 above referred to: and it appears to me that it does not.

The oldest Madras case bearing on the point is *Hirada Bassappa* v. *Gadiji Muddappa*(1) and followed in *Velu Pillai* v. *Ghose Mahomed*(2). The principle laid down appears to be that the test of mutuality is not the existence of a "shifting balance" (which is important evidence of mutuality but not conclusive); but—to quote Holloway—" To be mutual there must be transactions on each side creating independent obligations on the other and not merely transactions, which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations." This feature, the existence of *independent* obligations, appears to me to be entirely

(1) (1871) 6 M.H.C.R., 142. (2) (1894) I.L.R., 17 Mad., 293.

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wanting in the present case. A scrutiny of the accounts leaves no doubt that every consignment of coffee was made simply and solely on account of the antecedent loans and with a view to reduce the balance due thereunder. Not only was the balance never shifted to the defendants' credit, but there was never any approach to such a desirable state of affairs; apparently the balance against the defendants was never lower than the initial amount (Rs. 4,000) and the only substantial reduction was by the cash payment of Rs. 13,000 referred to above.

Applying the principle quoted above, I must hold that the account was *not* a mutual one with reciprocal demands.

Numerous rulings have been quoted by one side or the other; but none of them tend to really shake the above conclusion. That the fact that repayment was mostly by consignments of goods and not in cash makes no difference may be deduced from *Hargopal Premsukdas* v. *Abdul Khan Haji Muhammad*(1) if authority were needed. The judgment in *Ganesh* v. *Gyannu*(2) is in complete accord with that in *Velu Pillai* v. *Ghose Mahomed*(3) and follows the same principle; and I can find nothing inconsistent therein with either *Laljee Sahoo* v. *Roghoo Nundun Lall Sahoo*(4) or in *Chittar Mal* v. *Bihari Lal*(5) the other cases quoted by the respondents' vakil.

The other points raised in appeal may be summarily dealt with. I agree with the District Judge in rejecting the plea of discharge and in holding that the defendants formed a joint family with the second defendant as its managing member.

On the other hand I can find nothing in exhibit J which would as contended by the respondents' vakil, render the debt personally binding on any but the second defendant.

I would amend the decree of the District Court, by reducing the defendants' liability to the items accruing after the 24th May 1897 and by limiting the liability of all the defendants other than the second defendant to their share of the joint family property. The plaintiffs should be allowed proportionate costs in the lower Court, defendants bearing their own and the appellants should recover their costs in this Court from respondents.

(1) (1872) 9 B.H.C.R., 429. (2) (1898) I.L.R., 22 Bom., 606
(3) (1894) I.L.R., 17 Mad., 29. (4) (1881) I.L.R., 6 Calc., 447.
(5) (1910) I.L.R., 32 All., 11.

APPELLATE CIVIL.

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

1907. October 27. 1909. February 25. 1910. December 9. 1911. January 17.

KOTTILINGA SETTU ROYER, ZAMINDAR OF URKAD (SECOND DEFENDANT'S LEGAL REPRESENTATIVE), APPELLANT IN ALL THE CASES,

v.

SAHASRANAMA IYER AND OTHERS (PLAINTIFFS AND FIRST DEFENDANT), RESPONDENTS IN ALL THE CASES.*

Madras Irrigation Cess Act VII of 1865--Madras Act II, 1864—'Defaulter,' who is—Person liable to pay cess under Act VII of 1865—The zamindar and not the tenant in occupation liable.

Where water-cess is leviable on zamindari land under the provisions of Madras Act VII of 1865, the person bound to pay such cess is the zamindar and not the tenant in occupation of such land.

Nynappan Servai v. *Secretary of State for India*, [(1910) M.W.N., 322], dissented from.

Subramanya Chetty v. *Mahalingasami Sivan*, [(1910) I.L.R., 33 Mad., 41], followed.

The zamindar is the proprietor and land-holder within the meaning of Act II of 1864. He is the defaulter whose right and interest passes by the sale under section 39 of the Act.

The security for the public revenue and for the cess which is recoverable as such revenue is the full proprietary right and not the right of the tenant.

SECOND APPEALS against the decree of W. W. Phillips, District Judge of Tinnevelly, in Appeal Suits Nos. 1 to 4 of 1902, presented against the decree of M. R. Narayanaswami Ayyar, District Munsif of Ambasamudram, in Original Suits Nos. 420 and 421 of 1900, and 131 and 132 of 1901.

The facts are sufficiently stated in the judgment.

M. B. Doraisami Ayyangar for *P. R. Sundara Ayyar* for second appellant.

The Government Pleader for third respondent.

T. R. Ramachandra Ayyar and *T. R. Krishnaswami Ayyar* for second respondent.

ORDER.—Before disposing of this second appeal, we shall direct the District Judge to return a finding on the question whether there has been any increase in the supply of water to the

* Second Appeals Nos. 201 to 204 of 1904.

Moolachikulam tank on account of the improvements, if any, made by Government. Further evidence may be received. The finding should be submitted within two months from this date, and seven days will be allowed for filing objections.

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

On this evidence I find that there has been an increase in the supply of water to the Moolachikulam tank on account of the improvements made by Government but the full benefit of this increase has not been experienced owing to the negligence of the ryots in clearing the channel and tank under their control of silt.

JUDGMENTS (BENSON, J.).—The District Judge has now returned a finding that there has been an increase in the supply of water to the Moolachikulam tank in consequence of improvements carried out by Government.

It is conceded that on this finding Government is entitled under Madras Act VII of 1865 (amended by Act V of 1900) to impose the water-cess levied in this case.

The only other question is whether it is the zamindar (the second defendant) or the tenant (plaintiff) that is bound to pay it.

The District Judge has decided that the zamindar is the person liable, and that, if the circumstances are such as to justify him in demanding an enhancement of rent from the tenants, he should obtain the sanction of the Collector under section 11 of Madras Act VIII of 1865.

I am of opinion that the decision of the District Judge is right, and in accordance with the scheme of the Revenue Recovery Act (Madras Act II of 1864) as explained by this Court in *Zamorin of Calicut* v. *Sitarama*(1), *Secretary of State for India* v. *Ashtamurthi*(2) and the recent Full Bench Case of *Subramania Chetty* v. *Mahalingasami Sivan*(3).

In the first of these cases TURNER, C.J., and MUTHUSAMI AYYAR, J., said: "According to section 2 of the Act it is the proprietary right that is liable to be sold. According to section 1 it is the person in whom such right vests that is the 'land-holder.' According to section 3, it is the proprietor that is liable for the

(1) (1884) I.L.R., 7 Mad., 405. (2) (1890) I.L.R., 13 Mad., 89. (3) (1910) I.L.R., 33 Mad., 41.

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payment of the revenue. According to section 39, it is his right and property that passes by the revenue sale."

In the second case PARKER, J., said "Regulation XXVI of 1802 provides that Collectors shall keep registers of landed property paying revenue to Government and shall also enter all transfers of landed property from one proprietor to another. The regulation does not appear to contemplate the contingency of the person paying the revenue not being the proprietor . . . . It is admitted that the jenmi is really proprietor . . . . He therefore is, and has a legal right to be, the landholder within the meaning of section 1 of the Revenue Recovery Act." In the full Bench Case it was observed that the word 'defaulter' is not defined in the Revenue Recovery Act, but it was held that, reading that Act along with Regulation XXVI of 1802, the term 'defaulter' applied only to the puttadar registered in the Collector's register and that he remained the 'landholder' under the Act, and liable for the revenue under section 3 even after the real ownership had been transferred to some other person by sale or otherwise.

In the present case, however, the tenant relies on the unreported case of *Nynappan Servai* v. *The Secretary of State for India*(1) in which it was held that "a zamindari tenant in occupation is the holder of land subject to the payment of revenue direct to Government in respect of the water-cess, and therefore a landholder who becomes a defaulter under the Act." I was a party to that decision, but further consideration in the Full Bench Case of *Vidyapurna Thirta Swami* v. *Uyganu*(2) and in the present case has led me to the conclusion that the decision in Nynappa Servai's case is opposed to the decision of the Full Bench in Subramanya Chetty's case above referred to and to the scheme of the Revenue Recovery Act and ought not to be followed. In Subramanya Chetty's case it was held that the term 'defaulter' "applies only to the registered pattadar." I do not think that the Full Bench contemplated any other person as liable to become a 'defaulter' under the Act, whether in respect of land revenue properly so called, or cesses which like land revenue are secured on the land and are recoverable as land revenue. I would therefore confirm the decree of the District Judge and dismiss the second appeals

(1) Second Appeal No. 1597 of 1907 (unreported), see 1910 M.W.N., 322.
(2) Second Appeal No. 229 of 1907 (unreported), see 1910 M.W.N., 333.

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with costs two sets. The memoranda of objections are also dismissed with costs.

SANKARAN-NAIR, J.—The finding is that there has been an increase in the supply of water to the Moolachikulam tank on account of the improvements made by Government and it is therefore conceded by all the parties that the water must be treated as Government water and the Government is accordingly entitled to impose water-cess.

The next question is who is the person bound to pay such water cess to Government: the zamindar or the ryots?

The Judge has held that the zamindar is the person who would suffer if Government proceeded to recover the tax by attachment or sale of the land and therefore he is the person bound to pay. The appellant contends on the authority of the decision in *Nynappen Servai* v. *The Secretary of State for India*(1) that the tenant is bound to pay.

As the Judge's opinion that the zamindari itself may be sold by Government if water cess, which is revenue, is not paid seems to be in accordance with the other cases decided by this Court, it seems necessary to review them before we follow the case cited. There is no difference between water-cess and ordinary revenue under Act II of 1864. Both Regulation XXV of 1802 and Regulation XXVI of 1802 contemplate settlement of land revenue only with the proprietors of land and require transfers of *land* from one *proprietor* to another to be registered. If the registry is not transferred, the obligation of the registered proprietor continues to subsist and the land remains security for the revenue. They do not contemplate, as pointed out by PARKER, J., in *Secretary of State for India* v. *Ashtamurthi*(2) with reference to the latter Regulation, the contingency of any person paying the revenue not being the proprietor.

Section (3) of Act II of 1864 imposes upon every 'landholder' the obligation to pay the revenue due on *his land*. If it is not paid, he becomes a defaulter and his land may be sold. "The land, buildings upon it and its products" are the security for the land revenue (see section 3). The context shows that the full proprietary interest in the land is meant. The purchaser succeeds to all the rights and property of the former 'landholder' (section

(1) Second Appeal No. 1597 of 1907 (unreported); (1910) M.W.N., 322.
(2) (1890) I.L.R., 13 Mad., 89 at p. 115.

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39), *i.e.*, to the full proprietary interest subject to all the agreements between the defaulter and his tenants (see section 41). Reading now the definition of 'landholder' in section 1, which comprises "all persons holding under a Sanad-i-milkiyat-i-istimrar, all other zamindars, shrotriamdars, jagirdars, inamdars, and all persons farming the land revenue under Government; all holders of land under ryotwar settlements, or in any way subject to the payment of revenue direct to Government," by the light thrown upon it by the Regulations and the other sections of the Act, I have little doubt that it means the 'proprietor' referred to in the Regulations and not any subordinate tenure holder or any tenant.

The land is the security for the revenue. At a revenue sale the purchaser gets the full proprietary interest subject to the rights of the tenants. Naturally, therefore, the proprietor is the person entitled to pay the revenue to prevent the land being sold and the person to whom the Government must look for payment. He is therefore the 'landholder.'

The decided cases bear out this view.

Zamorin of Calicut v. *Sitarama*(1) and *Secretary of State for India* v. *Ashtamurthi*(2) were cases in which the Government sold the land when the pattadar was not the owner. In the first case the sale was affirmed on the ground that the owner was estopped from putting forward his claim as he had allowed the patta to stand in the name of his tenant, and, in dismissing the suit, the High Court said: "according to section 2 of Act II of 1864 it is the proprietary right that is liable to be sold. According to section 1, it is the person in whom such right vests that is the landholder. According to section 3, it is the proprietor that is liable for the payment of the revenue. According to section 39 it is his right and property that passes by the revenue sale." The contention that a tenant may be a landholder, and that his interest alone may be sold is inconsistent with this judgment. This principle was enforced in the next case. There a person had taken possession of certain waste land under a cowle from Government, and had subsequently obtained a patta for it after he brought it into cultivation, and *the land* was sold on default made by him for arrears of revenue. The question was fully argued and in an laborate judgment the sale was set aside. Mr. Justice PARKER

(1) (1884) I.L.R., 7 Mad., 405. (2) (1890) I.L.R., 13 Mad., 89.

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held that the Jenmi, the proprietor, "is and has a legal right to be, the landholder within the meaning of section 1 of the Revenue Recovery Act." SHEPHARD, J., agreed and pointed out the distinction between a tax for which the land is liable to be sold and a personal charge payable by the occupier in respect of the land. In that case though the pattadar was interested in the land and could not have been turned out by the owner without payment for the improvement which consisted in bringing the land into cultivation, the sale was set aside in its entirety, the purchaser not obtaining even the rights which the pattadar admittedly had. Once the land is assessed to revenue in the name of the proprietor, any subsequent transfer will be treated under the Regulations of 1802 as invalid against the Government claim to realize the revenue from the registered holder or by the sale of the land. In *Seshagiri* v. *Pichu*(1) MUTHUSAMI AYYAR, J., held that the real owner is also liable to pay the revenue while KERNAN, J., held that though the transferee may be the real owner yet he is not a 'defaulter' under Act II of 1864. Relying on the opinion of MUTHUSAMI AYYAR, J., it was held in *Srinivasa Thatha Chariar* v. *Rama Ayyan*(2) that not only registered proprietors but also real owners may be treated as defaulters within the meaning of section 35 of Act II of 1864. In *Boja Sellappa Reddy* v. *Vridhachala Reddy*(3) SUBRAMANIA AYYAR, J., took the opposite view, though curiously enough the cases in *Seshagiri* v. *Pichu*(1) and *Boja Sellappa Reddy* v. *Vriddhachala Reddy*(3) are not referred to in his judgment. He was of opinion that the owner cannot by virtue of his ownership alone be compelled to pay the revenue, and he pointed out that the landholder is the registered holder, and, though the unregistered owner may lose his land if it is sold for arrears of revenue due by the registered holder, he cannot be treated as the defaulter and is not therefore a person bound to pay the revenue, though he may be interested in paying it. In this state of the authorities the question came before the Full Bench in *Subramania Chetty* v. *Mahalingasami Sivan*(4) and we held that the transferee of the registered holder, though the real owner of the property, is not a 'defaulter' and the reason given is that, reading Act II of 1864 with Regulation XXVI of 1802 "the term 'defaulter' applies only to the registered pattadar,"

(1) (1888) I.L.R., 11 Mad., 452. (2) (1894) I.L.R., 17 Mad., 247.
(3) (1907) I.L.R., 30 Mad., 35 at p. 38. (4) (1910) I.L.R., 33 Mad., 41.

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or, in other words, the 'landholder' is the registered pattadar as he alone is the defaulter under the Act.

In *Nynappen Servai* v. *The Secretary of State for India*(1) a different view from that laid down in the previous cases seems to have been taken. Apparently accepting the view that, where there is a registered proprietor, no other person is to be treated as 'a landholder' under the Act, the learned Judges proceeded to decide that when the revenue payable is not under a settlement, any person who may be deemed to be the holder of the land must be comprised in the term 'landholder' and therefore a tenant in occupation is a 'landholder' and 'defaulter' under the Act, with reference to the water cess which is revenue for this purpose.

It necessarily follows from this decision that in cases of sales for non-payment of such revenue the purchaser will get only the interest of the tenant, the 'landholder' under section 39 of the Act.

It appears to me that this is opposed to the scheme of the Revenue Recovery Act and to the decisions. As I have pointed out above, the Government look to the full proprietary interest in the land for security for payment of revenue. In order to make that the security, they have to make the proprietor their debtor; for, as pointed out by SHEPHARD, J., in *Secretary of State for India* v. *Ashtamurthi*(2), "a security presupposes an obligation and unless therefore an obligation has been imposed on the landholder, it is difficult to see how his interest in the land can be affected." As decided therein the proprietor is the person under the Act treated as the landholder and none other can be treated as such. The fact that there is no patta cannot make another liable. It is not clear from the judgment whether, besides the tenant, the zamindar also may be treated as the 'landholder' for the purpose of recovering the same debt. The defaulter is also personally liable and it can scarcely have been intended to create two classes of defaulters.

I am therefore of opinion that the Judge is right in holding that the person to pay the cess or revenue is the zamindar and that the judgment in the Weekly Notes should not be followed.

I accordingly dismiss the appeals with costs—two sets.

The memoranda of objections are also dismissed with costs.

(1) Second Appeal No. 1597 of 1907 (unreported); (1910) M.W.N., 322.
(2) (1890) I.L.R., 13 Mad., 89 at p. 123.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Krishnaswami Ayyar.

1910. August 2, 3, 10.

THOTTOLI KOTILAN ALIYUMMA (SECOND DEFENDANT), APPELLANT,

v.

KUNHAMMED AND ANOTHER (PLAINTIFF AND FIRST DEFENDANT), RESPONDENTS.*

Muhammadan Law—Guardian, powers of—Agreement not to divide spes successionis, *validity of—Agreement for management, effect of, on outstanding kanom interest.*

A, a Muhammadan father, with children, some of whom were minors executed a settlement, whereby he gave *B* one of his adult children the right of managing all his properties during his, *B's*, lifetime. The deed also provided that there was to be no division of *A's* properties during the lifetime of *B*. The deed was signed by all the adult children, and by *A* on his own behalf and as guardian of his minor children. One of the properties mentioned in the deed was outstanding on kanom at the date of the deed. After *A's* death *C*, one of his adult children who had signed the deed, redeemed the kanom. *B* sued to recover possession of the property, on the ground that under the deed, he was entitled to the exclusive management thereof for his life:

Held, that *C* was entitled to redeem the kanom and that *B* had only a right to sue for partition of the property.

Although agreements between co-owners not to divide for a reasonable time are valid, such agreements are not valid when they relate to mere *spes successionis*. The property outstanding on kanom at the date of the deed was then a mere *spes successionis* and the agreement was invalid in respect of such property.

The agreement was not binding on the minor sons of *A*. Under the Muhammadan Law, the acts of a guardian will bind the ward only when urgent necessity or clear benefit to the ward are shown.

SECOND APPEAL against the decree of W. W. Philips, District Judge of North Malabar, in Appeal Suit No. 403 of 1907, presented against the decree of P. P. Raman Menon, District Munsif of Tellichery, in Original Suit No. 220 of 1906.

The facts are stated in the judgment of the lower Appellate Court which is as follows:—

First defendant obtained a kanom demise of the plaint property from one Ammad Kutti from whom the property passed to Ammankutti from whom Pokker, the father of plaintiff and second

* Second Appeal No. 50 of 1909.

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defendant, purchased the jenmam right. Plaintiff sues to redeem the kanom, but first defendant says that he surrendered his kanom right to second defendant while second defendant contends that she paid the kanom due to first defendant and is now in possession and that plaintiff is not entitled to possession as he is only a sharer with her in the plaint property.

The plaint property admittedly belonged to Pokker, and was his self-acquisition, and he and his wife and children executed exhibit C in 1903 and it is on this karar that plaintiff bases his right. In arguing this appeal a mistake appears to have been made in supposing that exhibit C was only to take effect after Pokker's death but a perusal of exhibit C shows that it was to take immediate effect. Pokker is executant No. 1 and plaintiff is executant No. 2. After a recital that executants Nos. 2—9 are Pokker's heirs after his death in accordance with Muhammadan Law, it is recited that in consequence of Pokker's age and illness it is neeessary to make a settlement of his property. Pokker accordingly surrenders to plaintiff "all my rights, authority, etc., over all my properties mentioned in the schedule" and also gives possession. Paragraph 5 is as follows:— As it is my full desire that No. 2 should manage these properties during his lifetime, executant No. 2 should be managed (directly and indirectly) all my properties renew with tenants . . . . realize by execution decree amounts as my representative have the assessment transferred and paid by him . . . . I, executant No. 1, accordingly commit all properties to his charge and make them over to him.—From this it is clear that the properties were made over absolutely to plaintiff. The next paragraph reduces the estate to a life interest, for it runs as follows:—Though Nos. 2—9 on my death are entitled under Muhammadan Law to division of all my properties (except . . . .), no division should be effected during the lifetime of executant No. 2, and after the death of No. 2, Nos. 3—9, if they choose, may cause the properties to be managed by the senior among them, and if they are not willing to do so they may severally claim and obtain separate shares, etc. Paragraph 8 runs:— This settlement is made with the full consent of me, No. 1, and of my heirs executants Nos. 2 to 9.

We see then that this document amounts to a gift of a life interest to plaintiff, and in order that such gift of all the property may be valid under Muhammadan Law the assent of all the other

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heirs is obtained. A life estate is an estate unknown to Muhammadan Law, but it is remarked in *Nizamudin Gulam* v. *Abdul Gafur*(1). "It might be that by consent such an estate might be created, but, as a general rule, the donee in such a case would take an absolute estate." In this case we have the consent of all the parties concerned, and consequently there seems to be no reason why plaintiff should not have a life estate, when not only the donor and donee consented to the creation of such an estate, but also all the other heirs of the donor. Otherwise the alternative that plaintiff takes an absolute estate applies, but plaintiff is quite satisfied to have a life estate only.

The appellant's main argument was based on the assumption that exhibit C was only to take effect on Pokker's death and it was contended that the property did not vest in executants Nos. 2—9 until his death, and that consequently the karar is invalid, for it amounts to a relinquishment by executants Nos. 3—9 of property which had not then vested in them, such relinquishment being void as the transfer of a mere expectancy. If, however, we accept the contention that the property only vested in executants Nos. 2—9 after the death of Pokker, the only rights relinquished by defendants Nos. 3-9 are the right of management and the right to enforce partition. This latter relinquishment may be void as being the transfer of an expectancy but the relinquishment of the right of management cannot be said to be a transfer of property. The right of management of immoveable property is not an interest in immoveable property and it is certainly not moveable property and consequently section 6 of the Transfer of Property Act is not applicable to the relinquishment of a future right of management. Such a relinquishment is merely an agreement between the parties made to secure the better administration of their estate. Such an agreement is not opposed to public policy and, effect can and should be given to it.

It is not however necessary to consider further the legal effect of exhibit C on the assumption that it only took effect after Pokker's death. The recital in paragraph 4 that possession is given to executant No. 2 and the recital in paragraph 5 that executant No. 2 is to realize decree amounts as the representative of Pokker, and to have the assessment transferred in his name show clearly

(1) (1889) I.L.R., 13 Bom., 264 at p. 275.

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that the document is a deed of gift and not a will. The right to the property, whether an absolute right or a life interest it is not necessary here to determine, vested in plaintiff on the date of exhibit C and there is no relinquishment of any rights by defendants Nos. 3—9 except in so far as they consent to the alienation to plaintiff as required by the provisions of Muhammadan Law. The recitals in exhibit C as to the rights of defendants Nos. 3—9 under Muhammadan Law are inserted in the first place to show that they are the heirs of executant No. 1 and in the second place to reserve certain rights in them after the determination of plaintiff's life interest. Whether effect can legally be given to such reservation need not be determined in this suit.

In this view second defendant had no right to redeem first defendant for she is not a co-owner of the property. The property being vested in plaintiff he is entitled to recover it from defendants Nos. 1 and 2.

The appeal is accordingly dismissed with costs. Time two months.

Second defendant appealed.

J. L. Rosario for appellant.

T. R. Ramachandra Ayyar for first respondent.

JUDGMENT.—The first defendant had a kanom dated the 1st June 1890. Pokker, father of the plaintiff and second defendant had the equity of redemption. In 1903 Pokker executed a document called a deed of settlement. It was also signed by his children including the plaintiff and the second defendant. Some of his children being minors, Pokker signed the document for them. One of the questions in the case is as to the effect of this document. The second defendant has redeemed the kanom. The plaintiff claims possession from the second defendant on payment of the amount due, Pokker being dead. The second defendant contends that the plaintiff is only entitled to sue for his share. The decision rests on the true construction of exhibit C the deed of settlement. Paragraph No. 2 of the document declares that Pokker's children are his heirs under the Muhammadan Law entitled to succeed on his death. Paragraph No. 4 transfers to the present plaintiff all rights of management and control over Pokker's properties. Paragraph No. 5 provides that the management shall last during the lifetime of the plaintiff and enumerates various powers of management. Paragraph No. 6 says that though his children will be entitled to

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divide the properties according to Muhammadan Law after Pokker's death, no partition shall be made during the plaintiff's lifetime. The property in suit though apparently included in the schedule of properties dealt with by the deed of settlement was then outstanding on kanom. It is clear to us that what was transferred to the plaintiff was the mere right to management with certain powers of dealing with the property. No estate was created in the plaintiff's favour either absolute or for life, though authority was given to defray reasonable expenses. The plaintiff and the other children were simply to inherit the property on Pokker's death. There are no words of disposition to the children of any interest in the property. On Pokker's death therefore all the children including the second defendant became entitled to their several interests under the Muhammadan Law. The second defendant was entitled by virtue of her interest in the equity of redemption to redeem the kanom. On redemption she was entitled to hold the property subject to the plaintiff's right to a partition of his share. But it is argued for the respondent that the plaintiff is entitled to possession by virtue of the right of management acquired under the deed of settlement which was assented to by the second defendant and the other children. It is argued that the provision as to the plaintiff's management and against partition during the plaintiff's lifetime to which the second defendant gave her consent, is binding upon her, see *Srimohan Thakur* v. *Macgregor*(1) and *Krishnendra Nath Sarkar* v. *Debendra Nath Sarkar*(2) and Mayne's Hindu Law, page 657, though it is difficult to see what consideration Pokker's children other than the plaintiff received for agreeing not to divide. The decision in *Ramalinga Khanapure* v. *Virupakshi Khanapure*(3) which declared an agreement never to divide invalid, does not affect the present case. The preponderance of American authority summarised in Freemen on Co-tenancy, section 442 appears to be in favour of the binding character of agreements not to divide as regards the parties to the agreement. For a similar rule under the Civil Law, see Dowat article 1498 But the agreement in this case was entered into in respect of a *spes successionis*. Section 6 of the Transfer of Property Act has, it is true, no application because the agreement related merely to

(1) (1901) I.L.R., 28 Calc., 769. (2) (1908) 12 C.W.N., 793.
(3) (1883) I.L.R., 7 Bom., 536.

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non-division and the right of management. But we are not aware of any authority for holding that an agreement not to divide a *spes successionis* is binding upon the parties even though the period of non-division is limited to one life. The agreement certainly cannot bind the three minors on whose behalf Pokker himself as guardian gave the assent. The powers of the guardian under the Muhammadan Law in respect of the immoveable property of the ward are very restricted, see Amir Ali, Vol. II (Edition of 1894), page 479 and Shama Charun Sirkar, Part I, page 484. Urgent necessity or clear benefit to the ward must be shown, see *Mussamat Bukshan* v. *Mussamat Maldai Kooeri*(1), *Massamut Syedun* v. *Syud Velayet Ali Khan*(2), *Bhutnath Dey* v. *Ahmed Hosain*(3) and *Hurbai* v. *Hiraji Byramji Shanja*(4). The decision of the Privy Council in *Kali Dutt Jha* v. *Abdul Ali*(5) recognises the rule of clear benefit to the ward as a necessary condition of the validity of the alienation of a ward's immoveable property. It is difficult to pretend so far as minors are concerned that an agreement by the guardian surrendering in anticipation the management of a *spes successionis* is within the rule as to clear benefit to the ward. The agreement being invalid as regards some of the parties to it, it is difficult to uphold it as to others, vitiated already as it is by its dealing with *spes successionis*. However this may be, we are clear that the agreement as to management cannot affect the kanom interest which was outstanding. The second defendant was entitled to acquire it and the plaintiff's only right is to have a partition of his share on payment of his proportion of the mortgage money. The present suit is not one for partition and the other sharers who would be necessary parties to such a suit have not been impleaded. We would allow the appeal and dismiss the suit with costs throughout.

(1) (1869) 3 Bom. L.R., A.C., 423. (2) (1872) 17 W.R., 239.
(3) (1885) I.L.R., 11 Calc., 417. (4) (1986) I.L.R., 20 Bom., 116.
(5) (1889) I.L.R., 16 Calc., 627.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Krishnaswami Ayyar.

SADAYA PILLAI (PLAINTIFF), APPELLANT,

v.

AMURTHATHACHY AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1910. September 5, 8.

Limitation Act, XV of 1877, Sch. II, art. 11—Civil Procedure Code, Act XIV of 1882 ss. 278, 281, 283—Art. 11 of the Limitation Act not applicable where judgment debtor no party to proceedings under s. 278 of the Civil Procedure Code.

Where, in a claim proceeding under section 278 of the Civil Procedure Code, the judgment-debtor has not appeared and there has been no adjudication between him and the claimant, the period of limitation prescribed by article 11 of schedule II of the Limitation Act will not apply to a suit brought by the defeated claimant to establish his right against the judgment-debtor.

SECOND APPEAL against the decree of E. L. Thornton, District Judge of Trichinopoly, in Appeal Suit No. 200 of 1907, presented against the decree of S. C. Ramaswami Aiyar, District Munsif of Ariyalur, in Original Suit No. 220 of 1906.

Suit to establish plaintiff's right as usufructuary mortgagee of the plaint properties under a mortgage deed executed by the first defendant on 7th January 1901 and to recover possession of same with mesne profits.

The mortgaged properties were attached in execution of a money decree against first defendant. The plaintiff put in claim petition under section 278 of the Civil Procedure Code, which was disallowed on 7th November 1901. The present suit to establish plaintiff's right was instituted on 14th February 1906.

The Munsif held the suit barred by limitation as it was not brought within one year from the date when the claim was disallowed.

This decree was confirmed on appeal.

Plaintiff appealed.

The Hon. Mr. *T. V. Seshagiri Ayyar* for appellant.

P. Narayanamurti for respondents.

* Second Appeal No. 49 of 1909.

ABDUR RAHIM AND KRISHNASWAMI AYYAR, JJ.

SADAYA PILLAI v. AMURTHATHACHY.

JUDGMENT.—The plaintiff had preferred a claim under section 278 of the Civil Procedure Code and his claim was disallowed under section 281 of the Civil Procedure Code. Within a year of the order disallowing the present plaintiff's claim, the judgment-debt was satisfied otherwise than by the sale of the attached property. The present suit is now brought to establish the plaintiff's right to the properties as usufructuary mortgagee and for recovery of possession from the defendants. It has been held that the suit is barred under article 11 of schedule II of the Limitation Act.

Mr. Seshagiri Aiyar, appearing for the plaintiff who is the appellant before us, contends that the order under section 283 enures in favour of or against the decree-holder or the claimant and not the judgment-debtor. The judgment-debtor, according to this contention, is not a party within the meaning of section 283 and this contention would seem to be supported by the decisions in *Kedarnath Chatterji* v. *Rakhal Das Chatterji*(1) and *Morshia Barayal* v. *Elahi Buxkhan*(2) where the proposition is laid down that, in proceedings under section 278, the real question for decision is not whether the title to the property belongs to the judgment-debtor or the claimant but whether the property should be released from attachment or not. We may also point out that the observations of their Lordships of the Privy Council in *Sardhari Lal* v. *Ambika Pershad*(3) would indicate that, besides the claimant, the only other party within the meaning of section 280 is the judgment-creditor. But *Koyyana Chithemma* v. *Doosy Gavaramma*(4) and *Moidin Kutti* v. *A. Kunhi Kutti Ali*(5) proceed upon the view that if the judgment-debtor be made a party to the proceedings and there has been an adjudication between him and the claimant, the suit of the claimant would be barred as against him if not brought within a year. Even supposing that to be the correct interpretation of the section of the Code in question—and we do not think that the respondent can properly put her case any higher—we find that in the present case the respondent, who was judgment-debtor in the claim proceedings, neither appeared nor was there adjudication of the claim as between her and the present plaintiff. We may point out that the decision in *N. Perengaryprom* v. *T. Parameshwaren Nambudry*(6) proceeds upon the Code

(1) (1888) I.L.R., 15 Calc., 674. (2) (1905) 3 C.L.J., 381.
(3) (1888) I.L.R., 15 Calc., 521 at p. 525. (4) (1906) I.L.R., 29 Mad., 225.
(5) (1902) I.L.R., 25 Mad., 721. (6) (1869) 4 M.H.C.R., 472.

ABDUR RAHIM AND KRISHNASWAMI AYYAR, JJ.

SADAYA PILLAI v. AMURTHATHACHY.

of 1857 where the language employed is different from that of the code of 1882.

We therefore hold that the view taken by the lower Appellate Court on the question of application of article 11 of the Limitation Act is wrong. The decree of lower Appellate Court will be set aside and the case will be remanded to it for disposal on the other issues. Costs will abide the result.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Krishnaswami Aiyar.

1910. July 29. October 18.

SREEMUTH DEVASIKAMONEY PANDARASANNADHI *alias* NATARAJA DESIKAR (PLAINTIFF), APPELANT,

v.

K. P. L. S. PALANIAPPA CHETTIAR AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Hindu Law—Trustees of temple, power of, to grant permanent lease of trust property.

The grant of a permanent lease of temple property by the trustee is *primâ facie* in excess of the powers of such trustee.

Special circumstances of necessity may justify such alienation.

Maharanee Shibessource Debia v. *Mothoornath Acharjo*, [(1869) 13 M.I.A., 270], followed.

Narasimhachari v. *Gopala Iyengar* [(1905) I.L.R., 28 Mad., 391], referred to.

There is no distinction in this respect between a religious institution like a temple and a charitable foundation. The powers of the trustee of a temple are analogous to those of the manager of an infant heir.

Hanuman Pershad's case referred to *Konwur Doorga Nath Roy v. Ramchunder Sen*, [(1876) 4 I.A., 52], referred to.

The requirements of daily worship, of buildings suitable for the carrying out of such worship, and of performance of festivals are among the purposes for which the trustee of a temple may alienate the *corpus*, in the absence of other reasonable means of providing for such needs.

In the case of such alienations, the alienee will be protected if, after proper enquiries, he is satisfied of the existence of such necessity.

SECOND APPEAL against the decree of C. Krishnaswami Rao, Additional Subordinate Judge of Madura, in Appeal Suit No. 466

* Second Appeal No. 1742 of 1908.

WALLIS AND KRISHNASWAMI AYYAR, JJ.

SREEMUTH DEVASIKAMONEY PANDARASANNADHI v. PALANIAPPA CHETTIAR.

of 1906, presented against the decree of S. Raghava Ayyangar, District Munsif of Sivaganga, in Original Suit No. 10 of 1905.

Plaintiff is the hukdar dharmakartha of Kunnakudy Subramaniaswami devastanam. Defendants are the hukdars of Annadhana Matam at Kunnakudy.

Defendants obtained a permanent lease of the plaint ground from a previous trustee of the devastanam. Plaintiff questions the validity of the cowle and sues for possession of the land after removal of the buildings erected thereon by the defendants. The District Munsif granted a decree as prayed for.

Defendants appealed. The Subordinate Judge reversed the decree of the lower Court and dismissed the suit with costs. Plaintiff appealed.

S. Srinivasa Ayyangar for appellant.

K. Srinivasa Ayyangar for respondents.

KRISHNASWAMI AIYAR, J.—The question is raised whether a permanent lease by the trustee of a temple of a building site belonging to the temple for a nuzzer or a premium is valid. It is argued for the appellant that such a lease constitutes a breach of trust and is therefore invalid. The Subordinate Judge in appeal has upheld the lease on the ground that it was made in the proper and reasonable exercise of the powers of the trustee and in accordance with local usage and was therefore an act of prudent management on his part. Assuming that local usage would at all events be an element in the determination of the question whether the lease was an act of prudent management, it is difficult to uphold the finding in its favour, as the earliest instance on record of such a lease was as late as 1870 and the other instances in evidence are only a few in number and not all of them permanent tenures. We are unable to hold that the evidence is sufficient to support a custom. That the alienation in question was in favour of a charitable institution or for the supposed good of the public is in our judgment no ground for upholding it if it is otherwise not in accordance with law. Putting aside then these considerations as irrelevant, we are face to face with the problem whether an alienation of temple property on a permanent lease at an unvarying rent or a fixed premium is sustainable because it is a house-site and was not producing any income before the date of the alienation. This question must be answered in the negative in the light of the definite pronouncements of the Privy Council in

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Maharanee Shibessource Debia v. *Mothooranath Acharjo*(1) *Mayandi Chettiyar* v. *Chokkalingam Pillai*(2) and *Abhiram Goswami* v. *Shyama Charan Nandi*(3). In the first of these cases where a permanent lease by a Shebait was in question the Judicial Committee observed "in the exercise of that office, she (the Shebait) could not alienate the property, though she might create proper derivative tenures and estates conformable to usage," page 273. Again at page 275 their Lordships said "there is no satisfactory proof in the cause that these *Jummas* were even held at a fixed invariable rent. One important element in this enquiry has been wholly lost sight of, viz., the nature of the shebait title, and its legal inability to be the source of such a derivative title. To create a new and fixed rent for all time, though adequate at the time, in lieu of giving the endowment the benefit of an augmentation of a variable rent, from time to time, would be a breach of duty in a shebait, and is not, therefore, presumable. What follows from the above is not that a permanent lease is under all circumstances absolutely invalid but that it is *primâ facie* in excess of the powers of a shebait. See Pranath Sarasvati's Tagore Lectures on the Hindu Law of Endowments, page 146. In the next case which dealt with the creation of a permanent right of occupancy *Mayandi Chettiyar* v. *Chokkalingam Pillai*(2), the Privy Council observed at page 295, quoting the decision in *Maharanee Shibessouree Debia* v. *Mothoornath Acharjo*(1), "the creation of a new and fixed rent for all time . . . . would be a breach of duty in the trustee unless there were special circumstances of necessity to justify it." In their latest pronouncement already referred to, their Lordships of the Privy Council say (*Abhiram Goswami* v. *Shyama Charan Nandi*(3)), "that the general rule as regards a trustee's power to alienate debutter property is that laid down in *Maharanee Shibessouree Debia* v. *Mothoornath Acharjo*(1), and held that a *Mokurari* or permanent patta by a shebait was invalid. It has also been held in this Court, following the decisions of the Privy Council, that a permanent lease at a fixed rent is invalid, and that a trustee has no power to create a perpetual tenure except on special grounds or circumstances of necessity, *Mahomed Meera*

(1) (1869) 13 M.I.A., 270. (2) (1904) I.L.R., 27 Mad., 291.
(3) (1909) I.L.R., 36 Calc., 1003 at p. 1013.

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Usain Rowthen v. *Nizurali Sahib*(1), and *Narasimha Chari* v. *Gopala Ayyangar*(2). The fact that in the present case the property leased is a building site does not appear to be any justification for leasing the property at an unvarying rent. Building sites of all lands are particularly susceptible of a continuous rise in value where the locality increases in prosperity or there are increased facilities of communication or there is an increase in population. The foregoing observations are sufficient for the disposal of this case. They lead to the conclusion that the lease in question in the present case cannot be upheld.

The question, however, has been argued as regards the limits of the power of a trustee of a temple property. Mr. S. Srinivasa Ayyangar in his able argument contended for the broad proposition that a permanent alienation or the creation of a permanent tenure is under all circumstances invalid, and he relied on the decision of SUBRAMANIA AYYAR, Officiating Chief Justice, and RUSSELL, J., in *Nallayappa Pillian* v. *Ambalavana Pandara Sannadhi*(3), and on the observations of SUBRAMANIA AYYAR and BHASHYAM AYYANGAR, JJ. in *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami*(4). The former of these cases proceeds upon the Privy Council decision in *Maharanee Shibessouree Debia* v. *Mothoornath Acharjo*(5), and on the decisions of the Bombay High Court in *Narayan* v. *Chintaman*(6), and *The Collector of Thana* v. *Hari Sita Ram*(7). There are observations in all these cases which go far to support the appellant's contention. Sir SUBRAMANIA AYYAR observes in *Nallayappa Pillian* v. *Ambalavana Pandara Sannadhi*(3), "according to the Indian common law relating to Hindu religious institutions such as the present, the landed endowments thereof are inalienable. Though proper derivative tenures conformable to custom may be created with reference to such endowments they cannot be transferred by way of permanent lease at a fixed rent, nor can they be sold or mortgaged. The revenues thereof may alone be pledged for the necessities of the institutions. Chief Justice WESTROPP makes use of similar language in *Narayan* v. *Chintaman*(6). He says at page 396 "Religious endowments in this country are not alienable, though the annual revenues of such endowments, as

(1) (1908) 19 M.L.J., 208.
(2) (1905) I.L.R., 28 Mad., 391.
(3) (1904) I.L.R., 27 Mad., 465.
(4) (1904) I.L.R., 27 Mad., 435.
(5) (1869) 13 M.I.A., 270.
(6) (1881) I.L.R., 5 Bom., 393.
(7) (1882) I.L.R., 6 Bom., 546.

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distinguished from the *corpus*, may, for purposes essential to the temple or other institution endowed, be occasionally pledged." The lands dealt with in that case had been dedicated for the support of a temple and not for a mere family idol. But nothing in that judgment appears to have turned on that distinction. The same eminent Judge says in *The Collector of Thana* v. *Hari Sita Ram*(1), "A Hindu religious endowment cannot be sold, or permanently alienated, though its income may be temporarily pledged for necessary purposes, such as the repair, etc., of the temple." Observations to the same effect are to be found in the judgment of Sir V. BHASHYAM AYYANGAR, J., at pages 450 and 451 in *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami*(2). With all respect to these very learned Judges it appears to me that the language employed in these cases is a little too wide. I know no text of the Hindu Law that absolutely prohibits the alienation of the *corpus* of the temple property where there are sufficient circumstances of necessity requiring it. What would amount to such necessity may be a question not easy of solution in the circumstances of each case. But if a proper necessity is made out, I feel no doubt that the alienation ought to be upheld. It seems to me that the authority of the Privy Council is distinctly in favour of the view that the alienation should be upheld if the necessity is made out. There appears to be no distinction in this matter as shown by Mr. Justice WEST in his very learned judgment in *Manohar Ganesh Tambekar* v. *Lakshmiram Govindram*(3), between a religious institution like a temple dedicated to an idol and a charitable foundation. In the most recent case on the subject to which reference has already been made, the Privy Council likened the power of the shebait of an idol to that of the manager of an infant heir. See *Abhiram Goswami* v. *Shyama Charan Nandi*(4). In *Prosunno Kumari Debya* v. *Golab Chand Baboo*(5), also which appears to have been somewhat misunderstood their Lordships made the same observation that the authority of the shebait of an idol's estate was analogous to that of the manager of an infant heir and cited Lord Justice KNIGHT BRUCE in *Hanooman Persaud's* case(6) as regards a

(1) (1882) I.L.R., 6 Bom., 546 at p. 552.
(2) (1904) I.L.R., 27 Mad., 435.
(3) (1888) I.L.R., 12 Bom., 247.
(4) (1909) I.L.R., 36 Calc., 1003 at p. 1013.
(5) (1875) 2 I.A., 145.
(6) (1856) 6 M.I.A., 393.

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manager's powers of alienation. The remarks of their Lordships in that case, which was one to set aside a prior decree against the preceding trustee, that that decree had been rightly made against the rents and profits of debutter lands (see page 153) and that no question was raised whether the lands themselves could be sold under the decree, have been taken to imply that a decree could not be passed against the *corpus* of the temple property. I cannot agree that there is any warrant for placing such a construction on the decision of their Lordships in the face of the express statement that the powers of a shebait were those of the manager of an infant heir which undoubtedly extend to the alienation of the *corpus* and the quotation from *Hanooman Persaud's* case(1) of the passage which upholds the validity of an alienation in favour of a *bonâ fide* lender after due enquiry notwithstanding the manager's wrong application of the money borrowed. Their Lordships expressly assert (p. 152) "it would seem to follow that the persons so entrusted must of necessity be empowered to do whatever may be required for the service of the idol, and for the benefit and preservation of its property, at least in as great a degree as the manager of an infant heir. If this were not so, the estate of the idol might be destroyed or wasted, and its worship discontinued, for want of the necessary funds to preserve and maintain them." Language more precise it is difficult to employ to define the powers of the trustee of a temple or the shebait of an idol. See also Prannath Sarasvati's Tagore lectures on the Hindu Law of Endowments, p. 152. Their Lordships commended the prior decree against rents and profits only as proper, because necessity, which may be sufficient for the charging of the rents and profits, is not sufficient for the alienation of the *corpus*. If there should still be any possibility of a misconception of their Lordships' view of the limits of a trustee's powers of alienation, that is completely removed by the decision in *Konwur Doorganath Roy* v. *Ram Chunder Sen*(2). In that case also dealing with the powers of the shebait of an idol their Lordships at p. 63 repeat the analogy of a manager of an infant heir and cite the well-known observations in *Hanuman Persaud's* case. The question there related to the sale of debutter property. At page 56 they say "she (the shebait) had,

(1) (1856) 6 M.I.A., 393. (2) (1876) 4 I.A., 52.

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as the manager of the estate, power, if it were debutter dedicated to the idol, to alienate so much of it as was necessary to keep up the temple and worship of the idol. At page 63 they repeat "she as the manager of this estate, had the same right, or an analogous right to that of the manager of an infant heir." Their Lordships indeed proceeded so far as to hold the alienation justifiable on the ground of *bonâ fide* inquiry by the purchaser and a representation by the alienor that the sale was made for the purpose of the repair of the temple. It is unnecessary to point out that the manager of an infant heir may "absolutely alienate his property in a case of need or of benefit to the estate," that in a case of honest inquiry by the alienee "the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and that under such circumstances he is not bound to see to the application of the money." The Privy Council spoke of the need and necessity referred to in *Hanooman Persaud's* case as legitimate family purposes in *Suraj Bunsi Koer* v. *Sheo Proshad Singh*(1) of course in the case of an idol the inherent difference in its character from a human infant must create differences in the circumstances constituting necessity sufficient to validate the alienation. The physical and moral requirements of a human infant are of course different from the requirements of an idol or an object of public worship suited to the faith, and rituals and religious traditions of the community for whose spiritual ministration it has been set up. The requirements of daily worship, of buildings suitable for the carrying on of such worship and even of the essential festivals intended to cultivate the religious emotions of the section of the public for whose benefit the temple is dedicated may afford grounds for the alienations of part of the *corpus* of the property of the temple. That such alienations ought only to be resorted to as extreme measures in the absence of other reasonable means of providing for the needs of the temple may well be accepted as the canon of judgment in regard to the validity of particular alienations. I have thought it necessary to make these observations to guard us from being supposed to accept without qualifications some of the language employed in *Nallayappa Pillian* v.

(1) (1879) 6 I.A., 88, at p. 101.

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Ambalavana Pandara Sannadhi(1) and *Vidya Purna Tirtha Swami* v. *Vidyanidhi Tirtha Swami*(2).

Certain English cases were referred to in the course of the argument. The law in England is at the present day embodied in statutes. Before their enactment it will be found that a similar test has been laid down in England with regard to the validity of alienations of charity property. See Tudor's 'Charitable Trusts,' IV edition, pp. 271, 272, also the decision in *William Charles Quinn* v. *Thomas William Hungerford*(3) and the cases cited by the Lord Chancellor in his judgment and by the eminent counsel who argued the case on both sides. There seems to be no doubt that in the actual application of the rule as to necessity the English courts have been very stringent. A permanent lease at an unvarying rent would have little chance of approval by them. It is unnecessary however to pursue this matter.

As regards the present case we must on the authority of the Privy Council cases cited in the earlier part of this judgment set aside the decree of the Subordinate Judge and restore that of the munsif. No claim was made in the written statement for the value of improvements and no issue was raised as to whether the defendants were entitled to it. We must decline to allow the defendants to raise it now. They will pay the plaintiff's costs in this and in the lower Appellate Court.

WALLIS, J.—I agree.

(1) (1904) I.L.R., 27 Mad., 465. (2) (1904) I.L.R., 27 Mad., 435.
(3) 6 Eng. Rep., 1189.

APPELLATE CIVIL.

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

VELAYUTHA CHETTY AND OTHERS (SECOND PLAINTIFF'S REPRESENTATIVES), APPELLANTS,

v.

GOVINDASAWMI NAIKEN (FOURTH DEFENDANT), RESPONDENT.*

1908. November 20. 1909. January 11. 1910. October 14.

Transfer of Property Act IV of 1882—Vendee's right to possession against unpaid vendor—Vendor only entitled to statutory charge.

The provisions of the Transfer of Property Act that the vendee after conveyance is entitled to possession and that the vendor has a statutory charge on the property for unpaid purchase money are clear and it is not competent to the Courts in a suit for possession by the vendee, to pass a decree for possession conditional on the vendee paying the balance of the purchase money.

Baij Nath Singh v. *Paltu*, [(1908) I.L.R., 30 All., 125], not followed.

SECOND APPEAL against the decree of Veron A. Brodie, District Judge of Coimbatore, in Appeal Suit No. 175 of 1902, presented against the decree of T. T. Rangachariar, District Munsif of Erode, in Original Suit No. 102 of 1901.

The facts are fully set out in the judgment.

V. Purushothama Ayyar for second to fourth appellants.

K. Srinivasa Ayyangar and *T. V. Gopalasawmi Mudaliar* for respondent.

JUDGMENT.—This appeal (*see Velayutha Chetti* v. *Govindasawmi Naiken*(1) was ordered to be re-heard on the ground that at the date of the former hearing the appellant was dead and no one had been brought on the record to represent him. At the rehearing it was contended that we were wrong in having given the vendee who was found not to have paid the whole of the purchase money an unconditional decree for possession and we were referred to the recent decision in *Baij Nath Singh* v. *Paltu*(2), in which it was held that although a vendee who has not paid the purchase money is entitled to maintain an action for possession against the vendor yet the vendor has an equity arising out of the non-payment of the purchase money and that the proper decree is that if the plaintiff pay the purchase money within six months the

* Second Appeal No. 1162 of 1904.
(1) (1907) I.L.R., 30 Mad., 524. (2) (1908) I.L.R., 30 All., 125.

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property be delivered to him, and if he fail to do so his suit do stand dismissed. The decision follows an *obiter dictum* of MAHMOOD, J., in *Shib Lal* v. *Bhagwan Das*(1), that "in a case such as this, in common with some other classes of cases, equities may exist in favour of the defendant, so as to subject the decree for possession to restrictions and conditions appropriate to the circumstances of each case." Now the provisions of the Transfer of Property Act that after conveyance the vendee is entited to possession and that the vendor has a statutory charge on the property for unpaid purchase money are perfectly clear, and the effect of the decision in our opinion is therefore to override the provisions of the statute and to say that the vendee is not entitled to possession until he pays the purchase money and that the vendor is entitled to retain possession until he is paid. With great respect we think it is not open to the Courts of this country to introduce and enforce equities modifying the provisions of the statute law. In this connection we may refer to the language of Lord DAVEY delivering the judgment of their Lordships of the Judicial Committee in *Webb* v. *Macpherson*(2), where he remarks that "the law of India, speaking broadly, knows nothing of the distinction between legal and equitable property in the sense in which that was understood when equity was administered by the Court of Chancery in England." Even then if an unpaid vendor could set up such an equity in England either as to the land or the title-deeds, which would not appear to be the case (*Goode* v. *Burton*(3)), that would not entitle us to enforce such an equity here. With reference to the last cited case it is observed in Darts' 'Vendors and Purchasers,' p. 731, that when an unpaid vendor is sued for possession of the title-deeds by the vendee his proper course is to counter-claim for the enforcement of his lien. If the present code allowed of counter-claims and the vendor had so counter-claimed for the enforcement of his charge we might have been at liberty to do as the Allahabad Court has done, that is to enforce the unpaid vendor's charge by passing a decree for foreclosure against the vendee, but that is not the case before us.

Another point taken at the re-hearing was that even allowing due weight to exhibit G which was not considered by the District

(1) (1889) I.L.R., 11 All., 244 at p. 251. (2) (1903) 30 I.A., 238 at p. 245. (3) 1 Ex., 189.

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Judge there is other evidence that the fourth defendant's possession was adverse to the plaintiff, and that under these circumstances we ought either to affirm the judgment of the District Judge or call for a fresh finding. We think that as the District Judge has failed to consider exhibit G the latter will be the better course and have resolved to call for a fresh finding as to whether the suit is barred by limitation on the evidence on record.

Findings should be submitted within six weeks and seven days will be allowed for filing objections.

In compliance with the above order the District Judge found the suit not barred.

This second appeal coming on for final hearing, after the return of the finding of the lower Appellate Court, the Court delivered the following

JUDGMENT.—On the finding, which we accept, the decree of the District Munsif is restored with costs here and in the lower Appellate Court.

APPELLATE CRIMINAL.

Before Mr. Justice Munro and Mr. Justice Krishnaswami Ayyar.

APPANNA, PETITIONER,

v.

PITHANI MAHALAKSHMI AND OTHERS, RESPONDENTS.*

1910. September 13.

Criminal Procedure Code, Act V of 1898, *s.* 423 (*b*) (2)—*Alteration of finding under —Indian Penal Code, Act XLV of* 1860, *s.* 325—*Conviction under, may be altered to conviction under s.* 144—*Appellate Court, power of.*

Under section 423 (*b*) (2), Criminal Procedure Code, the Appellate Court may alter the finding, maintaining the sentence, and there is nothing to restrict the finding which may be altered to a finding of conviction. A conviction under section 325, Indian Penal Code, may be altered by the Appellate Court into a conviction under section 147, Indian Penal Code, the sentence under section 325 being maintained.

Abhi Misser v. *Lakhmi Narain*, [(1900) I.L.R., 27 Calc., 566], distinguished.

PETITION under sections 435 and 439 of the Code of Criminal Procedure Code praying the High Court to revise the judgment of M. O. Parthasarathy Ayyangar, Sessions Judge of Gódávari, in

* Criminal Revision Case No. 202 of 1910.

MUNRO AND KRISHNASWAMI AYYAR, JJ.

APPANNA v. PITHANI MAHALAKSHMI.

Criminal Appeal No. 33 of 1909, presented against the finding and sentence of Head-Quarters Deputy Magistrate of Gódávari in Criminal Case No. 39 of 1909.

The facts are fully stated in the judgment.

Joseph Satya Nadar for petitioner.

The Public Prosecutor *contra*.

Dr. *S. Swaminadhan* for respondents.

ORDER.—The charge against the accused was under sections 148 and 325, Indian Penal Code. The Magistrate acquitted the accused under section 148, but convicted them under section 325. The accused then appealed to the Sessions Judge who was of opinion that the accused should have been convicted under section 147, Indian Penal Code, but thought he could not interfere with the acquittal. Here the Sessions Judge was clearly wrong. Under section 423 (*b*) (2) of the Code of Criminal Procedure the Appellate Court may alter the finding maintaining the sentence and there is nothing to restrict the finding which may be altered to a finding of conviction. We agree with the decision in *Queen-Empress* v. *Jabanulla*(1) which cannot, we think, with respect, be distinguished in the manner in which it was sought to be distinguished in *Sami Ayya* v. *Emperor*(2). In the Calcutta case there was no appeal by Government against the acquittal, but the High Court was dealing with an appeal by the persons who had been convicted. In *Sami Ayya* v. *Emperor*(2) also there is no reference to the wording of section 423 (*b*) (2), Code of Criminal Procedure (*Abhi Misser* v. *Lachmi Narain*(3)), upon which the Sessions Judge relies does not seem to us to have any bearing as it proceeded on the view taken by the learned Judges of the facts. If the Sessions Judge finds the accused guilty of rioting, he may then consider whether by virtue of section 149, Indian Penal Code, the conviction under section 325, Indian Penal Code, may or may not be sustainable. We therefore set aside the acquittal and direct the re-hearing of the appeal.

(1) (1896) I.L.R., 23 Calc., 975. (2) (1903) I.L.R., 26 Mad., 478.
(3) (1900) I.L.R., 27 Calc., 566.

APPELLATE CRIMINAL.

Before Mr. Justice Krishnaswami Ayyar.

ARUMUGAKADAR AND ANOTHERS,

v.

EMPEROR.*

1910. November 4, 10.

Penal Code, Act XLV of 1860, s. 339—Wrongful restraint, what necessary to constitute.

The accused placed a lock on the outer door of complainant's house intending to prevent and thereby preventing his ingress:

Held, that the offence of wrongful restraint was established although the accused were not physically present to enforce the obstruction. There is nothing in section 339, Criminal Procedure Code, which requires the physical presence of the obstructor at the moment of prevention.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the judgment of E. P. Walsh, First-class Sub-divisional Magistrate of Negapatam, in Criminal Appeal No. 47 of 1909, presented against the judgment of S. Raghunanthana Sastrial, Stationary Second-class Magistrate of Nannilam, in Criminal Case No. 201 of 1909.

The facts are fully set out in the judgment.

The Hon. Mr. *T. V. Seshagiri Ayyar* for petitioners.

The Public Prosecutor in support of the conviction.

ORDER.—I think the conviction in this case must stand. The complainant and his wife and daughter are found to have occupied a house. During their temporary absence the accused put a lock on the outer door and thereby obstructed them from getting into the house. I cannot go behind these findings. Indeed the accused in their defence do not dispute the right of the complainant to enter the house for it is said that he was a sub-lessee under the fifth accused who was himself a lessee under the first accused. In the face of this admission there could be no *bonâ fide* belief that the accused had a lawful right to obstruct so as to bring the case within the exception to section 339 of the Penal Code.

But Mr. Seshagiri Ayyar contended that there could be no wrongful restraint unless the accused were physically present to

* Criminal Revision Case No. 33 of 1910.

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enforce the obstruction and in this case the lock had been placed upon the door before the complainant came to the spot. It is true the offence is only committed when the person said to be obstructed is prevented from proceeding in the direction in which he has a right to go. But what is there in the section which requires the physical presence of the obstructor at the moment of prevention. Is it not enough if he voluntarily places the obstacle in such a position as to prevent another person's movement in a particular direction without standing behind the obstacle himself? The illustration to section 339 puts a case of obstruction of a path and a person being prevented thereby from passing along it, but there is no suggestion of the obstructor's presence. It can hardly be contended that, if a person who is asleep at night in a house is locked in without his knowledge so as to be debarred all *exit* and finds himself a prisoner when he awakes in the morning, the author of the imprisonment is not guilty of wrongful confinement if he is absent elsewhere when the other person becomes aware of the confinement. In *Bird* v. *Jones*(1) COLERIDGE, J., observed at page 746 "If, in the course of a night, both ends of a street were walled up, and there was no egress from the house but into the street I should have no difficulty in saying that the inhabitants were thereby imprisoned." The difference between wrongful restraint and wrongful confinement is only the distinction between obstruction in one direction and obstruction on all sides. To repeat the felicitous language of the First Law Commissioners. "By wrongful restraint we mean the keeping a man out of a place where he wishes to be and has a right to be." "Wrongful confinement which is a form of wrongful restraint is the keeping a man within limits out of which he wishes to go and has a right to go." If physical presence is not necessary as an ingredient of the offence of wrongful confinement, it must be held to be equally unnecessary to constitute wrongful restraint. Mr. Seshagiri Ayyar invited my attention to two cases (*Emperor* v. *Abdul*(2) and *King-Emperor* v. *Shamlal*(3)), but neither of them touches the present question and I do not think it necessary to discuss them. I am, however, unable to accept the suggestion of the Public Prosecutor that if a house is locked without any idea of keeping a particular

(1) 7 Q.B., 742. (2) (1885) 9 Bom. L.R., 30.
(3) (1880) 4 Bom. L.R., 79.

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person out and some person having a right of ingress finds himself prevented from going into the house, the person placing the lock is guilty of wrongful restraint. It is not voluntary obstruction of a person unless the obstructor intended it or knew or had reason to believe it to be likely that the means adopted would cause his obstruction. The section does not say that whoever does an act which causes obstruction to a person so as to prevent him from proceeding in any direction, etc., wrongfully restrains that person. There is no doubt, however, in the present case that the lock was placed upon the door with the deliberate purpose of preventing the complainant's entry into the house. The conviction is right. I dismiss the petition.